
**A SYMPOSIUM ON LINDA C. MCCLAIN'S
*WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER
MARRIAGE AND CIVIL RIGHTS LAW***

**PUZZLES ABOUT BIGOTRY:
A REPLY TO MCCLAIN**

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INTRODUCTION

Consider the following three cases:

(1) In 2012, baker Jack Phillips of Masterpiece Cakeshop refused to provide a wedding cake for customers Charlie Craig and David Mullins, citing his moral (and more specifically, religious) convictions against same-sex marriage.¹ The Colorado Human Rights Commission found him liable for sexual orientation discrimination, but the U.S. Supreme Court later overturned the Commission's decision, judging that it had not given Phillips a fair hearing.²

(2) In 2014, baker Marjorie Silva of Azucar Bakery refused to provide customer William Jack a cake with an image of two grooms with a red "X" over them, plus the following paraphrased biblical verses: "God hates sin. Psalm 45:7" and "Homosexuality is a detestable sin. Leviticus 18:22."³ She claimed that the design would conflict with her pro-equality moral convictions.⁴ The customer filed a religious-discrimination complaint with the Colorado Human Rights Commission, but the Commission rejected his claim.⁵

(3) In 1964, restaurateur Maurice Bessinger of Piggie Park BBQ refused dine-in service to Anne Newman, an African American woman.⁶ Bessinger argued that racial integration "contravenes the will of God" and that it would conflict with his moral and religious convictions to serve black customers in his restaurant (although he happily sold them takeout).⁷ Newman successfully sued Bessinger under the Civil Rights Act of 1964, forcing him to integrate his business.⁸

All three business owners refused a particular service because of their moral and religious convictions. Those convictions notwithstanding, most Americans today recognize Maurice Bessinger as a bigot. Some—a far smaller number—would apply the same label to Jack Phillips. Virtually no one calls Marjorie Silva a bigot, except as a way of underscoring perceived inconsistencies between her case and others.

In her timely, wide-ranging, and historically detailed work, Professor Linda McClain invites us to think more deeply about bigotry—what it is, how it has functioned in various debates over marriage, and how those debates in turn shed

¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018).

² *Id.*

³ *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 24, 2015).

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 947 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (per curiam).

⁷ *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring), *aff'd*, 390 U.S. 400 (1968) (per curiam).

⁸ *Id.* at 436.

light on the reality and rhetoric of bigotry.⁹ McClain's approach is legal and historical. What I aim to do here is to view her project through a philosophical lens, further clarifying the meaning and function of attributions of bigotry. Part I puts forth an analysis of bigotry and explains its relationship to related concepts such as racism. Part II uses this analysis to shed light on various "puzzles about bigotry" that McClain identifies in her first chapter and references throughout her book. Part III returns to the three cases mentioned above—those of Phillips, Silva, and Bessinger—and draws some lessons about ongoing controversies.

I. DEFINING BIGOTRY

Not all concepts can be captured in a tidy set of necessary and sufficient conditions.¹⁰ This point is especially true for social concepts, which often have a messy and conflicted history. A helpful account of bigotry, then, will not simply describe contemporary usage—because contemporary usage includes tensions and contradictions—but will also offer useful correctives. Although it should capture (most of) the paradigmatic cases, it may prescribe some narrowing or expanding in the service of coherence.¹¹

The philosopher William Ramsey has identified two related elements emphasized in standard definitions of bigotry: "The first is a very strong and perhaps irrational commitment to one's own viewpoint. The second is a strong intolerance toward other viewpoints and groups."¹² Both elements invite further questions. Given that "strong commitment" characterizes not only bigotry but also moral conviction, isn't the "irrational" part crucial to the definition? After all, some ideas genuinely merit strong commitment. Even more challenging is pinning down what "strong intolerance" entails. It cannot simply mean "strong disagreement," which, like strong commitment, is often warranted. Most Americans are strongly committed to the claim that slavery is immoral, and they strongly disagree with anyone who thinks otherwise. They may even be "intolerant" of such people in the sense that they would be willing to take steps

⁹ See generally LINDA C. MCCLAIN, *WHO'S THE BIGOT?: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW* (forthcoming 2020) (on file with the Boston University Law Review). Page references to *Who's the Bigot?* in this Essay refer to the penultimate version of the book (indicated as "manuscript").

¹⁰ Much of this section is drawn from my earlier piece on this topic. See John Corvino, *Trump, Bigotry, and the Ethics of Stigma*, KENNEDY INST. ETHICS J. (SPECIAL ISSUE) (July 20, 2017), <https://kiej.georgetown.edu/trump-bigotry-ethics-stigma/> [<https://perma.cc/AKR8-G8L8>].

¹¹ See Anil Gupta, *Explicative Definitions*, STAN. ENCYCLOPEDIA PHIL. § 1.5, <https://plato.stanford.edu/entries/definitions/#ExpDef> [<https://perma.cc/QN2L-CNTK>] (last updated Apr. 20, 2015) ("Sometimes a definition is offered neither descriptively nor stipulatively but as, what Rudolf Carnap (1956, §2) called, an *explication*. An explication aims to respect some central uses of a term but is stipulative on others.").

¹² William M. Ramsey, *Bigotry and Religious Belief*, 94 PAC. PHIL. Q. 125, 128 (2012).

to stop others from practicing slavery or from spreading pro-slavery views. But no one would describe the committed abolitionist stance as “bigoted”—except, perhaps, an ardent proponent of slavery. This leads one to wonder, along with McClain, whether “bigotry” is simply a term that we apply to strong viewpoints with which we strongly disagree.¹³

Ramsey builds upon standard definitions by emphasizing the group-directed aspect of bigotry.¹⁴ He defines bigotry as “[h]olding evaluative beliefs or other attitudes that are (usually) negative and directed toward members of a group of persons where the property used for grouping fails to provide proper support for the negative evaluation.”¹⁵ I agree that group-directedness is key, but I also emphasize a feature that Ramsey abandons—stubbornness. In my view, bigotry is best defined as *stubborn and unjustified contempt toward groups of people, typically in the context of a larger system of subordination*.

First, bigotry is fundamentally *stubborn*—a point underscored by the traditional definition’s inclusion of terms such as “strong” and “intolerant.” Ramsey rejects this feature because he is worried about the counterexample of the “wishy-washy racist.”¹⁶ He writes:

[W]hile we often regard overly obstinate proponents of certain viewpoints as stubborn or dogmatic, relatively few people today would regard this as an essential element of bigotry. Wishy-washy racists who aren’t completely confident about their views are nevertheless seen as bigots, even if they are open to abandoning those views. Moreover, few people would say that a deeply religious person with an unyielding commitment to her faith is closer to being a bigot. In fact, we seldom think of bigotry as involving the *endorsement* of anything. Instead, we associate bigotry with the *rejection* or *attacking* of something – with an attitude of hostility or condemnation.¹⁷

Ramsey’s concern about the deeply religious person, along with his related point about “endorsement,” is handled by my inclusion of *unjustified contempt* as a key feature of bigotry. Indeed, when unjustified contempt is religious in nature—as with, for example, the Westboro Baptist Church of “God hates fags” infamy—unyielding commitment to the faith does, in fact, bring one “closer to being a bigot.”¹⁸ More important, I disagree with his claim that most people would not consider dogmatism or stubbornness an essential element of bigotry, as well as with his related point about the “wishy-washy racist.” The wishy-washy racist should not be labeled a bigot for two reasons: First, such labeling

¹³ See McCLAIN, *supra* note 9 (manuscript at ch. 2).

¹⁴ See Ramsey, *supra* note 12, at 127 (“The paradigms suggest that bigoted sentiments are directed at persons (including, perhaps, non-human animals) grouped in various ways.”).

¹⁵ *Id.* at 141.

¹⁶ See *id.* at 128.

¹⁷ *Id.*

¹⁸ *Id.*

would make bigots of virtually everyone. In a society as permeated by racism as ours, most people harbor some racist beliefs and attitudes, even if only implicitly. Those who are willing to abandon those beliefs and attitudes in light of contrary evidence are not (and are generally not labeled as) bigots. The second, related reason is that “compliant bigot” is a contradiction in terms. The inclusion of obstinance in standard dictionary definitions of bigotry suggests as much. So while the wishy-washy racist’s views are wrong and odious, they are not strictly speaking “bigoted” precisely because of the responsiveness to contrary evidence.

A second key feature of bigotry is that it is *unjustified*. This point captures our intuitions about the antislavery case—we do not consider an ardent opponent of slavery a bigot because we recognize their position to be justified. The slavery proponent, by contrast, would (wrongly) view a strong commitment to abolition as unjustified and thus (wrongly) judge the ardent abolitionist to be bigoted. Because epistemic justification is context-sensitive, so too is bigotry. In different historical periods and places, people’s access to evidence varies and thus so does their level of (subjective) justification. That evidence includes the testimony of others—it is harder to meet the threshold for being a bigot in a society where most others share one’s wrongheaded view than in one where one’s bigotry is frequently and openly criticized. Also note that the lack of justification inherent in bigotry is often accompanied by a systematic insensitivity to, or discounting of, evidence that would upset the bigot’s views—a point also related to the “stubbornness” feature. What philosopher Kwame Anthony Appiah writes about “racial prejudice” is apt here as well: bigotry involves a “systematically distorted rationality.”¹⁹

Third, bigotry requires *contempt*, a stance of disdain. By contempt, I do not mean something necessarily vicious; contempt may be warranted or unwarranted, depending on the object. As Professor Michelle Mason argues, it can even be a valuable moral attitude when properly focused—“a morally justified response to persons who manifest a bad moral character.”²⁰ Thus, to say that bigots have contempt is not to say that they are necessarily hate-filled (although they may be and often are). It is rather to say that bigots have a *negative evaluative attitude* toward the object of bigotry. Ramsey captures this feature in terms of “evaluative beliefs or other attitudes that are (usually) negative and directed toward members of a group.”²¹

I leave open whether this negative evaluative attitude is fundamentally affective (a matter of feeling) or cognitive (a matter of belief). It may be both. On the one hand, “indifferent bigot,” like “compliant bigot,” appears to be a contradiction in terms. We typically characterize the bigot as *feeling* something—and feeling it strongly. On the other hand, we can conceive of

¹⁹ KWAME ANTHONY APPIAH, *ETHICS IN PARADISE* 392 (Hugh LaFollette ed., 2d ed. 2002).

²⁰ See Michelle Mason, *Contempt as a Moral Attitude*, 113 *ETHICS* 234, 269 (2003).

²¹ See Ramsey, *supra* note 12, at 141 (emphasis omitted).

someone coolly and dispassionately holding views that nonetheless strike us as bigoted. Imagine a Vulcan who stubbornly harbors racist beliefs. (The fictional Vulcans of *Star Trek* suppress their emotions.)²² In any case, even if felt disdain is not a strictly necessary condition of bigotry, it is surely a typical feature—the paradigmatic bigot feels aversion to his targets.

Fourth, as Ramsey emphasizes, bigotry is essentially directed toward *groups of people*.²³ Stubborn, unjustified contempt toward an isolated individual would be wrong, but it is not necessarily bigotry; the contempt must be directed at the individual *qua* group member. Moreover, not just any grouping counts. Someone who feels stubborn, unjustified contempt toward people whose names begin with the letter *K* would be strange but would not be a bigot. Why not? One might think that the reason is that the grouping of “people whose names begin with *K*” is arbitrary, whereas bigotry typically targets constitutive features of identity such as race, ethnicity, religion, sex, gender identity, sexual orientation, and so on. But while bigotry is *typically* directed toward constitutive characteristics, it is not clear that it is essentially so. Suppose that stubborn, unjustified contempt toward people with *K* names were widespread. In that case, it would plausibly be categorized as bigotry. Moreover, in the face of such systemic contempt, having a *K* name might eventually become a salient identity feature. The discrimination would ground the constitutive characteristic and not vice versa.

I suggest that what explains our intuitions about this case is not that *K* names fail to be a constitutive feature of identity but that they fail to be a target of a larger system of subordination. Bigotry is a social phenomenon, at least in its standard forms. Of course, someone might exhibit bigotry toward people with certain kinds of names because such names correlate with other identity characteristics. Consider, for example, names that end in “ski.” Those other characteristics would be the salient object.

Let us turn now to the connection between bigotry and racism. One of the interesting philosophical debates about racism in the last two decades concerns the “location problem”: whether racism consists mainly in beliefs—in particular, beliefs about the superiority of certain races—or in attitudes, choices, behaviors, or some other element. Most accounts treat beliefs as essential. Philosopher Tommie Shelby, for example, argues that racist beliefs are “essential to and even

²² E.g., John Walsh, *The Vulcan Way: How to Live Long and Prosper*, THE INDEPENDENT (Apr. 23, 2009), <https://www.independent.co.uk/arts-entertainment/films/features/the-vulcan-way-how-to-live-long-and-prosper-1672660.html> (“The thing is, [Vulcans] do have emotions, they just suppress them.”).

²³ Ramsey, *supra* note 12, at 141 (“Thus, what distinguishes the negative attitudes associated with racism, on the one hand, from the intolerance associated with anti-racism, on the other hand, is that the former is based upon (a) groundless negative attitudes that are (b) about groups of people.”).

sufficient for racism.”²⁴ He treats racism as “fundamentally a type of *ideology*,” defining ideologies as “widely accepted illusory systems of belief that function to establish or reinforce structures of social oppression.”²⁵ Professor Jorge Garcia, by contrast, has argued for a fundamentally nondoxastic, *volitional* account of racism.²⁶ According to Garcia, racism consists mainly in ill will. It is not primarily a belief, ideology, or doctrine—it is a sin.²⁷

My account of bigotry, like Garcia’s account of racism, treats bigotry as essentially a moral vice—both because bigotry involves unjustified contempt and because such contempt tends to contribute to systemic, unjust subordination. Even where the contempt does not risk this effect—say, because the bigot keeps his bigotry to himself—bigotry remains vicious in its improper attitude toward fellow human beings. Bigotry may also be an epistemic vice, insofar as contempt has a cognitive component. This is what Appiah seems to have in mind when he refers to the “systematically distorted rationality” of racial prejudice.²⁸ The bigot refuses to enter the realm of reasons, discounting contrary evidence in order to maintain bigoted views.

Although Garcia’s nondoxastic account of racism provides a helpful model for my account of bigotry, most race theorists treat racism as depending primarily on racist *beliefs*, not volitions or actions. In what follows, I will assume that the more common, doxastic/cognitive account of racism is correct. On that assumption, there is an important contrast between racism and bigotry. Whereas racism is fundamentally about *what* people believe, bigotry is about *how* they believe it—or, alternatively, how they feel it, if contempt is essentially affective. The bigot is *stubborn*, and the bigot *lacks justification*.

One way to think about this (assuming a cognitivist understanding of contempt) is to view bigotry as a matter of bad epistemic hygiene regarding our fellow humans’ moral worth. The bigot’s beliefs about his target are not only stubborn but also careless and risky and thus irresponsible. Refusing to enter the realm of reasons, the bigot instead clings to unjustified contempt. This refusal primarily harms the objects of bigotry, but it is also harmful to bigots in stunting their opportunities for knowledge and relationship.

This contrast between racism and bigotry may shed light on some other puzzles. Recall Ramsey’s example of the “wishy-washy racist.” If racism consists of beliefs, then it is perfectly possible to be a wishy-washy racist; it is not possible, however, to be a wishy-washy (i.e., nonstubborn) bigot. Also, consider Ramsey’s point that we generally do not consider young children bigots

²⁴ Tommie Shelby, *Is Racism in the “Heart”?*, 33 J. SOC. PHIL. 411, 414 (2002).

²⁵ *Id.* at 415.

²⁶ See J.L.A. Garcia, *The Heart of Racism*, 27 J. SOC. PHIL. 5, 6 (1996).

²⁷ See *id.*

²⁸ APPIAH, *supra* note 19, at 392.

even when, for example, they repeat their parents' racist views.²⁹ That observation is consistent with labeling children "racist" simply in virtue of their sharing the views. (Their culpability is a separate matter.)

Ramsey notes that "many regard bigotry [as] a superordinate category with subordinates that include, most prominently, racism and sexism,"³⁰ and he himself lists racism and sexism as "*types* of bigotry."³¹ This common classification scheme is inapt. Bigotry is not a genus of which various ideologies are species. Bigotry is a distorted way of *forming and maintaining* certain beliefs (or attitudes, or both), whereas ideologies such as racism and sexism are distorted belief systems.³² Ramsey seems to agree, at least partially, at one point arguing that definitions of bigotry should "emphasiz[e] the manner in which the attitudes are formed or supported."³³ Of course, bigotry helps to maintain and reinforce racist and sexist systems, which in turn foster bigotry by making it easier for the bigot to remain unchallenged.

One final clarification before proceeding: on the standard, doxastic account of racism, it would appear that racism applies directly to beliefs and derivatively to persons—persons are racist insofar as they hold racist beliefs or engage in practices that manifest such beliefs. Bigotry, I think, is exactly the opposite; it is essentially a feature of persons and only derivatively a feature of beliefs or expressions of belief—statements, actions, and so forth. A bigoted belief, remark, or action is the sort that is typical of bigoted persons. That fact may help explain why some are inclined to label even wishy-washy racists as bigots. Their views are typical of those who harbor stubborn, unjustified contempt—even though they themselves lack it.

II. MCCLAIN'S PUZZLES

In her opening chapter, McClain identifies four "puzzles" about bigotry that she seeks to address.³⁴ If we adopt the account of bigotry just outlined—treating bigotry as stubborn, unjustified contempt that is morally and epistemically reckless in its refusal to engage with evidence—then those puzzles become less puzzling.

²⁹ Ramsey, *supra* note 12, at 132 ("The younger the child, the more we might be inclined to regard their attitudes as justified and thus the less inclined to view them as bigots, just as my view suggests.").

³⁰ *Id.* at 127.

³¹ *Id.* at 126. Ramsey acknowledges that "some may believe that there are forms of institutional racism that do not qualify as bigotry. If so, then perhaps the proper subordinate category is racial bigotry." *Id.* at 149 n.5.

³² See Shelby, *supra* note 24, at 415 (defining ideology roughly as "widely accepted illusory systems of belief that function to establish or reinforce structures of social oppression").

³³ Ramsey, *supra* note 12, at 129.

³⁴ MCCLAIN, *supra* note 9 (manuscript at 6-14).

McClain's first puzzle concerns "whether it is the *motive for* or the *content of* a belief that makes it bigoted."³⁵ It is unusual to speak of motives for beliefs as opposed to motives for *action* or *reasons* for belief. Yet not everything that influences belief constitutes a reason. I might believe that it is going to rain tomorrow because I am a pessimistic guy and I have a picnic scheduled, because I am a vindictive guy and my despised colleague has a picnic scheduled, because handsome Joe Weatherman says it is going to rain and I tend to find good-looking people compelling, or because of some combination of the above. (People may have mixed motives.) None of these motives constitutes an epistemic *reason*; that is, none constitutes evidence for the claim that it will rain.

When McClain ponders whether bigotry consists in the motive for a belief, she specifies the motive of hatred and, specifically, hatred toward a group.³⁶ She goes on to ponder whether, if bigotry entails hatred, "appeal to *sincere* religious belief or *conscience*" would be a defense against charges of bigotry.³⁷ But as McClain quickly observes, people can be hateful quite sincerely. So it is difficult to see how sincerity makes a difference.³⁸

What about the appeal to conscience? Although McClain lumps sincerity and conscience together, the two are distinct. Sincerity refers to absence of deceit, whereas conscience, at least in this context, refers to acting according to what one believes to be right rather than acting from hatred or other insidious motives. Sincerity and conscience may diverge: *pace* Kant, a well-formed conscience may permit or even demand insincerity (such as when the axe-murderer at the door inquires as to your children's whereabouts).³⁹ Moreover, one can sincerely express beliefs and feelings—including hatred but also a wide range of innocuous or beneficent emotions—that have little to do with decisions about what is right. So it is worth considering separately whether conscience might constitute a defense against bigotry even if sincerity (alone) does not.

As I argued in Part I, bigotry is essentially stubborn and unjustified.⁴⁰ A well-formed conscience is neither. Of course, as already noted, there is a fine line between stubbornness and *conviction*—a notion frequently associated with conscience. Still, one could argue that conscience depends on *reasons* and, more specifically, on contemplating and weighing reasons. That process of reasoning

³⁵ *Id.* (manuscript at 6) (emphases added).

³⁶ *Id.* (manuscript at 7) ("Certainly, the impulse to link bigotry to hateful motivation tracks common definitions of bigotry: hateful beliefs about and actions toward a group are a worrisome form of bigotry.").

³⁷ *Id.* (manuscript at 6).

³⁸ *See id.*

³⁹ *See* Immanuel Kant, *On a Supposed Right to Tell Lies from Benevolent Motives*, in KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS, at app. I (Thomas Kingsmill Abbott trans., Longmans Green & Co. 6th ed. 1948) (1873).

⁴⁰ *See supra* Part I.

is inconsistent with the stubborn, unjustified contempt at the heart of bigotry. Again, bigotry is a refusal to enter the realm of reasons.

Many, including McClain, have highlighted how Chief Justice Roberts's dissent in *Obergefell* complains that Justice Kennedy's majority opinion portrays opponents of same-sex marriage as "bigoted," even though Justice Kennedy never uses the term.⁴¹ The Chief Justice writes:

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. These apparent assaults on the character of fairminded people will have an effect, in society and in court. Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.⁴²

As should now be clear, however, the fact that a person's view of marriage demeans or stigmatizes others is by itself insufficient to convict that person of bigotry. One can hold and even enact harmful views without harboring stubborn, unjustified contempt and thus without being a bigot. Indeed, against Chief Justice Roberts's complaint, Justice Kennedy argues that same-sex marriage opponents are by and large *not* bigoted, writing: "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises"⁴³ To reach conclusions by way of premises is to enter the realm of reasons. Doing so is antithetical to bigotry, even though it sometimes produces results that are wrong, harmful, and unconstitutional.

This point about weighing reasons helps to explain the relevance of sincerity. Consider the paradigmatic case of racists who point to the Bible to justify their belief in segregation. In doing so, they are offering not motives but *reasons*, which putatively provide evidence for their moral position. Thus, on the surface,

⁴¹ See MCCLAIN, *supra* note 9 (manuscript at 6).

⁴² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) (alterations and omission in original) (internal citations omitted).

⁴³ *Id.* at 2602.

it would seem that (on my account) they are not bigoted. But if such pointing is *insincere*—that is, if the Bible’s teaching is not a genuine reason but merely a *post hoc* justification—then their support of segregation might not really be a matter of conscience. It might instead consist in stubborn, unjustified contempt cloaked in a conscience costume. Perhaps Chief Justice Roberts is worried that Justice Kennedy is accusing same-sex marriage opponents of similar disguise, although nothing in Kennedy’s opinion supports this interpretation and some things explicitly contradict it.

A second puzzle concerns whether bigotry depends on the content of the allegedly bigoted belief.⁴⁴ McClain fleshes out this question in terms of whether the belief is reasonable (or rational) as opposed to unreasonable (or irrational).⁴⁵ Here again, it is worth teasing apart issues that sometimes get jumbled together.

In asking whether bigotry depends on a belief’s content, one could be asking whether certain propositions are bigoted regardless of how people arrive at them. The idea that some races are superior to others certainly seems to qualify. But if we treat bigotry as a matter of bad epistemic hygiene, there is a more complicated story to tell. Bigotry is largely content-neutral—any belief, even a true one, can be arrived at stubbornly and recklessly. Of course, insofar as bigotry involves stubborn, unjustified *contempt toward groups of people*, bigoted beliefs have some content constraints. For example, a stubborn, unjustified belief in leprechauns is not bigoted because bigotry necessarily involves contempt toward a group. But keeping in mind Mason’s point about properly focused contempt as a justified moral attitude, group contempt need not be irrational or stubborn. It is rational to feel contempt toward sexual harassers and racists, to take just two examples. And a person who feels *irrational* contempt toward a group because of an isolated upbringing but who readily abandons that contempt in the face of contrary evidence is not bigoted (because they are not stubborn).

We can even imagine scenarios in which the (thoroughly racist) belief that some races are superior to others is arrived at in a nonbigoted way. It is generally rational for young children to accept what their parents tell them. Thus the five-year-old who accepts white supremacy but who with education will later abandon that view is a racist but not a bigot. Of course, under normal circumstances, any modern adult who accepts that view is bigoted—which helps to explain the common belief that some views are necessarily bigoted in virtue of their content.

One might take my condition that bigoted beliefs must be *unjustified* as a further kind of content constraint. Much depends on whether we adopt an objective or subjective view of justification. *Objectively unjustified contempt* is unjustified relative to what is true. If one takes “stubborn, unjustified contempt” to refer to objective justification, then my definition of bigotry does require bigoted beliefs to be false. By contrast, *subjectively unjustified contempt* is

⁴⁴ McClain, *supra* note 9 (manuscript at 8).

⁴⁵ See *id.*

unjustified relative to what the person has good reason to believe. Because what we have good reason to believe is influenced by what those around us believe, it is sometimes possible for those raised in a deeply racist, sexist, or heterosexist society to be subjectively justified in their (objectively unjustified) racist, sexist, or heterosexist beliefs. Therefore, if we adopt a subjective view of justification and we stipulate that certain persons (children especially but also those lacking certain educational or social experiences) are innocent in their stubborn contempt, then we must concede that such persons are not bigots—even though they are objectively unjustified in their beliefs.

These points about justification shed light on McClain's third puzzle, on whether "bigotry" is "simply a term used to signal an anachronistic and now-reviled view"⁴⁶—or, as McClain puts it later on, a view that is on the "wrong side of history."⁴⁷ Let us first note that, in terms of its progress toward justice, history is more of a jagged line than an arc; thus, what is anachronistic is not always objectively wrong. But with that in mind and utilizing the subjective/objective distinction just explained, we can say that the bigot is objectively on the wrong side of history—because of their objectively unjustified contempt—but is not always recognized as such. Put another way, the reason that social progress seems both relevant and irrelevant to whether a view is bigoted—thus forming a puzzle—is that prevailing social norms are relevant to subjective justification but not relevant to objective justification.

Despite their rhetorical power, appeals to the "right" or "wrong" side of history are virtually always question-begging in these contexts. Culture-war debates are about which moral views are justified or unjustified; they are about objective right and wrong. Telling someone that their view puts them on the "wrong side of history" will likely persuade them only if they are either more concerned about reputation than rectitude or if they already feel the pull of independent reasons for changing their mind.

McClain's fourth puzzle concerns "whether the term 'bigot' suggests a particular type of *character*, with distinctive psychological or moral traits."⁴⁸ Insofar as stubborn contempt is essential to bigotry, the answer is yes. Indeed, at first glance, it is hard to see the tension to which McClain here refers. She explains:

In tension with this association of bigotry with fixed mental traits and bad character, however, is the scientific understanding of prejudice as the outgrowth of normal cognitive processes. For example, even as he diagnosed the bigoted personality, [social psychologist Gordon] Allport observed that humans must think in categories, which set the stage for the study of stereotypes and social psychologists' emphasis, today, on how people have "implicit bias" despite their egalitarian ideals. Recent social psychology speaks of the "buried prejudice" to which ordinary people are

⁴⁶ See *id.* (manuscript at 9).

⁴⁷ See *id.* (manuscript at 10).

⁴⁸ *Id.* (manuscript at 11).

prone because of the way the mind works. Such work avoids the language of bigotry and moral blame in describing these processes, instead offering hope that it is possible for people to gain insight about these biases and overcome them. Phrases like “good people with hidden biases” communicate that people who seek to address their biases are not doomed to be bigots.⁴⁹

I argue that the tension to which McClain here refers obscures gradations in both prejudice and bigotry—which are not the same thing. Yes, “normal cognitive processes” may at times produce prejudice, and, if we are not careful, they may even produce deeply harmful prejudice—racism, sexism, religious prejudice, and so forth. But insofar as people are willing to “gain insight about these biases and overcome them,” they lack the stubborn contempt at the heart of bigotry; they are not bigots. Moreover, the characteristic features of bigotry—stubbornness, lack of justification, contempt—are ones that people may possess to a greater or lesser degree, which means that people may indeed be more or less bigoted. Blogger Wes Alwan writes, “Bigotry does not constitute a spectrum: rather, it marks a spectrum’s far end.”⁵⁰ That is half right. Bigotry falls at one end of a spectrum, but when zoomed in, there are gradations there, too.

One upshot of the account of bigotry sketched here is that it is an essentially internal vice. Observers have only indirect access to the operations of the alleged bigot’s mind and heart. Naming bigotry thus calls for epistemic humility balanced by the urgency of containing its spread and mitigating its effects.

The pragmatics of terms such as “bigot” and “bigotry” are at least as important as their meaning. As I have argued elsewhere, calling someone a bigot typically functions as a conversation-stopper.⁵¹ It marks the subject’s views as beyond the pale, more worthy of shunning and shaming than of thoughtful engagement. Indeed, by accusing the person of departing the realm of reasons, it implies the futility of engagement. This is a stance that, for obvious reasons, ought to be adopted sparingly.⁵² The problem is not merely that it is easy to adopt unfairly. The problem is that it may entrench the discriminatory views of an otherwise pliable target. It may cause the “moveable middle” to dig in to prejudice, thus fostering bigotry rather than ameliorating it.⁵³

McClain identifies a further problem with overusing the charge of bigotry: doing so may feed the victim mentality of those who balk at being “branded as

⁴⁹ *Id.* (manuscript at 11-12) (endnotes omitted).

⁵⁰ Wes Alwan, *What the Word “Bigot” Actually Means (and Why It Is Important)*, PARTIALLY EXAMINED LIFE (Nov. 29, 2013), <https://partiallyexaminedlife.com/2013/11/29/what-the-word-bigot-actually-means-and-why-it-is-important/> [https://perma.cc/K8B5-U9AN].

⁵¹ See Corvino, *supra* note 10.

⁵² See *id.* (fleshing out dangers of accusing person of departing from reason).

⁵³ See *id.*

bigots.”⁵⁴ Of course, as we have seen in Chief Justice Roberts’s dissent in *Obergefell*, such complaints may arise even when the charge is absent or, for that matter, explicitly disavowed. As McClain observes, “complaining that someone has been ‘branded a bigot’”—even when the term has not been invoked—“can be as much a conversation stopper as actual charges of bigotry.”⁵⁵ I would add that it can be as much a departure from the realm of reasons as bigotry itself. The time that *Obergefell* critics spend crying wolf about being called bigots is time that they do not spend engaging with arguments from the other side. Recall the previously cited passage from the dissent, in which the Chief Justice ignores a basic distinction between intent (which is relevant to the “character of fairminded people”) and impact (which is Justice Kennedy’s main concern in his arguments about the harms of exclusion from marriage):

The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that “the necessary consequence” of laws codifying the traditional definition of marriage is to “demea[n] or stigmatiz[e]” same-sex couples. The majority reiterates such characterizations over and over. By the majority’s account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States’ enduring definition of marriage—have acted to “lock . . . out,” “disparage,” “disrespect and subordinate,” and inflict “[d]ignitary wounds” upon their gay and lesbian neighbors. These apparent assaults on the character of fairminded people will have an effect, in society and in court.⁵⁶

There is no doubt that traditional marriage policy served to “lock out” same-sex couples from marriage. Regardless of whether such exclusion *intentionally* demeaned or stigmatized such couples, that was certainly its felt effect—for reasons that Justice Kennedy explains at length. Chief Justice Roberts barely touches on those reasons. Instead, he employs the familiar trope that those who point out discrimination are therefore themselves guilty of discrimination—indeed, of an “assault.”⁵⁷

History amply teaches that well-meaning people can do harm. What accounts for Chief Justice Roberts’s misplaced defensiveness? Perhaps it is indeed an (intentional or unwitting) attempt to distract from the argument at hand. Or perhaps it is a reaction to other arguments in the neighborhood. Certainly, some observers view opponents of same-sex marriage as bigots, no better than the racists of the Old South.

⁵⁴ See, e.g., MCCLAIN, *supra* note 9 (manuscript at 12-14).

⁵⁵ *Id.* (manuscript at 14).

⁵⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) (alterations and omission in original) (internal citations omitted).

⁵⁷ See *id.* (characterizing Justice Kennedy’s assertion that those who opposed marriage equality harmed their queer neighbors as “assaults on the character of fairminded people”).

III. *WHO'S THE BIGOT? MASTERPIECE AND OTHER CONTROVERSIES*

This brings us back to the three cases mentioned at the outset of this Essay: those of Jack Phillips, who refused to provide a cake for a same-sex wedding; Marjorie Silva, who refused to provide a Bible-shaped cake with a crossed-out image of two grooms alongside the phrase “Homosexuality is a detestable sin”; and Maurice Bessinger, who refused to allow interracial dining in his restaurants—which, to be clear, amounted to refusing to allow Blacks to dine in his restaurants. All three individuals cited moral or religious convictions to explain their stance, and all three were apparently sincere in doing so. Who’s the bigot?

Let me make two observations here. First, we cannot usually diagnose bad epistemic hygiene by simply looking at the resulting beliefs or attitudes. Without access to other minds or infallible testimony, the best evidence we have of another person’s stubborn, unjustified contempt consists of contextual clues as to how they arrived at their beliefs and attitudes. Even then, it is difficult to diagnose stubbornness without deep insight into their personality—insight that relatively few observers (perhaps their family and friends) have for Phillips, Silva, or Bessinger.

Second, the controversial question of whether someone is a bigot depends on another controversial question: whether that person’s negative evaluative stance (contempt) is *justified*. In the context of a culture war, the latter question is likely to be very much a live one. Put another way, we cannot reach agreement about who is a bigot without first securing agreement on whether their position—on marriage, on racial integration, or on any other moral matter—is warranted. That is one reason why it is easier to apply the term “bigot” to Bessinger than to the others. There is widespread agreement that his stance is unwarranted.

These two problems—the “limited mental access” problem and the “live question” problem—mean that it is likely unproductive to ask, “Who’s the bigot?” here, even apart from the rhetorical effects of levying the label. It may nevertheless be useful to compare and contrast the three cases as a way of deepening our appreciation of their contours. Doing so is not without risk. Analogies are easily misinterpreted. They can suggest false equivalences even when we take pains to disavow them, and they can stamp out nuance as much as highlight it. The analogies that McClain explores throughout her book—between the same-sex marriage debate, the interracial marriage debate, and the interfaith marriage debate, among others—are no exception. On the contrary, their exploration often prompts two opposite and equally false reactions: that opposition to same-sex marriage is “just like” traditional racial (or religious) discrimination and that it is “nothing like” such discrimination. Both reactions treat analogies as if they were identities, rather than tools for exploring similarity and difference.

Despite these potential pitfalls, I would like to explore the three cases a bit further, beginning with a comparison of Bessinger and Phillips. One striking difference between the cases is that Bessinger refused to serve Black customers

at all inside his establishments, although he happily served them takeout.⁵⁸ Phillips, by contrast, regularly served gay customers.⁵⁹ He explicitly told Craig and Mullins that he would happily sell them other items in the store—birthday cakes, cupcakes, cookies, and so on—just not wedding cakes.⁶⁰ Ryan T. Anderson and Sherif Girgis, in a point/counterpoint book with me, highlight this difference, suggesting that it applies more generally to the wedding-provider controversies:

The refusals of the bakers . . . have nothing like the sweep or shape of racist practices. They don't span every domain but focus on marriage and sex. Within that domain, they're about avoiding complicity with certain choices, not contact with groups. Thus Barronelle Stutzman, who refused to arrange wedding flowers for her client of ten years, clearly didn't think gay people vicious, incompetent, or unproductive. (Her business and livelihood depended on them as customers and employees.) She didn't think they mattered less or deserved shunning. (She employed them and served them faithfully as clients, denying them no other product.) Patterns in her behavior make nonsense of all these interpretations.⁶¹

Notice the claim that the current wedding refusals are “nothing like” traditional racial discrimination. Unfortunately, Anderson and Girgis's argument for making this sharp distinction requires both exaggerating some racist practices and minimizing many anti-LGBTQ ones.

First, not all who refuse business to LGBTQ people are kindly characters like Baronelle Stutzmann or Jack Phillips. An Oklahoma restaurant owner told a television reporter that he would not serve homosexuals, stating “I've been in business 44 years, I think I can spot a freak or a fa**ot.”⁶² Asked to explain, he replied, “Any man that would compromise his body would compromise anything.”⁶³ A Texas restaurant, while not excluding gay people entirely, removes them for even minimal displays of affection; one server explained that “[w]e do not like fags” and pointed to a sign on the door requiring that “men act

⁵⁸ *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (per curiam).

⁵⁹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018).

⁶⁰ *Id.*

⁶¹ JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 194 (2017). I have responded to this passage in John Corvino, *Free Speech and Discrimination in the Cake Wars*, in *THE PALGRAVE HANDBOOK OF PHILOSOPHY AND PUBLIC POLICY* 317-28 (David Boonin ed., 2018).

⁶² Hayley Peterson, *Oklahoma Restaurant Owner Says He Won't Serve Homosexuals in On-Air Rant*, *BUS. INSIDER* (Feb. 10, 2014, 4:56 PM), <https://www.businessinsider.com/oklahoma-restaurant-wont-serve-homosexuals-2014-2> [<https://perma.cc/FF8C-Z74C>].

⁶³ *Id.*

like men and women act like ladies.”⁶⁴ A Michigan car repair shop owner announced on his Facebook page that he would not serve any homosexuals, citing his religious liberty:

I am a Christian. My company will be run in a way that reflects that. Dishonesty, thievery, immoral behavior, etc. will not be welcomed at MY place of business. (I would not hesitate to refuse service to an openly gay person or persons. Homosexuality is wrong, period. If you want to argue this fact with me then I will put your vehicle together with all bolts and no nuts and you can see how that works.)⁶⁵

Anderson and Girgis’s understanding of racism is even more distorted. Racism never “span[ned] every domain”⁶⁶ in the sense of requiring a complete avoidance of interaction with Black people. On the contrary, the economy of the Old South depended heavily upon such interaction. The goal was not complete avoidance but keeping Blacks “in their place.” Even Bessinger did not reject all contact with Black customers—recall, he served them takeout—he just did not want them in his dining rooms.

The nuances of racist discrimination become even clearer when we consider opposition to miscegenation, well detailed in McClain’s book. Take the notorious case of Bob Jones University, which prohibited interracial relationships at the school until the year 2000.⁶⁷ A university spokesperson explained as late as 1998 that

God has separated people for his own purposes. He has erected barriers between the nations, not only land and sea barriers, but also ethnic, cultural, and language barriers. God has made people different from one another and intends those differences to remain. Bob Jones University is opposed to intermarriage of the races because it breaks down the barriers God has established.⁶⁸

Note that, despite the ban, the university admitted black students beginning in 1971—freely, without court order. Presumably, it did not (openly) regard them as “vicious, incompetent, or unproductive.”⁶⁹ During the intervening

⁶⁴ Josh Israel, *Texas Restaurant Bans Gay Couple Because ‘We Do Not Like Fags,’* THINKPROGRESS (May 29, 2014, 2:39 PM), <http://thinkprogress.org/texas-restaurant-bans-gay-couple-because-we-do-not-like-fags-ac0a81703fd4> [<https://perma.cc/VCS3-2PUH>].

⁶⁵ Dieseltc (@Dieseltc), FACEBOOK (Apr. 14, 2015), <https://www.facebook.com/Dieseltc/posts/640574982710796> [<https://perma.cc/X3J9-PS3V>].

⁶⁶ CORVINO, ANDERSON & GIRGIS, *supra* note 61, at 194.

⁶⁷ See, e.g., *Bob Jones University Drops Mixed-Dating Ban*, L.A. TIMES, Mar. 4, 2000, at A15. I have discussed this case elsewhere. See CORVINO, ANDERSON & GIRGIS, *supra* note 61, at 68-70.

⁶⁸ *Bob Jones University Apologizes for Its Racist Past*, 62 J. BLACKS HIGHER EDUC., Winter 2008/2009, at 22, 23 (quoting Jonathan Pait, a public relations spokesman for the university).

⁶⁹ CORVINO, ANDERSON & GIRGIS, *supra* note 61, at 194.

decades, when it admitted Blacks but prohibited them from dating whites (and vice versa), it was trying to avoid “complicity with certain choices, not contact with groups.”⁷⁰

To bring things even closer to the Phillips case, imagine a modern-day “Baker Bessinger,” only slightly tweaked from his historical counterpart. He welcomes customers of all races into his bakery and, indeed, depends on them for his livelihood. (We can assume the bakery is not a dine-in establishment.) He sells a variety of artfully decorated cakes, including wedding cakes for Black couples, White couples, Asian couples, and so on. But interracial marriage is a bridge too far for him. When an interracial couple enters his bakery seeking a wedding cake, he politely declines, citing his moral and religious convictions. Is he a bigot? If not, why not? Is he merely exercising his freedom of speech and his religious freedom? If not, in what ways does he differ from Jack Phillips? Are we assuming that Jack Phillips is sincere in his moral and religious convictions but Baker Bessinger is not, or that Baker Bessinger is sincere but the original Maurice Bessinger was not? On what grounds are we making these assumptions?

I pose these questions rhetorically because I think that a key function of such analogies is to jog our intuitions about the cases at hand—and, in the process, to expose the hidden assumptions driving them. One great value of McClain’s book is that it exposes how the historical record contradicts common assumptions. Yes, some racists used religion as a pretext for sheer prejudice; so do some opponents of same-sex marriage. But many were apparently sincere adherents of popular, racist religious teaching.

One might have expected Maurice Bessinger’s *Piggie Park* case to feature more prominently in the 2018 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*⁷¹ decision, which overturned the Colorado Civil Rights Commission’s ruling against Jack Phillips on the narrow grounds that particular commissioners expressed religious hostility toward Phillips—not on the more general grounds of freedom of speech or freedom of religion.⁷² In fact, *Newman v. Piggie Park Enterprises, Inc.*⁷³ is referenced only once—in a footnote in Justice Kagan’s concurrence.⁷⁴ Instead, both the Court and the separate concurrences by Justices Kagan and Gorsuch spend considerable time exploring the analogy between Jack Phillips’s case, on the one hand, and a series of cases involving customer William Jack, including the case mentioned at the outset of

⁷⁰ *Id.*

⁷¹ 138 S. Ct. 1719 (2018).

⁷² *Id.* at 1732.

⁷³ 390 U.S. 400 (1968) (per curiam).

⁷⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1733 n.* (Kagan, J., concurring) (“As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait.”).

this Essay with baker Marjorie Silva, on the other. (Interestingly, many key arguments regarding that analogy also occur in footnotes.)

Consider the details of that incident: in 2014, not long after the Colorado Civil Rights Commission issued its judgment against Phillips, William Jack visited Azucar Bakery in Denver (among several others) and requested a Bible-shaped cake decorated with the image of two grooms with a red “X” over them, plus the following paraphrased biblical verses: “God hates sin. Psalm 45:7” and “Homosexuality is a detestable sin. Leviticus 18:22.”⁷⁵ Azucar’s owner, Marjorie Silva, declined: the message conflicted with her moral belief in LGBTQ equality.⁷⁶ She nevertheless offered to make the customer a Bible-shaped cake and to provide him with an icing bag so that he could write what he wished.⁷⁷ Jack—who was clearly aiming to make a point about the Phillips case—filed a complaint alleging religious discrimination.⁷⁸ But the Commission disagreed, arguing that the baker refused because of her unwillingness to endorse a particular message, not because of the customer’s religion.⁷⁹

At first glance, the analogy between the cases seems straightforward: If Silva should not be forced to create something conveying a message she opposes, why should Phillips be forced to do so? Is the difference simply one of which messages are favored? Why do such refusals count as unjust discrimination in one case but not the other? As Justice Gorsuch writes in his *Masterpiece* concurrence:

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there’s no indication the bakers actually *intended* to refuse service *because* of a customer’s protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else).⁸⁰

First glances can be deceiving, however. As I have argued at length elsewhere, Justice Gorsuch’s position elides the distinction between *design-based* refusals and *use-based* refusals.⁸¹ Silva’s refusal was design-based: she

⁷⁵ Jack v. Azucar Bakery, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 24, 2015).

⁷⁶ *Id.*

⁷⁷ *Id.* at 3.

⁷⁸ *Id.* at 1.

⁷⁹ *Id.* at 4.

⁸⁰ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1735 (2018) (Gorsuch, J., concurring).

⁸¹ See CORVINO, ANDERSON & GIRGIS, *supra* note 61, at 318-19.

would not sell the requested design to any customer, although she was happy to sell William Jack any cake (design) that she would sell anyone else, including a Bible-shaped cake, knowing that he might use it for purposes of which she disapproved. Phillips's refusal, by contrast, was use-based. Without even discussing designs with Craig and Mullins, he refused to sell them *any* cake that would be used for a same-sex wedding. The difference amounts to one between *what is sold* and *for what purpose it is purchased*, i.e., a difference between intrinsic and extrinsic qualities of the cake.

Thus, as Justice Kagan points out in response to Justice Gorsuch's claim that the bakers in both cases "would not sell the requested cakes to anyone":

That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. Justice GORSUCH can make the claim only because he does not think a "wedding cake" is the relevant product. As Justice GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a "cake celebrating same-sex marriage." But that is wrong. The cake requested was not a special "cake celebrating same-sex marriage." It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike.⁸²

In response, Justice Gorsuch asks, "Why calibrate the level of generality in Mr. Phillips's case at 'wedding cakes' exactly—and not at, say, 'cakes' more generally or 'cakes that convey a message regarding same-sex marriage' more specifically?"⁸³

There are a number of ways to approach Justice Gorsuch's question, but the simplest is this: allowing extrinsic factors to determine what counts as "the same item" for purposes of applying antidiscrimination law greases the slippery slope from the Phillips case to the Bessinger cases. Consider that our hypothetical Baker Bessinger could make the very same argument about "cakes that convey a message regarding interracial marriage." Like Phillips, he harbors religious objections to a particular form of marriage. Yet like Phillips, he is happy to sell these customers [interracial couples] other items in the store. On Justice Gorsuch's logic, Baker Bessinger could explain "without contradiction that [he] would not sell the requested cakes to anyone, while [he] would sell other cakes to members of the protected class (as well as to anyone else)."⁸⁴

If a "cake celebrating a same-sex marriage" is treated as the relevant cake type—one that Phillips would not sell to *anyone*, regardless of sexual orientation—then a "cake celebrating interracial marriage" could also be a distinctive cake type. From there, it is only a short step to treating "barbeque

⁸² *Masterpiece Cakeshop*, 138 S. Ct. at 1733 n.* (Kagan, J., concurring) (internal citations omitted).

⁸³ *Id.* at 1735 (Gorsuch, J., concurring).

⁸⁴ *See id.*

intended for interracial dining” as a distinctive product—one that the original Maurice Bessinger simply did not sell.

There are three possible lines of response. One is to try to block the slippery slope from wedding cakes to barbeque by arguing that wedding cakes are inherently expressive; thus, they implicate First Amendment free speech protections in a way that barbeque does not. As Sherif Girgis argues:

Couples don’t spend hundreds or thousands of dollars on wedding cakes out of fear that their guests might still go hungry after the salmon or filet. Nor do newlyweds make a big show of feeding the cake to each other in order to model what guests should do when their own slices come around. No, the overwhelmingly dominant purpose of having wedding cakes is to make them integral to the celebration of a new marriage—first as the centerpiece of that celebration, and then as part of its programming. Wedding cakes in this respect are like central props in a play. And we wouldn’t let lawmakers force dissident artists to design props for use in plays promoting the state’s favored messages.⁸⁵

But the free speech argument strikes me as a red herring here. For one thing, the significance that people attach to the wedding cake is both deeply personal and highly variable—the religious significance even more so. As Justice Gorsuch writes in his *Masterpiece* concurrence:

To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. . . . It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.⁸⁶

But if cakes—let alone bread or caps—can have such significance, why not barbeque? Moreover, the free speech response does not touch the “Baker Bessinger” hypothetical, which, like the Phillips case, involves wedding cakes. And one can exploit that case further. Suppose Baker Bessinger becomes further emboldened in his racism: in addition to refusing service for interracial weddings, he also decides to stop selling *birthday* cakes to Black customers. “Birthday cakes send a message,” he says, “that a person’s life is worth celebrating. But I believe that ‘Black lives *don’t* matter!’ By requiring me to make birthday cakes for Black customers, the state is forcing me to lend my artistic talents to a message I don’t support.” Indeed, the emboldened Baker Bessinger could draw on Girgis, arguing that no one serves birthday cakes “out

⁸⁵ Sherif Girgis, *The Christian Baker’s Unanswered Legal Argument: Why the Strongest Objections Fail*, PUB. DISCOURSE (Nov. 29, 2017), <https://www.thepublicdiscourse.com/2017/11/20581/> [<https://perma.cc/7RZF-NJT7>].

⁸⁶ *Masterpiece Cakeshop*, 138 S. Ct. at 1739-40 (Gorsuch, J., concurring).

of fear that their guests might still go hungry”; instead, the cakes are “central props in a play” involving candles and singing and celebration.⁸⁷ They are clearly expressive in that context.

Incidentally, there has been a recent case of a baker denying a birthday cake to a customer—this time, on the grounds of sexual orientation—although the specific nature of the baker’s objection was unclear. In July 2016, Candice Lowe ordered a birthday cake for her wife, Amanda, from Take the Cake Bakery in Toledo, Ohio.⁸⁸ Shortly thereafter, the owner, LaGresha Fizer-Brown, visited Lowe’s Facebook page, realized that Lowe was in a same-sex relationship, and sent her a text message canceling the birthday-cake order: “Candice, I’m sorry . . . I just realized your [sic] in a same sex relationship and we do not do cakes for same sex weddings or parties . . . I’m so sorry. I wasn’t aware of this exactly until I saw your page. Take care :).”⁸⁹

So the “free speech” distinction is likely to be little help in blocking the slippery slope from Phillips to Bessinger. A second and rather different strategy acknowledges that Phillips engaged in a use-based refusal of service but denies that this was tantamount to a *user*-based refusal of service. That is, it argues that to discriminate on the basis of “intended use at a same-sex wedding” is not tantamount to discriminating on the basis of sexual orientation—which is the relevant characteristic in the Colorado Anti-Discrimination Act (“CADA”).⁹⁰ This strategy would then require a second step, arguing that Bessinger’s refusal was different. Not allowing Blacks to dine in his restaurants clearly *does* involve discriminating on the basis of race.

But while Bessinger’s violation of antidiscrimination law may be clearer and more direct, this is a distinction without a difference. As I have argued elsewhere, to discriminate against same-sex *couples* is to discriminate on the basis of sexual orientation; indeed, it is the most obvious and likely way to do so.⁹¹ So Phillips’s use-based refusal is tantamount to a user-based refusal, in violation of CADA. By analogy, a creator of artistic embroidered fabrics who refused to sell those fabrics for use as hijabs would be discriminating on the basis of religion; in both cases, the use is tightly connected with the protected classification. As Justice Scalia once put it, “A tax on wearing yarmulkes is a tax on Jews.”⁹² Moreover, as with the previous rebuttal, this one does not touch the “Baker Bessinger” case. Recall that Baker Bessinger is happy to serve

⁸⁷ See Girgis, *supra* note 85.

⁸⁸ Frank Carber, *Ohio Baker Refuses to Make a Birthday Cake for a Lesbian Customer*, METROWEEKLY (July 12, 2016), <http://www.metroweekly.com/2016/07/ohio-baker-make-birthday-cake-lesbian-customer> [<https://perma.cc/43V9-YNE7>].

⁸⁹ *Id.* (alteration and omissions in original).

⁹⁰ COLO. REV. STAT. § 24-34-601 (2019).

⁹¹ See generally John Corvino, “*The Kind of Cake, Not the Kind of Customer*”: Masterpiece, Sexual-Orientation Discrimination, and the Metaphysics of Cakes, 46 PHIL. TOPICS, Fall 2018.

⁹² *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993).

customers of all races; he just will not make cakes for interracial weddings. Surely Baker Bessinger discriminates on the basis of a protected classification; but if he does, so does Jack Phillips.

The third and fourth strategies for blocking the slippery slope from Phillips to Bessinger draw on this Essay's previous discussion of bigotry, essentially arguing that Bessinger is a bigot whereas Phillips is not. The third strategy contends that Phillips is sincere in his religious convictions whereas Bessinger's objections are pretextual; thus, Phillips is in the realm of reasons, whereas Bessinger evinces stubborn contempt. For all I know, this may well be an accurate description of the two cases. But that is a contingent matter. Plaintiffs today are more carefully chosen than they were in the 1960s, given the speed and pervasiveness of modern media. In Bessinger's time, it would not be terribly difficult to find a kindly character for whom integration was simply a bridge too far—someone who reflected on the debate surrounding integration and concluded sincerely (albeit very wrongly) that integration contravened the laws of God and nature.

The fourth strategy argues that Phillips is "reasonable" but Bessinger is not—which brings us right back to the culture war where we started. Whether Phillips's views are justified is very much a live question, and there is no way to lift ourselves to a God's-eye perspective on that question. We are in its throes.

Perhaps that is the central lesson of comparing these three cases: whether each one meets the criteria for bigotry is very much a matter of perspective. The great value of McClain's book is how deeply she contributes to that perspective. After reading it, I thought: Bigotry is not so puzzling. What is puzzling is how easily we forget the lessons of history—and recent history, at that.