What's in a cake? A note on *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*

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Title: Cosa c'è in una torta? Considerazioni su *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*

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1. – Twenty years ago, on early morning of 7 October 1998, a mountain bike rider cycling through the prairies surrounding Laramie, Wyoming, casually bumped into the body of a 21-year-old boy. His hands were tied to a fence with an iron thread and his face had been so badly disfigured that he resembled a scarecrow. Investigations soon unveiled that the boy, whose name was Matthew Shepard, had been beaten to death by two men because he was gay. Shepard's brutal murder not only caused an acceleration of the development of the gay rights movement in the United States, but also vividly symbolized a conflict that existed – and exists today – in American society. In fact, "as Matt lay in the hospital just a few miles away, a float in the parade [at the Colorado State University] carried a scarecrow draped in anti-gay epithets" (B. Loffreda, *Losing Matthew Shepard: Life and Politics in the Aftermath of Anti-Gay Murder*, Columbia UP, 2000, 11), while at Matthew's funeral "a very vocal group of people that condoned the brutality" held the sign "Fags Die God Laughs" (M. Cobb, *God Hates Fags. The Rethorics of Religious Violence*, NYU Press, 2006, 2). According to the Supreme Court, the Constitution allows gays and lesbians to take part in the public debate and seek protection from discrimination, but at the same time shields anti-gay funeral picketing as free speech [see respectively *Romer v. Evans*, 517 U.S. 620 (1996) and *Snyder v. Phelps*, 562 U.S. 443 (2011)].

This conflict has exacerbated in more recent times in the particular context of the so-called "horizontal" enforcement of anti-discrimination laws, *i.e.*, between private parties. The problem was accidentally addressed by the Supreme Court in *Obergefell v. Hodges*, the ruling that entitled same-sex couples to marry under the Fourteenth Amendment [135 S.Ct. 2584 (2015)]. There Justice Kennedy, writing for the majority, noted that "the 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, and to their own deep aspirations to continue the family structure they have long revered" (*id.*, 2607). Also, Chief Justice Roberts predicted, in his dissenting opinion, that "hard questions" would shortly arise "when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage", concluding that "similar questions will soon be before this Court" (*id.*, 2625, Roberts, C.J., diss.).

They did not have to wait long. In 2017, the Court granted certiorari in the case *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (No. 16-111) on the question

whether a business owner may refuse to apply to gay clients the same terms and conditions offered to other members of the public based on religious objections to same-sex marriage. On June 4, 2018, the Court handed down its decision, which is briefly commented in this note.

2. – In 2012, well before same-sex marriage was legalised in Colorado as a consequence of *Obergefell*, Charles Craig and Dave Mullins – a gay couple – entered Masterpiece Cakeshop, a bakery owned by Jack Phillips in suburban Denver. They asked Phillips to bake a cake for their wedding, a request that the latter categorically refused. A devout Christian, Phillips had in fact turned away many customers, stating that he did not intend to endorse a ceremony that was against the Bible's teaching.

As some other states, Colorado provides for a public accommodation law that prohibits business from refusing to serve clients for certain specific reasons [for a survey: J.D. Bayless, S.F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-Discrimination Public Accommodation Laws*, 2 Wm. & Mary Pol'y Rev. 288, 300-306 (2011)]. Passed in 1885 with the purpose of granting all citizens equal access to goods and services regardless of their skin color, the Colorado Anti-Discrimination Act (CADA) progressively expanded to other traits such as disability, creed, marital status, national origin and sexual orientation. The CADA also provides that discrimination complaints are adjudicated by an administrative body, the Colorado Civil Rights Commission, in charge of carrying out the proper investigations and handing down a decision that is subject to appeal before state courts. According to CADA's relevant provisions, the Commission has the power to order to cease-and-desist discrimination, to file periodical compliance reports and to take affirmative action such as public posting, while it has no power to award damages or fines.

When Craig and Mullins filed a complaint against Phillips, the latter responded by claiming that baking a wedding cake was a form of free speech and free exercise of religion, both protected by the First Amendment. However, both the Commission and the Colorado Court of Appeals disagreed, concluding that the CADA qualified as "a valid and neutral law of general applicability" whose enforcement cannot be relieved on the ground that it intruded on Phillips' First Amendment rights [*Craig v. Masterpiece Cakeshop Ltd.*, 370 P. 3d 272 (Colo. App. 2015)].

The problem, as the U.S. Supreme Court posited it, was whether the owner's discriminatory conduct "would be well understood in our constitutional order as an exercise of religion … that gay persons could recognize and accept without serious diminishment of their own dignity and worth". The case, however, was narrower than it seemed at first glance: Phillips did not refuse to serve the gay couple any of his products, but only one – a wedding cake – for which he claimed to have used his artistic skills "to make an expressive statement". Furthermore, as said above, all this happened at a time when same-sex marriage was not yet permitted in Colorado.

3. – Justice Kennedy delivered the opinion for the Court, while Justices Kagan, Gorsuch and Thomas filed three different concurring opinions and Justices Ginsburg and Sotomayor dissented. Remarkably, the Court did not answer directly to the question posed by the petitioner, preferring not to take position on a business owner's right to refuse service in light of her religious beliefs against gay people's right not to be discriminated. Rather, it preferred to focus almost exclusively on the facts of the case, using a typical "avoidance technique" that allows it to hear the case and at the same time safely step out of intensely controversial constitutional issues (see L. Kloppenberg, *Playing It Safe: How the Supreme Court Sidesteps Hard Cases and Stunts the Development of Law*, NYU Press, 2001, 121). By this way, the Court could transform a controversy between private parties into a governmental matter, addressing Phillips' treatment by the

Colorado Civil Rights Commission and not the relationship between the Fourteenth and the First Amendment.

In this respect, the Court first noted that "the Civil Rights Commission's treatment of [Phillips'] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection". In particular, at least two of the commissioners expressed the view that religion has no place in business. One said that if someone wants to do business in Colorado, she needs to find a compromise with her personal beliefs. Another went further, stating that "freedom of religion has been used to justify all kinds of discrimination throughout history, whether it be slavery [or] the [H]olocaust". None of the other commissioners objected, and all these elements, according to the Court, "cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case".

A second element considered by the Court was a bunch of decisions taken by the same Colorado Commission in respect of the case of a man, William Jack, who requested three different bakeries to make cakes displaying some anti-gay images and text taken from the Bible, which the bakeries refused to do. In those three cases, the Commission had found no probable cause in support of Jack's religious discrimination complaints, concluding that the bakeries had correctly turned away Jack for demanding statements that stigmatized the same category of clients that anti-discrimination laws seek to protect. According to the Supreme Court, the Commission had ignored Phillips' willingness to sell Craig and Mullins other products while it had retained this circumstance relevant in favor of the bakeries addressed by Jack, hence forcing to conclude that there was a difference in treatment between the two as to the validity of religious objections.

The Court also cited *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* [508 U.S. 520 (1993)]. That case concerned some ordinances prohibiting animal sacrifices which were passed by the municipal council of Hialeah, Florida, after a Santería church, which traditionally practices such sacrifices publicly, announced some construction projects in the city. Writing on behalf of a unanimous court, Justice Kennedy had noticed that the ordinances directly targeted the Santería church and its practices, and therefore were neither general nor neutral in their scope, as required by *Employment Division v. Smith* [494 U.S. 872 (1990)]. In fact, the discussions that led to the ordinances illustrated quite well the council's attitude towards the church, being sufficient to mention here the statement of the council's president: "What can we do to prevent the Church from opening?" (*Church of Lukumi Babalu Aye, supra*, 541). Based on the ordinances' text, scope and legislative history the Supreme Court finally struck them down, warning the government about the duty to respect the First Amendment: "Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices" (*id.*, 547).

For the Court, Phillips was subject to the same treatment as the Santería church. In particular, the records revealed that the Commission "was neither tolerant nor respectful of Phillips' religious beliefs". In other words, while Phillips was entitled to a neutral decisionmaker, it was not on the adjudicators to say whether his objections were legitimate or not. Because the Commission was not neutral, the Court ruled that its decision in Phillips' case had to be invalidated and the judgment of the Court of Appeals that had affirmed it had to be reversed.

4. – It has been stated, quite correctly, that "every judicial opinion can be thought of as creating its own gravitational field. Important decisions have greater mass than run-of-the-mill decisions and operate at a closer distance to some public issues than others" (W. Frank, *Law and the Gay Rights History*, Rutgers UP, 2014, 204). No doubt *Masterpiece Cakeshop* will not only attract further cases, but also operate closely to highly debated

issues – namely, the effectiveness of public accommodation laws and the limits of religious objections and exemptions.

In fact, both religious freedom and gay rights advocates had much to fear from the outcome of this case: the former accused the government to be using "antidiscrimination statutes as swords to punish already marginalized people" [R.T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 Geo. J.L. & Pub. Pol'y 123, 124 (2018)] and the latter expressed concern about a possibly fatal erosion of anti-discrimination laws [T.R. Day, D. Weatherby, *Contemplating* Masterpiece Cakeshop, 74 Wash. & Lee L. Rev. Online 86, 102 (2017)]. Now that the ruling is out, however, both sides have plenty to reflect upon.

One may start with three main objections against the majority's reasoning. First, as Justice Ginsburg remarked in her dissenting opinion, the Court's counterfactual analysis does not look very accurate. In fact, the majority wrongly presumed that the comments of two members of the Colorado Civil Rights Commission determined the final outcome of the whole proceedings, including the well-articulated 23-page long ruling of the Colorado Court of Appeals. Moreover, the fact that the other commissioners omitted to openly criticize their colleagues' statements says nothing about their own hostility towards religion, let alone towards Phillips' religious beliefs. These two elements make the judgment so connected to the peculiarities of the case that it will be difficult to use it to delineate a generally applicable First Amendment right on business owners to refuse to serve same-sex couples based on the traditional definition of marriage.

Second, regarding the other three bakeries, their cases are sharply different from Phillips' one. In fact, the Colorado Civil Rights Commission had properly found that such bakeries had not discriminated against Jack for the simple reason that they would have refused to write the same anti-gay messages over *any* cake, regardless of the client's religion. In other words, as Justice Ginsburg commented, "change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request". It is subsequently hard to see hostility towards religion behind the Commission's decision against Phillips *just because* in other previous cases the Commission had decided correctly that discrimination had not occurred. Distinguishing justified the opposite outcomes.

Finally, the precedent mentioned by the Court is very different from *Masterpiece Cakeshop*, for two reasons. First, the factual background is substantially different. In *Church of Lukumi Babalu Aye*, the municipal council of Hialeah had deliberated under the strong influence of the city population that opposed the construction plans of the Santería church. For that reason, the ordinances challenged before the Supreme Court were polluted by a discriminatory intent, which made them void for violation of the First Amendment. Also, the proffered objectives of the ordinances were not pursued for similar nonreligious conduct, which cast a doubt on their sincerity. Second, in its holding the Court had made clear that "a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny" (*Church of Lukumi Babalu Aye*, *supra*, 546). By contrast, nothing of the sort characterizes the CADA, which remains neutral and of general application, as it addresses all public accommodations in Colorado – and religious discrimination as well. Whereas one might be sympathetic to the Court's concern for Phillips' objections being subject to a fair and religiously neutral scrutiny, the precedent used by the Court is clearly misleading.

As a final note, coming back to the metaphor of the gravitational field, *Masterpiece Cakeshop* can – and will – be used to settle other cases, provided that, however, it is well understood that in no way did the Court imply that business owners are now generally entitled to refuse service to gay couples based on their traditional definition of marriage. This interpretation has been recently confirmed by the Arizona Court of Appeals, which on June 7, 2018 rejected the First Amendment complaint of an artwork provider in light of *Masterpiece Cakeshop*, and by the Oregon Supreme Court, which on June 23, 2018 denied review of the case of a vendor who refused to bake a wedding cake for a lesbian couple

[see, respectively, *Brush & Nib Studio LC v. City of Phoenix*, 418 P.3d 426 (2018), and *Sweetcakes by Melissa v. Oregon Bureau of Labor and Industries*, 410 P.3d 1051 (2017)].

If there is a clear and usable take-away from *Masterpiece Cakeshop*, then, it is that refusing service should never bring about a stigmatization of lesbian and gay people. While the Court clearly affirmed that religious freedom deserves protection, it remains disputable that this freedom comes with the freedom to discriminate baesd on the customer's sexual orientation. It is not an accident, in this respect, that the ruling both opened and closed not with a note on the First Amendment but with an affirmation of the need to ensure equal access to public accommodations. Future disputes, Justice Kennedy concluded, "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".