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MORE THAN JUST A CAKE: MASTERPIECE CAKESHOP AND THE FUTURE OF CIVIL RIGHTS

ABSTRACT: *The US Supreme Court's ruling in the case of* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission *has disappointed many commentators.*
The case originated by the refusal expressed by Jack Phillips, a Colorado baker, to create a cake for a same-sex couple's wedding. Charged with violation of the Colorado Anti-Discrimination Act, Mr. Phillips justified such a denial by claiming that he could not be compelled to exercise his artistic talents to support a view of marriage at odds with his own religious convictions. Phillips' case is part of a growing number of disputes that, all over the country, are challenging state public accommodation laws by invoking the Free Speech or Free Exercise Clauses of the First Amendment of the US Constitution. Therefore, the difficult question raised before the High Court was whether the First Amendment exempts businesses to serve same-sex couples for religious reasons.
The Court did not give an answer to the broader constitutional issue but ruled in favor of the baker "on narrow grounds" finding that he did not receive a fair and impartial hearing. Thus, many authors contended that the decision will not set a precedent for futures cases, except those where there is evidence of religious hostility or bias from public officials. However, this paper argues that the Masterpiece Cakeshop *ruling has set the table for a radical change in the civil rights jurisprudence. In particular, it will explain why this decision failed to bolster the principles recognized in* Obergefell v. Hodges *and, at the same time, left the door open to the creation of "a right to discriminate" in the name of religious liberty.*

1. During one public address in 2006, John Roberts, newly appointed Chief Justice of the United States, stated that he was strongly in favor of deciding cases on

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"the narrowest possible grounds.[1]" In his view, judicial restraint and pragmatism foster greater consensus on the Court, with "clear benefits" for the entire judicial system. He argued that unanimous or near-unanimous decisions would "promote clarity and guidance for the lawyers and for the lower courts interpreting what the Supreme Court meant" so that "[t]he rule of law is strengthened when there is greater coherence and agreement about what the law is". The Supreme Court, in its recent decision *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* appears, *prima facie*, to follow the Chief Justice's approach to legal reasoning.[2]

The High Court was called upon to weigh equal rights with religious liberty on a complex case involving a baker who, in the name of freedom of contract, refused to create a cake for a gay couple's wedding. In particular, the question addressed to the Supreme Court was whether compelling a business owner to engage in artistic expression, which would conflict with his religious beliefs about same-sex marriage, could violate the Free Speech or Free Exercise Clauses of the First Amendment.

In the end, the Supreme Court limited its 7-2 ruling to just an aspect of procedural fairness, thus leaving most substantive issues still open.[3] Therefore, it was not surprising that the first commentators spoke of a narrow ruling on the unique facts of the case, which would have not set a precedent for future clashes of state anti-discrimination laws and First Amendment rights.[4] This point of view is also supported by the sheer numbers of the majority opinion. Not only the opinion of the Court was delivered by Associate Justice Anthony M. Kennedy - notably a champion of individual liberty rights - , but it is worth emphasising that two justices from the court's liberal wing, Justice Elena Kagan and Justice Stephen Breyer, joined their conservative colleagues[5]. By focusing the decision on the peculiar aspects of the case it has been easier to gain a broader consensus and a solid majority in the Court. This result would have been much more difficult to achieve, had the most divisive constitutional issues at stake not been circumvented. Therefore, the *Masterpiece Cakeshop* ruling seems to prove the

1 As reported by C. R. Sunstein, *The Minimalist*, in *L. A. Times*, 25 May 2006.

2 US Supreme Court, *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission, et al.,* 138 S. Ct. 1719, 2018.

3 The Court itself is fully aware that similar issues will likely arise again, as it is written in Justice Kennedy's majority opinion: "the outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

4 See, e.g., C. R. Sunstein, *Congrats, Supreme Court. Keep Thinking Small*, in *Bloomberg*, 21 June 2018; R. Epstein, *Symposium: The worst Form of Judicial Minimalism - Masterpiece Cakeshop Deserved a Full Vindication for Its Claims of Religious Liberty and Free Speech*, in *SCOTUSblog*, 4 June 2018.

5 Justice Kagan filed a concurring opinion, in which Justice Breyer joined.

expediency of Robert's modest, minimalist approach.

In reality, *Masterpiece Cakeshop* outcome was not "as narrow as may first appear.[6]" This paper explores the context from which this decision developed and ultimately analyzes its precedential value, considering the rising number of similar "wedding-vendor cases.[7]"

Notably, litigation is often seen as a tool for proactive social change in the American system.[8] Supreme Court decisions like *Brown v. Board of Education* (1954),[9] which abolished school segregation and implemented civil rights, and *Obergefell v. Hodges* (2015)[10], which recognized the fundamental right to marry for same-sex couples, "were not only mileposts in legal development, they are also part of the country's cultural identity"[11]. Indeed, *Masterpiece Cakeshop v. Colorado Civil Rights Commission* may prove to be the first step toward another significant social change in American society, albeit in a very different direction from *Obergefell*.

2. The case arose in 2012. David Mullins and Charlie Craig, a same-sex couple, visited the bakery "Masterpiece Cakeshop" in Lakewood, Colorado, to evaluate ordering a cake for their wedding reception. The State of Colorado did not recognize same-sex marriages at that time. Therefore, the two men planned to marry in Massachusetts, and they were looking for a wedding cake for a reception to be held in Denver. Jack Phillips, a devout Christian and the owner of the bakery, refused to sell them a cake for their wedding, saying that creating a wedding cake for same-sex couples was at odds with his faith. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into".

6 D. Laycock – T. Berg, *Symposium: Masterpiece Cakeshop - Not as Narrow as May First Appear*, in *SCOTUSblog*, 5 June 2018.

7 See D. Laycock, *The Wedding-vendor Cases*, in *Harvard Journal of Law & Public Policy*, 41, 2017, p. 49.

8 See R. Michaels, *American Law (United States),* in J. M. Smits, *Elgar Encyclopedia of Comparative Law, Cheltenham - Northampton*, 2006, p. 66.

9 US Supreme Court, *Brown v. Board of Education of Topeka*, 347 U.S. 483, 1954.

10 US Supreme Court, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2015.

11 R. Michaels, *American Law (United States)*, p. 66.

The couple felt humiliated by Mr. Phillips's refusal to serve them. Consequently, they filed a charge with the Colorado Civil Rights Commission, alleging discrimination based on sexual orientation in violation of the Colorado Anti-Discrimination Act (CADA). The Statute, amended in 2007 and 2008, explicitly prohibits a place of public accommodation from refusing or denying to individuals the full and equal access to goods and services because of their sexual orientation.[12] For these purposes, a place of public accommodation is defined as any "place of business engaged in any sales to the public and any place offering services... to the public", with the exclusion of places that are principally used for religious purposes.[13] Following an investigation of the facts, the Colorado Civil Rights Division concluded that Craig and Mullins's claims were supported by probable cause that Phillips violated CADA and referred the matter to the Colorado Civil Rights Commission. The Commission found it proper to conduct a formal hearing, referring the case to a State Administrative Law judge. Finding no dispute as to the material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The court rejected the two constitutional claims raised by Mr. Phillips. The baker first argued that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech, by compelling him to exercise his artistic talents to express a message with which he disagreed. Moreover, Phillips asserted that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. However, the ALJ did not agree that creating a wedding cake for Craig and Mullins' wedding would force Phillips to adhere to "an ideological point of view." It also found that CADA was a "valid and neutral law of general applicability", as it regulates both religiously-motivated and secular conduct, and therefore its application to Phillips in that case did not violate the Free Exercise Clause. The court thereby ruled against Phil-

12 "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation". See Colorado Revised Statutes, §24-34-601(2)(a).

13 Col. Rev. Stat. (C.R.S.), §24-34-601(1).

lips and the cakeshop.

Both the Commission and the Colorado Court of Appeals affirmed the ALJ's decision in full. The Colorado Supreme Court denied *Masterpiece Cakeshop*'s request for further review. Therefore, Phillips filed petition for a writ of certiorari with the U.S. Supreme Court. The *certiorari* petition renewed his claims under the Free Speech and Free Exercise Clauses of the First Amendment.[14] The Supreme Court granted Phillips' petition on 26 June 2017.

3. *Masterpiece Cakeshop* became the battleground of a social and political conflict that is still polarizing the entire Nation.[15] The dramatic trend of the so-called "cultural wars" has been highlighted by a survey conducted by the Pew Research Center,[16] which found the Country evenly split on religious exemptions in the wedding-vendor cases: almost half of U.S. adults (49%) said businesses that provide wedding services should be required to provide those services to same-sex couples as they would for any other couple, while a nearly equal share (48%) said they should be able to refuse services to same-sex couples if the business owner has religious objections to homosexuality.[17] More strikingly, only eighteen *percent* of the respondents expressed at least some sympathy for both .[18] As Professor Douglas Laycock pointed out, these two sides of Americans - rather than seek "liberty and justice for all"- are openly looking to crush each other.[19] Consequently, it is no wonder that the Masterpiece Cakeshop ruling was expected to be the most important of the Court term.[20] It also saw the direct intervention of the Department of Justice, who filed an amicus brief on behalf of Jack Phillips, among more than 100 amicus briefs filed on both sides. The Trump Administration

14 *Petition for Writ of* Certiorari, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 16-111 2017 WL 2722428, 22 July 2016.

15 See D. Laycock, *The Wedding-vendor Cases*, in *Harvard Journal of Law & Public Policy*, 41, 2017, pp. 49-58; see also S. Warmiel, *SCOTUS for Law Students: Splitting the Free Speech Community*, in *SCOTUSblog,* 8 December 2017.

16 See Pew Research Center, *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, 28 September 2016.

17 See Pew Research Center, *Where the Public Stands on Religious Liberty vs. Nondiscrimination*

18 See D. Laycock, *The Wedding-vendor Cases*, p 58.

19 See D. Laycock, *The Wedding-vendor Cases*, p 58

20 See M. Walsh, *A "View" from the Courtroom: Setting the Table for a Major Ruling*, in *SCOTUSblog*, 5 December 2017.

agreed with the baker that his cakes were a form of expression and that he could not be compelled to use his talents for something that was in contrast with his religious principles.[21] As Acting Solicitor General Jeffrey B. Wall wrote: "forcing Phillips to create expression for and participate in a ceremony that violates his sincerely held religious beliefs invades his First Amendment rights", and that "a custom wedding cake can be sufficiently artistic to qualify as pure speech, akin to a sculptural centerpiece.[22]"

From an historical perspective, federal and state legislation against private actors' discrimination has given rise to a number of significant constitutional issues. Notably, because anti-discrimination statutes regulate private conduct in public accommodations, they inevitably interfere with freedom of contract, one of the most revered liberties of Anglo-American legal culture.[23] This tension emerged during the Reconstruction Era when Congress enacted the Civil Rights Act of 1875, prohibiting racial discrimination in public accommodations (such as railroads, hotels, inns, theaters and places of public amusement) even if privately owned.[24] The legislation did not succeed in stopping discrimination practices by private actors, while numerous cases testing its application rose across the entire country. Ultimately, the Supreme Court held that the Civil Rights Act of 1875 was not constitutional under the Thirteenth and Fourteen-

21 As reported by R. Barnes, *In Major Supreme Court Case, Justice Dept. Sides with Baker who Refused to Make Wedding Cake for Gay Couple*, in *The Washington Post*, 7 September 2017.

22 US Supreme Court, *Brief for the United States as Amicus Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S., 2018.

23 According to Professor Epstein: "an antidiscrimination Law is the antithesis of freedom of contract" (R. A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Cambridge (MA), 1992, p. 3).

24 18 Stat. 335–337. The Civil Rights Act of 1875 provided: "Section 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by Law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude . . . Section 2. That any person who shall violate the foregoing section . . . shall . . . be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year".

th Amendments.[25] However, in the following decades, the importance of contractual freedom began to decline.[26] Other societal and economic interests were deemed more important than the traditional doctrine of freedom of contract, and Congress passed numerous laws that limited significantly the individual's right to contract freely.[27] Moreover, pressures to recognize and challenge contractual discrimination on the basis of race, color, religion, or national origin grew. Finally, after a long legislative battle, President Lyndon B. Johnson signed into law the Civil Rights Act of 1964, prohibiting racial discrimination in places of public accommodation.[28] The constitutionality of this provision was immediately challenged. This time, the Supreme Court unanimously held that Congress had acted within its authority and upheld the law. In Heart of Atlanta Motel, Inc. v. United States case,[29] the Court ruled that the power of Congress to promote interstate commerce also included the power to enact the prohibitions on discrimination contained in the public accommodations section of the Civil Rights

25 US Supreme Court, Civil Rights Cases, 109 U.S. 3, 1883. For the Court, the recently enacted Amendments did not invest Congress with the power to legislate against private acts of racial discrimination. On the contrary, the Court held that the Fourteenth Amendment protected African Americans only from discrimination by State or its agents. As Justice Bradley observed: "it is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment". 109 U.S. 3-11. Following the Court's "*state action doctrine*", the scope of application of constitutional rights provisions is only limited "to vertical relationships between the government and private individuals, but not to horizontal relationships between or among private parties", see J. W. Singer – I. Saidel-Goley, *Things Invisible To See: State Action & Private Property*, in *Texas A&M Law Review*, 5, 2018, pp. 439-445. For a brief description of the history of state action doctrine, see R. Hemphill, *State Action and Civil Rights*, in *Mercer Law Review*, 23, 1972, p. 519; G. Donadio, *Modelli e questioni di diritto contrattuale antidiscriminatorio*, Torino, 2018, p. 8.

26 For an analysis of the common Law of contract in the late eighteenth and early nineteenth centuries see P. S. Atiyah, *The Rise & Fall of Freedom of Contract*, Oxford, 1979.

27 Antitrust legislation is a clear example of this paradigm shift. In fact, the Sherman and Clayton Acts "consisted of unprecedent restrictions on contractual freedom" by introducing anti-discrimination measures "involving the use of economic power and coercion". See K. L. Mccaw, *Freedom of Contract Versus the Antidiscrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Antidiscrimination Provisions*, in *Seton Hall Const. Law Journal*, 7, 1996, pp.195-211.

28 Title II of the Civil Rights Act of 1964 provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities . . . and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin" 42 U.S.C. § 2000(a)-(h)6 (1964). In order to be a public accommodation under the Act, an establishment must affect commerce, or its discrimination must be supported by state action. The establishment must also fall within one of the following four categories: "(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests,... (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, ... (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out asserving patrons of such covered establishment". 42 U.S.C. § 2000a(b).

29 US Supreme Court, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 1964.

Act of 1964.[30] In fact, discrimination policies had a disruptive effect on interstate commerce by significantly discouraging travel by African-Americans.[31] Thus, the Supreme Court decision allowed Congress to invoke its Commerce Clause powers to eradicate racial discrimination when it had an impact on interstate commerce. Moreover, after *Heart of Atlanta Motel, Inc. v. United States* ruling, it was clear that discriminatory exercises of freedom of contract could not be reconciled with the country's "spheres of allowable and tolerated activity.[32]" Nevertheless, discriminatory practices in public accommodations did not cease to exist, also targeting women, people with disabilities and homosexuals.[33] As hostility toward these forms of discrimination grew, numerous states adopted statutes to offer protection against discrimination on the basis of disability, marital status, sex and sexual orientation. However, the inclusion of sexual orientation as "protected class" has increased "the potential for conflict between state public accommodations laws and the First Amendment rights.[34]" Indeed, Jack Phillips is one of a growing number of bakers, florists, wedding planners, and the like who are challenging modern public accommodations laws by invoking their free speech and free exercise rights.[35]

4. The issue of whether the design and creation of a cake could be considered an expressive conduct - thus protected by the First Amendment - was central during the

30 In upholding the authority of Congress to prohibit racial discrimination by a motel used by interstate travelers, Justice Tom C. Clark argued that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce". 379 U.S. 241-258, 1964.

31 379 U.S. 241-253, 1964.

32 As James Buchanan notes: "the reconciliation of individual's desires to "*do their own things*" with the fact that they live together in society is accomplished largely by mutual agreement on spheres of allowable or tolerated activity". See J. M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*, Chicago, 1975, p. 20.

33 L. G. Lerman – A. K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, in *N.Y.U. Review of Law and Social Change*, 7, 1978, pp. 215-217.

34 As noted by the Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640-657, 2000.

35 See NM Supreme Court, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M.), 2013; *NY Supreme Court, Gifford v. McCarthy*, 23 N.Y.S.3d 422 (App. Div.), 2016; *Washington Supreme Court, State v. Arlene's Flowers*, Inc., 389 P.3d 543, 2017, petition for cert. filed, No. 17-108, 2017 WL 3126218 (U.S. 14 July 2017).

oral argument.[36] Attorney Kristen Waggoner, representing Mr Phillips, claimed that the cakes created by her client (described as "highly-sculpted" and "stylized") were entitled to protection in the same way that works of art are. Justice Sotomayor contended that the Court had never given such protection to any food, regardless of their aesthetic appeal. Moreover, as she added, its primary purpose is simply "to be eaten.[37]" What was fundamental for the Justice was to stress the importance of public accommodation laws in changing society's views on civil rights. Putting the issue in an historical perspective, she pointed out that America's reaction to mixed marriages and to race had not changed "on its own." "It changed," she said, "because we had public accommodation laws that forced people to do things that many claimed were against their expressive rights and against their religious rights." In this respect, she invoked the 1968 *Newman v. Piggie Park Enterprises*, *Inc. ruling*, addressing racial discrimination in public accommodations and First Amendment liberties.[38] In that case, a restaurant owner refused to serve black customers because it was "his belief as a Christian" that, in doing so, he would have contributed to racial intermixing and "contravened the will of God." Later, the owner was sued by some customers who were turned away because his refusal was considered a direct violation of Title II of the Civil Rights Act of 1964, which bars discrimination in public accommodations.[39] In his defense, he claimed that the instant action and the Act under which it was brought constituted State interference with the free practice of his religion, in absolute violation of The First Amendment. Both the lower courts and the Supreme Court rejected the constitutional challenge to the Civil Rights Act. In a unanimous opinion, the High Court found that the owner defenses were "patently frivolous" and his conduct was in plain violation of Title II. Newman v. Piggie Park Enterprises outcome helped establishing the principle that religious views do not trump civil rights, as clearly explained by the District Court: "free exercise of

36 The audio and the transcription of the oral argument are available at www.oyez.org/cases/2017/16-111. See also H. ALVARE, *Symposium: As a Matter of Marriage Law, Wedding Cake is Expressive Conduct*, in *SCOTUSblog*, 13 September 2017.

37 Justice Gorsuch noted that a wedding cake is also chosen for its artistic quality, rather than for mere consumption. "*In fact*," he said, "*I have yet to have a wedding cake that I would say tastes great*".

38 US Supreme Court, *Newman v. Piggie Park Enterprises*, Inc., 390 U.S. 400, 1968.

39 For an analysis of the similarities between the two cases see J. P. Schnapper-Casteras, *Déjà Vu "No Cake for You",* in *Harvard Law Review Blog*, 1 December 2017.

one's beliefs, ... as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society.[40]"

The holding in *Piggie Park*, that discrimination in public accommodations is not protected by The First Amendment, was reaffirmed in the majority opinion in *Masterpiece Cakeshop*.[41] As Justice Kennedy wrote in the beginning of the court's opinion: "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodation law".

Though the Court recognized that the Constitution and the laws must protect LGBT persons in the exercise of their civil rights, the majority ruled in favor of the baker. Justice Anthony Kennedy's majority opinion found the Civil Rights Commission's treatment of Phillips' case in violation of the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In particular, the bias against Mr. Phillips' belief was shown in the remarks of one commissioner, who stated: "freedom of religion and religion have been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust... 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 their religion to hurt others.[42]"

This sentiment was found totally inappropriate by the majority.[43] Citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Court stressed that Free Exercise Clau-

40 US Supreme Court, *Newman v. Piggie Park Enterprises*, Inc., 256 F. Supp. 941 (D.S.C.), 1966.

41 See S. Ifill, *Symposium: The First Amendment Protects Speech and Religion, Not Discrimination* in *Public Spaces*, in *SCOTUSblog*, 5 June 2018.

42 As also reported in the Petition for *Certiorari*, p. 42.

43 "To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways", Kennedy explained, "by describing it as despicable, and also by characterizing it as merely rhetoric … This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination Law-a Law that protects against discrimination on the basis of religion as well as sexual orientation".

se bars even "subtle departures from neutrality" on matters of religion.[44] Because the record did not show any objection from the other six members of the Commission, Justice Kennedy concluded that these statements casted doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Other evidence of hostility was found in the Civil Rights Division's different treatment in similar cases, involving other bakers who had declined to make cakes with "religious" messages.[45] In these cases, a Christian activist named William Jack filed complaints alleging religious discrimination, as three bakeries had refused to make a cake decorated with quotations from the Bible, such as "Homosexuality is a detestable sin. Leviticus 18:22." The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. Before the Colorado Court of Appeals, Phillips pointed out that the disparity in treatment with the other bakers reflected the anti-religious animus of the government. However, the Court of Appeals rejected this argument, holding that in the previous cases there was no impermissible discrimination because of the offensive nature of the requested message.

This argument was strongly criticized in Kennedy's Opinion. In his view, a principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. In this respect, the majority referred to its precedent decision West Virginia State Board of Education v. Barnette,[46] where the Supreme Court held that neither the State nor its officials can prescribe "what shall be orthodox in politics, nationalism, religion, or other matters of opinion.[47]" According to the majority, Phillips was denied the right to a neutral decision-maker, "who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided." Because of this, the rulings of the Commission and of the State Court that

44 US Supreme Court, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520-523, 1993.

45 See D. Rodriguez, *Symposium: The Masterpiece Ruling Calls for Increased Vigilance of Discrimination in the Marketplace*, in *SCOTUSblog*, 7 June 2018.

46 US Supreme Court, *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 1943.

47 US Supreme Court, *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624-642, 1943.

enforced the Commission's order "must be invalidated."

Nevertheless, the justices left open the possibility that similar cases could have a different outcome, particularly if no evidence of unconstitutional hostility shall be found.[48] "The outcome of cases like this," Kennedy wrote, "in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." Finally, the Court reversed the judgment of the Colorado Court of Appeals, therefore invalidating the rulings of the Colorado State Administrative Law judge and the Colorado Civil Rights Commission.

Thus, it is clear that the Masterpiece decision is based exclusively on the Free Exercise Clause;[49] the Supreme Court simply avoided addressing the core issue of whether religious objectors to same-sex marriage could be exempted from laws prohibiting discrimination against same-sex couples. Moreover, the High Court is likely to sidestep such an issue for a while.

In fact, shortly after rendering the decision in the Colorado case, the Court granted the petition for a writ of certiorari in another similar wedding-vendor case brought to its attention, *Arlene's Flowers, Inc. v. Washington*, concerning a florist who declined to provide her services - original flower arrangements - to a same-sex couple for their wedding.[50] The justices remanded the case to the Supreme Court of Washington, which unanimously ruled against the florist, for further consideration in light of the *Masterpiece Cakeshop* decision.

48 See A. Howe, *Opinion Analysis: Court Rules (Narrowly) for Baker in Same-sex-wedding-cake Case*, in *SCOTUSblog*, 4 June 2018.

49 See D. Laycock – T. Berg, *Symposium: Masterpiece Cakeshop - Not as Narrow as May First Appear*, in *SCOTUSblog*, 5 June 2018.

50 See A. Howe, *Court Sends Battles over Services for Same-sex Couples, North Carolina Gerrymandering Back to Lower Courts*, in *SCOTUSblog*, 25 June 2018.

5. In reality, *Masterpiece Cakeshop* is far from being a narrow ruling, confined to the unique facts of the case.[51] And it will certainly set a precedent for the growing number of disputes against businesses that, in response to the legalization of same-sex marriage in *Obergefell v. Hodges*, are demanding exemptions from public accommodation laws that prohibit sexual orientation discrimination.[52] This trend has been fueled by the Court itself. In cases like *Burwell v. Hobby Lobby Stores, Inc*.,[53] it substantially extended to for-profit corporations the possibility to claim religious exemption from a federal statute, specifically the contraceptive mandate of the Affordable Care Act[54]. After this landmark decision, religious exemption has been frequently invoked to justify the refusal to serve LGBT people.[55] In all the abovementioned cases, the same notion of religious freedom is very far from its traditional meaning. It is indeed presented as a "right to discriminate and impose a conservative social order in the name of religion.[56]"

A right, essentially, to express his own bigotry without considering the humiliation, frustration and embarrassment inflicted to a person "when he is told that he is unacceptable as a member of the public.[57]" The Masterpiece ruling has even entitled religious motivated bigotry to gain immunity from "even being called as bigotry at all.[58]" Indeed, the Court found "the smoking gun" that proved hostility to Phillips' faith in a simple statement, from only one of the seven members of the Commission. This position is quite puzzling for several reasons. As Justice Ginsburg pointed out in her dissenting opinion, there was no concrete reason why the comments of one or two

51 As argued by E. Clark, *Symposium: And the Winner Is… Pluralism?*, in S*COTUSblog*, 6 June 2018, available at www.scotusblog.com/2018/06/symposium-and-the-winner-is-pluralism; D. Rodriguez, *Symposium: The Masterpiece Ruling Calls for Increased Vigilance of Discrimination in the Marketplace*, in *SCOTUSblog*, 7 June 2018.

52 G. Donadio, *Modelli e questioni di diritto contrattuale antidiscriminatorio*, p. 89.

53 US Supreme Court, *Burwell v. Hobby Lobby Store*s, Inc., 134 S.Ct. 2751, 2014.

54 See K. Russell, *Analysis: Hobby Lobby and Claims for Religious Exemptions from Anti-discrimination Laws?*, in *SCOTUSblog*, 30 June 2014.

55 See A. K. Hersh, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws since Obergefell*, in *Stanford Law Review*, 70, 2018, pp. 265-269; G. Donadio, *Modelli e questioni di diritto contrattuale*, p. 89.

56 P. Miller, *Religious Freedom Advocates Warn of "Theocratic Zones of Control", in Religion Dispatches*, 13 June 2016, available at www.religiondispatches.org/religious-freedom-advocates-warn-of-theocratic-zones-of-control; T. R. Day – D. Weatherby, *Contemplating Masterpiece Cakeshop*, in *Washington & Lee Law Review Online*, 74, 2017-2018, pp. 86-99.

57 US Supreme Court, *Heart of Atlanta Motel, Inc. v. United States, (Goldberg, J. Concurring)*, 379 U.S. 241-292, 1964 (quoting S. REP. No. 88-872, §16).

58 N. Zatz, *Masterpiece Cakeshop and the Constitutionalization of "Both Sides"-ism*.

Commissioners should have been taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. In fact, the proceedings involved several layers of independent decision making (the Civil Rights Division, the Commission, the Administrative Law judge and the Colorado Court of Appeals) of which the Commission was but one. Moreover, the declarative portion of these "hateful" assertions is simply true. In the entire human history, religion has often been used to justify vile acts and horrible crimes. And these statements were not aimed at Mr. Phillips own faith, but rather they constituted part of a broader reflection on religion in general. A further controversial aspect of the decision is the Court's view that Craig and Mullins' case is comparable to Jack's case.[59] In contrast to Jack - who requested special cakes decorated with biblical curses against homosexuality - , Craig and Mullins were simply looking for a wedding cake: they mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold. As Professor Noah Zatz rightly noted, the Supreme Court's ruling - rather than being narrow - has created a new standard: hostility to anti-gay sentiments is treated as the equivalent of anti-religious hostility.[60]

Masterpiece Cakeshop is not only a missed opportunity to bolster the protection against discrimination of LGBT people in public accommodations. Some considerations in Justice Thomas' concurring opinion suggest that, in the following years, the protection of anti-discrimination laws could be further weakened by an avalanche of religious exemptions. "The First Amendment gives individuals the right to disagree about the correctness of Obergefell and the morality of same-sex marriage," stated Thomas (joined by Gorsuch). "If Phillips' continued adherence to that understanding makes him a minority after Obergefell, that is all the more reason to insist that his speech be protected." For Thomas, the fact that homosexuality is embraced and advocated by increasing numbers of people is an even more compelling reason to give First Amendment protection to those "who wish to voice a different view." He then concluded with a reassurance to every Mr. Phillips of America (or, depending on the point of view, a

59 See D. Rodriguez, *Symposium: The Masterpiece Ruling Calls for Increased Vigilance of Discrimination in the Marketplace*.

60 See N. Zatz, *Masterpiece Cakeshop and the Constitutionalization of "Both Sides"-ism*.

menace for the LGBT Americans who are going to exchange vows): "in future cases, the freedom of speech could be essential to preventing Obergefell from being used to "stamp out every vestige of dissent" and vilify Americans who are unwilling to assent to the new orthodoxy.[61]"

Thomas's opinion goes beyond merely allowing people to discriminate in public accommodations, when it is religiously based.

Rather, it opens up to the possibility of using the First Amendment as a weapon against Obergefell itself, undermining marriage equality in a devious manner. And it is highly possible that his position would prevail in the near future with the support of a very influential and powerful ally: the Trump Administration. Former Attorney General Jeff Sessions recently announced the creation of a "Religious Liberty Task Force", whose objective is to implement and enforce the religious liberty guidance issued in the 2017.[62] The guidelines for executive agencies include ensuring the "government may not target religious individuals or entities through discriminatory enforcement of neutral, generally applicable laws," with a clear reference to the political impact of Jack Phillips's case. More importantly, after the announcement that moderate "swing" Justice Anthony Kennedy is to retire, President Trump had the historic opportunity to recast the Court in a more conservative posture, with a significant and decades-long effect on the definition of religious freedom in America.

After *Obergefell*, many announced the end of the "culture wars." Gay marriage legalization was deemed as the final blow to the predominance of religion in American society, a crashing and total defeat for conservative Christians.[63] However, *Obergefell* remains a Fourteenth Amendment case.

It operates only against the government and its agents. Thus, the right to civil marriage, to "equal dignity in the eyes of the law," does not apply to private actors[64].

61 Citing Justice Alito's dissenting opinion in *Obergefell*.

62 Administration of Donald J. Trump, 2017 Executive Order 13798-Promoting Free Speech and Religious Liberty Daily Compilation of Presidential Documents 1-2.

63 See, e.g., R. Dreher, *The Benedict Option. A Strategy for Conservative Christians in a Post-Christian Nation*, New York, 2017.

64 See C. H. Esbeck, *A Post-Obergefell America: Is a Season of Legal and Social Strife Inevitable*, in *The Christian Lawyer*, 11, 2015, pp. 3-5.

Moreover, there is no federal law that protects LGBT people.[65] While some States have chosen to implement marriage equality including "sexual orientation" as a protected class, the invigorate resistance of religious objectors - supported by the federal government - could seriously undermine the effectiveness of anti-discrimination acts.

A group of scholars has tried to offer a solution, attempting to reconcile religious liberty in the context of changes in the law of marriage.[66]

They argue that small businesses that sell goods and services should be exempt from the obligation to supply them to same sex weddings, unless the denial would cause substantial hardship.[67] Following this model, a local monopolist cannot be permitted to invoke religious freedom to deny same-sex couples or anyone else access to the market.[68] Nevertheless, this compromise solution leaves out the core aspect of the deprivation of personal dignity that accompanies discrimination.[69] After all, the *Masterpiece* case implicated much more than wedding cakes. It was about the "stigmatizing injury,[70]" the "feeling of inferiority,[71]" the humiliation, frustration, and embarrassment resulting from discrimination.

65 As pointed out by J. G. Culhane, *The Right to Say, but Not to Do: Balancing First Amendment Freedom of Expression with the Anti-Discrimination Imperative*, in *Widener Law Review*, 24, 2018, pp. 235-247.

66 See D. Laycock, *The Wedding-vendor Cases*, p. 65.

67 See I. C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, in *Alabama Civil Rights & Civil Liberties Law Review*, 7, 2015, pp. 1-55.

68 D. Laycock, *The Wedding-vendor Cases*, p. 66.

69 G. Donadio, *Modelli e questioni di diritto contrattuale antidiscriminatorio*, p. 93.

70 US Supreme Court, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-628, 1984.

71 US Supreme Court, *Brown v. Board of Education of Topeka*, 347 U.S. 483-494, 1954.