

SUBVERTING SAME-SEX COUPLES' EQUAL DIGNITY: THE PERPETUATION OF A SYSTEM OF DOUBLE BINDS

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ABSTRACT

Justice Anthony Kennedy has ascertained a strand of jurisprudence articulated around the concept of equal dignity, which he enshrined in the equal protection clause and the promise of liberty guaranteed by the Fourteenth Amendment. However, in their dissents, so-called originalist justices have framed marriage equality as a way to shift the burden of discrimination onto religious conservatives who claim their right not to recognize LGBTQ+ citizens by invoking religious freedom (First Amendment) and direct democracy. Although it is too early to determine whether the court will be poised to overturn key precedents, I argue that the empowerment of religious conservatives within the federal judiciary has led to an ideological upward shift towards the right, enabling Donald Trump to prioritize traditional religious beliefs, which could potentially undermine Kennedy's legacy. Prior to *Bostock* (2020) and *Dobbs* (2022), Donald Trump, with the grassroots support of his right-wing Christian base, equipped himself with all the tools to hold the leverage he needed to launch a moral crusade against women's reproductive rights or transgender Americans in an attempt to deny them equal protection against sex discrimination and gender-affirming care under the 1964 Civil Rights Act. By referring to *Lawrence* (2003), in dissent, I aim to explore the interpretive foundations of Justice Scalia's opinion, affirming that the right to engage in homosexual sodomy is nowhere to be found in the US Constitution. Such an evidentiary objection has paved the way for a possible path to accommodate Americans' "sincerely held religious beliefs." Similarly, in *Masterpiece Cakeshop* (2018), Kennedy's failed attempt to draw a fine line between sexual orientation discrimination and "religious freedom" on narrow grounds has empowered conservative Christians to claim the right to ignore the symbolic value of same-sex marriages.

Keywords: double binds; LGBTQ+ equality; religious freedom; substantive due process; unequal treatment.

INTRODUCTION

The decision of the Supreme Court in *Dobbs v. Jackson Women's Health Organization* (2022), put an end to a nearly 50-year-old fundamental constitutional protection to an abortion in the US. It is therefore likely to jeopardize the idea of sexual privacy, established in *Griswold* and *Roe*, and the subsequent judicial achievements securing LGBTQ+ equality. In his concurring opinion, Justice Thomas openly displays a political agenda by offering judicial remedies on the notion of substantive due process, which protects written and unwritten fundamental rights, namely life, liberty, or property, against government interference: "For that reason, in

future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous" (*Dobbs v. Jackson*). In other words, the federal right of married persons to use contraceptives (1965), the right to engage in private, consensual sexual acts (2003) and the right to marry for same-sex couples (2015) could be potentially eliminated at the federal level by eviscerating substantive due process and the penumbral approach, given that such rights are not explicitly enumerated in the US Constitution.

However, due process was not always limited to process itself after the Fourteenth Amendment was ratified (1868). With the privileges or immunities clause and the equal protection clause, some courts considered due process to be a basic encompassing principle designed to determine whether the intended effects of a legal provision represented an "undue burden" on the concept of ordered liberty (Ely 1981, 18). Thus, the substantive dimension of law becomes inherent to the issue of recognizing the fundamental rights of minority groups excluded from the constitutional pact of yesteryear. It is now an indispensable lever at the disposal of any judge wishing to access the intrinsic and extrinsic motivations of some legislators who might exceed their prerogatives to infringe upon the fundamental freedoms of marginalized citizens. No wonder such power sparks conservative ire among critics of the concept of a living constitution, who perceive it as the establishment of a government of judges rather than a key component of checks and balances, stemming from the broad power of interpretation granted to judges in *Marbury* (1803).

Referring to substance allows justices to be confronted with the authentic narratives of same-sex couples to unveil the rights and protections they were unfairly deprived of. As Wurman argues (2020), the requirement is embedded within the constitutional framework (*checks and balances*) and the judicial process envisioned to illuminate the truth through the justices' creative power to interpret the meaning of the Constitution (1). As a maverick conservative and a swing justice in enforcing equal protection for gays and lesbians, Justice Kennedy believed that in the context of individual rights challenges, the responsibility of the judiciary was to go beyond history

and tradition artifacts to offer instead a meaningful and comprehensive understanding of the constitutional text to be fixed over time: “[The founders] entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning” (*Obergefell v. Hodges*). In that sense, Kennedy’s definition of liberty goes hand in hand with the protection of individual rights against an overbearing government, which is an ancient idea inherited from conservative thinkers dating back to the 18th century. His majority opinion in *Lawrence* (2003) best encapsulates his judicial philosophy on privacy, which breaks away from an originalist interpretation of the Constitution, as advocated by some members of the Federalist Society.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. (*Lawrence v. Texas*)

Kennedy meticulously applied the same reasoned judgment in both *Lawrence* and *Obergefell* by relying on a due process model, as a continuous central thread, echoing Wurman’s (2020) thesis that “the clause protects unwritten, unenumerated fundamental rights or prohibits arbitrary and oppressive legislation” (1). More specifically, the principle is rooted not only in the privileges or immunities clause as well as the equal protection clause of the Fourteenth Amendment, but also in the Ninth Amendment.¹

Although the latter should not be interpreted as a vehicle for granting substantive rights (Tribe 1998, 776), it does restrict the actions of an oppressive government determined to curtail fundamental rights like marriage through the trappings of a majoritarian democracy. Justice Thomas’ statement is a stark reminder that despite the doctrine of *stare decisis*, nothing in the court decisions is intangible. Interpreted as “a duty to ‘correct the error’” in the jurisprudence, some conservative

¹ Ninth Amendment to the US Constitution, ratified in 1791: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

justices are poised to strike down *Lawrence* and *Obergefell* in the years to come as they refuse to recognize sexual orientation and gender identity as immutable characteristics inherent to human dignity in the contemporary era; in other words such foundational concepts are not only constitutionally irrelevant, but also politically expedient to regulate non heterosexuality and gender expansiveness as reprehensible conduct that could be changed and/or cured. The result could lead to a patchwork of unequal laws in which same-sex couples would be recognized as married for the purpose of state law but unrecognized for the purpose of federal law while some others would remain completely invisible and marginalized citizens for both purposes, further undermining the Full Faith and Credit Clause.

Although the objective remains speculative at this point, rolling back the right to privacy and marriage for same-sex couples manifests itself at a time when conservative justices are eager to reinforce states' rights in relation to regulating sexuality and marriage practices. More precisely, their discourse aims at advancing the right to reject queer otherness as "prescribed by the religious doctrine", thus broadening the scope of Americans' religious interests (*Creative LLC v. Elenis* 2023), despite the pragmatic approach of Kennedy's interpretive theory grounded in human rights and dignity. Since 2018, the Supreme Court has been wrestling with the collision between three fundamental rights: LGBTQ+ equality, religious freedom and free speech, but systematically yielded to religious grievances on narrow grounds. By referring to the dissenting opinion in *Lawrence* (2003), Justice Scalia's legal analysis paves the way for a potential return to policing same-sex sexual activity in the name of compelling traditional religious interests. In spite of Kennedy's failed attempt to sketch the contours of religious freedom in *Masterpiece Cakeshop* (2018), his judicial compromise, positing that religious freedom always prevails when "under attack", threatens the course to equal dignity "as a fact and as a result." Consequently, the activist trajectory pursued by conservative justices reinforces the significance of Sedgwick's thesis in the post-Trump era after President Trump methodically reshaped the entire judicial branch of government: "The most obvious fact about this history of judicial formulations is that it codifies an excruciating system of double binds, systematically oppressing gay people,

identities, and acts by undermining through contradictory constraints on discourse the grounds of their very being” (Sedgwick 1990, 70). To what extent can *Lawrence*, in dissent, and *Masterpiece Cakeshop* be examined in cross-perspective as the deployment of signifiers that could send same-sex couples back to a system of double binds to accommodate the “sincerely held religious beliefs” of some extremely conservative Christians? Under this *modus operandi*, branded as “religious freedom,” same-sex couples would be required to step away from rigoristic religious institutions and to come to terms with the fact that their relationship would always be considered as “less than” in some specific contexts. Put differently, LGBTQ+ Americans would be free to come out in the public sphere but would still remain oppressed in their wish to be equal, especially when their rights intersect with the traditional beliefs of the religious doctrine.

RESTORING RELIGIOUS FREEDOM THROUGH SCALIA’S STATES’ RIGHTS PARADIGM BASED ON ORIGINALISM² AND TEXTUALISM³

Double binds prevail when same-sex couples come up against paradoxical commands that challenge their personhood and citizenship through a unique and elaborate system of restricted civil liberties. Justice Scalia, the chief advocate of constitutional originalism on the Supreme Court, remained a vigorously unyielding judge as regards homosexuality, rejecting its recognition and protection on both constitutional and religious grounds. To do so, he relied on the doctrine of the Due Process Clause of the Fourteenth Amendment, shaped by opinions focused on controversial procedural concerns rather than fundamental fairness, which allows the state to prohibit certain behaviors and thus deprive individuals of their liberties as long as these are not considered “fundamental.” Otherwise, the government must present a compelling state interest. While Kennedy supported the idea that the Constitution protects essential

² Theory of Constitutional interpretation (corollary to textualism) that claims to prioritize the original intent of the constitutional text as the supporters of this theory say it was understood at the time of its ratification.

³ Textualism is dedicated to the plain meaning of the constitutional text, as surmised by judges, without necessarily taking into account the intentions of the legislator.

liberties for homosexual individuals, Scalia, as a proponent of a narrow and literal interpretation of the Constitution, indicated that it did not stipulate that sodomy practiced by homosexual men was a fundamental right guaranteed by due process. A textualist reading of the Constitution, as it was written, thus reinforces the speciousness of LGBTQ+ authenticity, legitimizing the criminalization of same-sex sexual relationships when deemed necessary by state authorities.

The main point of contention revolves around the absence of a theoretical framework that clarifies the notion of fundamental rights to determine the conditions for the exercise of these freedoms for LGBTQ+ Americans. As a result, there is no consensus among the judges to define what constitutes a fundamental liberty or not. This partly explains why this loophole has contributed to the creation of new rights, as Gerstmann (2008) has contended (120). Ultimately, judges rely on distinct criteria within a broad legal framework, which explains why they must seek to persuade their colleagues to secure a majority vote. Kennedy favored reasoning based on a subjective interpretation of the concept of liberty, whereas Scalia leaned towards using history and customary law to conduct his analysis as a strategy to cement his right-wing ideology. If we adhere to Scalia's applied jurisprudence, fundamental rights are by definition "deeply rooted in this Nation's history and tradition" (*Washington v. Glucksberg* quoted in *Lawrence v. Texas*). However, Scalia's tradition-centered approach is debatable, as the notion intersects with numerous controversial ideological stances in the history of the United States, as pointed out by Michael Perry (1982): "There are several American traditions, and they include denial of freedom of expression, racial intolerance, and religious bigotry" (Perry quoted in Gerstmann 2008, 157). By providing a blurred contour to the concept of tradition, Scalia's vision thus inherently excludes any inclusive evolution of society, particularly in the treatment of certain minority groups. As stated by the judge, the terms intolerance and bigotry equally applied to the judgments of his liberal colleagues, accused of fostering dissent by challenging the traditional beliefs of some Americans, including the sanctity of human life that begins at conception.

Scalia defended "religious freedom", not the kind based on the tradition of persecutions suffered by freedom-seeking Pilgrim Fathers, but rather on religious views

that aligned with a prescriptive model of procreative heterosexuality. He accused his critics of waging a secular crusade against anti-sodomy laws, which were designed to halt the gradual dissolution of "good" morals (*Lawrence v. Texas* 2003, 1). As mentioned by the judge, the unchanging nature of the *Bowers v. Hardwick*⁴ ruling from 1986 to 2003 strengthened its longstanding legitimacy and demanded that the judicial institution show deference, even though the jurisprudence was notably short (17 years), compared to cases like *Plessy* (58 years): "The need for stability and certainty presents no barrier" (*Lawrence v. Texas* 2003, 1). The judge ensured the continuation and perpetuation of an old moral order in which a practice was deemed criminal *ad infinitum* by tradition, despite an extensive and robust body of research that demonstrates otherwise. Scalia arbitrarily decreed that *Bowers* was infallible and contributed to the formulation of a legal order based on moral dogmas. Any disobedient homosexual deserved to be exposed and could not in any case address a complaint for the violation of a fundamental right. Scalia flatly refused to admit that the fight for LGBTQ+ rights was a historical reality that now constitutes a tradition since the second half of the 20th century. In framing LGBTQ+ existence as ahistorical, science and LGBTQ-inclusive research appear as neither a viable nor a persuasive strategy to change a longstanding moral tradition, despite a shifting social and legal context.

He also criticized Kennedy's unreliable method, namely the application of *stare decisis* to two fundamental subjects: homosexuality and abortion. For him, Kennedy's judgment was the result of an improper alteration of the doctrine, as when two "criminal" activities led to upholding the right to abortion (1992) and the repeal of anti-sodomy laws (2003), there existed, in his view, a contradiction that undermined the Supreme Court and its duty of coherence (*Lawrence v. Texas* 2003, 2).⁵ This inconsistency, he argued, stemmed from the fact that the right to abortion and the right to same-sex sexuality were reflections of modern "inventions," without historical

⁴ The Supreme Court found that the US Constitution did not protect the right to engage in private, consensual sodomy for gay Americans.

⁵ Scalia relies on *Planned Parenthood v. Casey* (1992).

foundation. The concept of individual autonomy, underpinning Kennedy's reasoning, was repudiated by Justice Scalia. He warned that the notion hindered the prerogatives of the legislature, which can decide to regulate certain "unacceptable and immoral" (3, 5) practices through law.

He thus compared anti-sodomy laws to the ban on the sale of sex toys in Alabama, upheld by the US Court of Appeals for the 11th circuit (2001), the ban on military personnel disclosing their homosexuality or their being subjected to an in-depth investigation for national security purposes (1997, 1988), the condemnation of all sexual activity outside of marriage as well as adultery (1999, 1996) (5). This repressive arsenal of measures based on moral grounds, intended to regulate sexuality, can be accounted for by a societal project in which the state guarantees certain moral prescriptions. Scalia lumped the sexual orientation of homosexual individuals into a large mishmash of diverse laws that generated confusion and misunderstanding among the public: "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers's* validation of laws based on moral choices" (5-6). Beyond the religious basis underlying these laws, some of these bans constituted, for the judge, a strong foundation of references to design a privatized moral order, thus giving the state a legitimate and rational interest to defend it by neutralizing the politicization of same-sex sexuality.

Consequently, he held that an ethics of right and wrong occurs through the force of law and precedent, which by definition "is constantly based on notions of morality."⁶ While morality is intended to regulate harmful choices in terms of sexual practices due to the psychological and physical traumas they induce, Scalia proscribed the legitimacy of a sexual orientation conducive to self-fulfillment and self-affirmation, which he unfairly equated with a dangerous practice (Corvino 2013, 16). As a defender of Christian traditions, he promoted the status quo ante as well as a backward, stagnant, and

⁶ Citing the majority opinion in *Bowers v. Hardwick* (1986). The Supreme Court found that the US Constitution did not protect the right to engage in private, consensual sodomy for gay Americans. *Lawrence v. Texas*, 6.

obscurantist society in which homosexuality has neither the right to be mentioned nor the right to be integrated into the principle of human dignity.

He then embarked on the relevance of the right to privacy in the context of sexual activities. For the judge, this right is nowhere to be found in the jurisprudence as a fundamental liberty under the doctrine of substantive due process, which was heavily criticized in the 1930s for striking down laws regulating economic activities.⁷ Contrary to Scalia's assertion, it is worth noting that Kennedy did indeed refer to the decision in *Meyer v. Nebraska* (1923) to define the concept of liberty. Furthermore, in the *Griswold* case (1965), the majority of judges had identified an implicit right to privacy through the association of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. Ultimately, Scalia accused liberal judges of using this doctrine solely to grant new individual liberties in *Roe v. Wade* and *Lawrence v. Texas*, whereas, as indicated in his minority opinion, neither abortion nor sodomy are historically fundamental rights rooted in tradition. Instead, Scalia contended that Kennedy employed his own constitutional doctrine to include a right to sodomy, within the realm of privacy, by interpreting the concept of liberty, contained in the Fourteenth Amendment, too broadly.⁸

Scalia mocked the linguistic expressions used by Kennedy. From his point of view, they had no legal basis: "I don't know what 'to act behind closed doors' means; surely consensual sodomy, like heterosexual sex, is rarely conducted on stage" (*Lawrence v. Texas* 2003, 13). This strategy allowed him to drain Kennedy's reasoning of its substance through discredit. Pretending not to understand Kennedy's pragmatism, Scalia rebutted the argument that homosexual Americans possessed fundamental liberties inherent to their sexual orientation in confined spaces. The reference to a theatrical scene further discredited the plaintiffs' fanciful demand to require the same right to privacy recognized for women.

⁷ This period in American legal history is referred to as the Lochner Era in which laissez-faire was the dominant theory advocated by the judiciary.

⁸ Citing the majority opinion in "Roe v. Wade" (1973), quoted in *Lawrence v. Texas*, 11, <https://www.law.cornell.edu/supct/pdf/02-102P.ZD>.

By refusing to admit that the Texas law amounted to a discrimination based on sexual orientation, the judge remained fundamentally attached to originalism, as a way to disregard the merits of the case. So convinced that his reasoning was objective, he even pre-empted Justice Kennedy's words, who formally acknowledged an "emerging" societal awareness in the 20th century regarding the numerous prejudices endured by LGBTQ+ individuals: "An "emerging awareness" is not, by definition, deeply "rooted in the history and traditions of this nation" (*Lawrence v. Texas* 2003, 14). This narrow interpretation allowed the judge to emphasize that only rights stemming from historical tradition were considered fundamental. Because same-sex couples' injury was not relevant in this case, no redress could be formulated.

No systematic recourse to history could possibly overshadow a long tradition of persistent discrimination that impeded the effective implementation of equality. By engaging in subterfuge to offer instead a sanitized view of the history of the United States, Scalia would condone Jim Crow laws as the worthy heirs of the "peculiar institution": the historical tradition of slavery that subjected African Americans to the status of an inferior race by denying them access to their fundamental rights. Similarly, he rejected the growing influence from any foreign institution, such as the European Court of Human Rights, and instead advocated a form of isolationism in legal practice (*ibid.*)⁹ by refusing any interference, cooperation, or even imitation of the European model.

However, the republican ideals of the Enlightenment pervade the political culture and liberal tradition of the United States, with several prominent figures, especially in the study of the rights of sexual and gender minorities: John Stuart Mill, Jeremy Bentham, and Edmund Burke. The first two advocate an ideology of liberalism, capable of reform and adaptation, that aligns with LGBTQ+ equal rights, while Edmund Burke's approach emphasizes tradition and religion as potent catalysts of political action. Justice Scalia's thinking was heavily influenced by Burke's political theories

⁹ Referring to Justice Thomas' opinion in *Foster v. Florida* (2002).

which also influenced another English conservative jurist William Blackstone, whose parliamentary report is cited in Chief Justice Burger's concurring opinion in *Bowers*. Looking at his interpretive philosophy through an originalist lens, Scalia absolved the state of Texas from responsibility in creating a second-class citizenship. In other words, Burkean thought prompted the state's rational choice to act against homosexual men in order to "promote the civic belief that certain forms of sexual conduct are immoral and unacceptable," thus granting a popular majority a license to discriminate.

Scalia's opinion showed the cracks in applying rational basis review, and thus brought to light, by the same token, the judge's thinly veiled hostility towards a class of individuals, sparked by "moral disapproval of relationships between homosexual persons" (Gerstmann 2008, 21). The mere reminder that sodomy had led to four hangings in colonial times was a way to extol the gentler methods of Texas in policing same-sex sexuality (*Lawrence v. Texas* 2003, 13). Unlike Kennedy, Scalia opposed condemning the intentions of Texas legislators by reason of rational basis review. One can reasonably deduce that this methodological rift should prompt judges to engage in a more demanding and restrictive constitutional review by making sexual orientation a suspect classification deserving protection on par with other categories, such as race. Thus, any debate about the rational premise of certain punitive laws would become irrelevant in that they attack a person's immutable characteristic inherent to their dignity (*strict scrutiny*).

Scalia's critical stance with regard to Justice O'Connor's reasoning was a plea against enforcing the Equal protection Clause of the Fourteenth Amendment, advancing the idea that homosexual individuals were not on the same level as heterosexuals, considering their sexual practices. As a result, it was not inconceivable for the State to draw an extraordinary distinction, targeting the members of a specific class, like that of traditional marriage for centuries, he contended (16). In other words, because these individuals were not equal before the law, in the same way as others apprehended for their criminal behaviour, disparate treatment could be applied reasonably to enforce strict moral gender norms. He used the example of nudists, as a class, to support his argument: "A law against public nudity targets "the conduct that is

closely correlated with being a nudist” and hence “is targeted at more than conduct”; it is “directed toward nudists as a class” (17).

As demonstrated by Scalia, it was purely incidental if sodomy laws were targeted against homosexuals. He did not even bother to elaborate on the specific reasons that might explain why public nudity was prohibited by law (*rational basis review*), like the possible indecent exposure such a conduct could cause, inasmuch as an originalist judge does not need to pay attention to the intentions of the legislator. Scalia’s strategy enabled him to disregard the underlying constitutional issue, which was personal autonomy in engaging in private, consensual sexual acts in an intimate space. He brought up the case of naturism to equate it with homosexuality as a way of life that could be regulated by specific rules in public spaces.

Nonetheless, this comparison aimed to present nudity and homosexuality as alternative and transient lifestyles that the law could control, regulate, and suppress, since these individuals were not “acting under coercion” but according to their “personal preferences.” By homosexuality, Scalia meant: “sexual proclivity of the principal actor” (16) that is, a voluntary choice to deviate from the norm, not an immutable sexual attraction. He categorically rejected that a stricter constitutional review should apply, except in cases of discrimination based on an individual's sex or racial origin, by virtue of the pervasive nature of heteronormative ideology.

With this in mind, it is entirely conceivable to consider that anti-sodomy laws against homosexual men were aimed at arbitrarily imposing the supremacy of heterosexuality and sexuality for reproductive purposes. Scalia situated the ban on same-sex marriage within a broader historical perspective of American traditions that established an unequal hierarchical structure of domination in the social structure of American society, as described by Jonathan Ned Katz (1995, 189). Heterosexuality, as a social construct, was implicitly glorified in Scalia’s dissenting opinion. Its legitimacy derived from the political action of the State, actively participating in the hegemonic nature of a capitalist economic model, based on a majoritarian sexual orientation and the biological nature of the sexes (Pierceson 2005, 39).

Finally, Scalia took advantage of two missteps by Justice O'Connor. She first referred to the notion of historical tradition, dear to Scalia, and then failed to support Kennedy's due process reasoning, offering instead an opinion grounded in equal protection concerns. He showed contempt for O'Connor's clever euphemisms, which he interpreted as implicit animosity towards same-sex couples as if they threatened the stability of marriage: "Preserving the traditional institution of marriage" is a kinder way of describing the State's *moral disapproval* of same-sex couples" (*Lawrence v. Texas* 2003, 17). As such, the resentment adopted towards same-sex couples justified a structural discrimination that enabled the State to argue for a legitimate interest in enforcing laws that govern proper sexual conduct and protect the sanctity of marriage. As Scalia further explained, there was no need to hide such prejudiced views from the social and judicial bodies, as they were embedded with the societal project envisioned by the elected government of Texas.

Although Scalia's dissenting views clashed with Kennedy's majority opinion, his strict line of reasoning was equally shared not only by some other justices on the bench but also by faith and flag conservatives who considered that public policy should reflect their restrictive religious beliefs. In retrospect, Jefferson's wall of separation between Church and State was antinomic to the principle of religious freedom which played a robust role in shaping political and legal opinions, without it being necessary to invoke religion per se at the risk of infringing the Establishment Clause. This state of fact generated high expectations from conservative courts in granting religious objections in relation to enforcing State anti-discrimination laws protecting LGBTQ+ Americans:

no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise" (*Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm'n* 2018, 9)

In this context, First Amendment and Fourteenth Amendment claims intersect so perilously that faith, when anchored in sincerely held objections by right-wing Christians, turns out to be impregnable, making "religious freedom" and LGBTQ+

equality countervailing forces. The compelling nature of religious interests aims to downplay, or even obscure, the issue of religious encroachment in matters pertaining to the civil rights of LGBTQ+ citizens, not believers, that is the right to seek goods and services offered to all.

WEAPONIZING RELIGIOUS FREEDOM THROUGH POLITICAL EXEMPTIONS: THE RIGHT NOT TO RECOGNIZE SAME-SEX COUPLES' MARRIAGES

President Donald Trump managed to tap into a backward-looking movement by reinvigorating and empowering traditional religious beliefs. “Making America Great Again” involves barely concealed strategies of erasure and renewed invisibility by attacking transgender Americans and LGBTQ+ youth. After all, the devil is in the details: Trump’s use of the rainbow flag in Colorado on October 30, 2016, a few days before the election. As the Republican nominee for President, Trump made history by holding up the flag of the LGBTQ+ community, except that one detail ruined this special moment: the flag was upside down. The protection of “religious freedom” and deference to state sovereignty, in connection with the adoption of anti-discrimination laws (or not), by legitimizing a patchwork of laws across the country are the ingredients that bolster a system of double binds (Sedgwick): referring to a drastic dilemma for gay people, torn apart between disclosing too much information on their sexual orientation and gender identity in exercising their freedom, and not disclosing enough to protect themselves, which could potentially cost them their job either way: “married on Saturday and fired on Monday” as summarized by Democratic nominee for President Hillary Clinton in June 2016. Double bind situations are one of the most tangible manifestations of the double-bind structure of LGBTQ+ lives: policing queer life by silencing LGBTQ+ voices and by denying their very existence to uphold a hegemonic heteronormative power system and its negative effects they have on LGBTQ+ people’s mental health. In other words, having to choose between embracing one’s true self or living a lie represents an undue burden.

In response to the *Obergefell* decision, combined with the growing awareness of the aspirations and visibility of the LGBTQ+ movement, conservative legislators rushed

into a legislative battle to pass laws, sometimes dubbed by their critics as “Don’t Say Gay,” robust enough to protect the “freedom of conscience” of their Republican voters.¹⁰ These laws are designed to rein in teachers’ academic freedom and to ban controversial books, as in Iowa. Under the GOP’s rationale, religious freedom, narrowly conceived, refers to “sincerely held religious beliefs, like marriage as the union between a man and a woman, that run contrary to diversity and inclusion public policies. These believers claim to be protected by law if they refuse to serve LGBTQ+ clients, decide not to hire them, fire them, or deny them access to housing and gender affirming care, citing their sexual orientation and gender identity as an infringement on their freedom of conscience and parental rights without having to prove anything or even showing any evidence.

They want to be exempt from any binding law designed to defend and protect the rights of citizens whose sexuality is “contrary” to their interpretation of the Bible. Under the guise of wanting to protect Christians who feel aggrieved and hurt in their faith, the paradigm of religious discrimination, conceived as a matter of civil rights, allows for the political justification of moral exemptions that would authorize differential treatment of LGBTQ+ Americans in accessing public spaces and in the areas of health care and adoption.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), Jack Phillips, owner of Masterpiece Cakeshop for twenty-three years, was convicted after refusing to make a wedding cake for a same-sex couple due to a religious objection. At the time of the incident, in 2012, the Colorado Constitution prohibited the recognition of same-sex marriage through the adoption of Amendment 43 (2006) by referendum. The legal framework adopted by the state of Colorado was in line with Phillips’ decision, opposing a religious objection. In order to avoid charges of discrimination, the owner agreed to sell any other product available in his establishment, which did not meet the initial request of his customers who wanted to buy a cake specific to the wedding

¹⁰ House Bill 1523, «Protecting Freedom of Conscience from Government Discrimination Act,» april 2016, <https://billstatus.ls.state.ms.us/documents/2016/html/HB/1500-1599/HB1523SG.htm>.

tradition: “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings” (*Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm’n* 2018, 4).

In accordance with the Colorado Anti-Discrimination Act (CADA), which prohibited discrimination, in this case based on sexual orientation, in any retail spaces in Colorado, the Colorado Civil Rights Commission and the Colorado Court of Appeals denied Phillips' request. Phillips was seeking protection of a right of service refusal, rooted in his freedom of expression, associated with an artistic creation, by not granting the request of a customer whose wedding cake violated his freedom of conscience as well as the free exercise of his religion (freedom of worship): his fundamental belief that marriage is the celebration of a union between a man and a woman.

According to Kennedy, the main issue in this case was to combine two seemingly antinomic objectives. On the one hand, honoring the promise of civil rights and the dignity of LGBTQ+ people facing discrimination in exercising their rights as customers by acquiring marketable goods and services. On the other hand, the enforcement of fundamental rights, guaranteed by the First Amendment, in the states of the Union and in accordance with the Fourteenth Amendment of the US Constitution (*Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm’n* 2018, 1-2). While ambitious, the convergence of these two interests is not the constitutional problem at stake but rather how the Civil Rights Commission dealt with the case, and even if both parties involved fundamentally disagreed on the nature of Phillips' denial, according to Kennedy.

The Supreme Court faced a novel, but instructive, context in the realization of free speech and free exercise of religion as applied to equal rights for LGBTQ+ people. According to Kennedy, in another purely hypothetical situation, the protection of a baker's artistic creativity may motivate a refusal to design a product that might interfere with his or her moral and religious conscience, which would fall within a legitimate and legally compliant exemption. Strictly speaking, Kennedy’s assumption was merely conjectural, because he framed the issue in a completely different way to subtly circumvent the question of free speech to focus on religious freedom.

First, he portrayed the plaintiff as a faithful practitioner of the Baptist Church (evangelical Christianity) to which he devoted unwavering devotion, faithful to the word of God, carrying out his wishes on a daily basis, and ensuring that his artistic creations respected the canons of his Church: “his main goal in life is to be obedient to Jesus Christ and Christ’s teachings in all aspects of his life” (*Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm’n* 2018, 3). His religious practice imposed on him the belief that “God’s intention for marriage from the beginning of history is that it is and should be the union of one man and one woman” (*ibid.*). Forcing him to create a cake would violate his intangible religious beliefs, which would constitute a substantial recurring injury to his moral conscience and freedom of expression (or opinion). Thus, the liberty relied upon by the petitioner incorporated the unconstitutionality of forced speech. Under this principle, an individual cannot be compelled to express a message, dictated by the government, with which he or she strongly disagrees (*West Virginia State Board of Education v. Barnette* 1943).

Attesting the sincerity of the belief system to which the plaintiff adheres is thus no longer in question, so that the state must act in a cautious manner so as not to offend the beliefs that Phillips is entitled to believe in and apply in his everyday life. The plaintiff’s religious freedom must be treated as a form of expression, free from government interference. If not possible, “the State invades the sphere of intellect and spirit which it is the purpose of the First Amendment [...] to reserve from all official control,” (*Wooley v. Maynard* 1977). In another case, Justice Scalia reiterated the same requirement that “the First Amendment generally prevents governments from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed” (*R.A.V. v. City of St. Paul* 1992).

Justice Kennedy’s ruling was based on some evidence of procedural misconduct on the part of the Civil Rights Commission—allowing him to write a majority opinion of limited scope, regardless of the recommendations made by the Department of Justice—headed by Jeff Sessions (2017-18), in an amicus brief. The Trump administration was keen to strengthen “religious freedom,” despite the equal protection clause, by allowing a virtually unfettered right to discriminate: “As President Trump said, ‘Faith is

deeply embedded into the history of our country, the spirit of our founding and the soul of our nation . . . [this administration] will not allow people of faith to be targeted, bullied or silenced anymore” (“Attorney General Sessions”).

The defence of religious freedom, allegedly under siege during Obama’s presidency, was erected as a compelling interest, allowing the government to enforce the moral code of redeemed conservative Christians, protected by the shield of the First Amendment.

In the present case, Kennedy accused the Commission of failing to meet its obligation of religious neutrality in investigating the case, by not respecting the principles of concord and respect that should guide the representatives of the republican order, in enforcing secularism, specific to the American model. During Phillips’ questioning, one of the commissioners reportedly acted out of animosity, stating that:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others. (*Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm’n* 2018, 4)

According to Kennedy, this misguided remark constituted unacceptable bias and prejudice, since Phillips anchored his refusal to serve his clients on the basis of sincerely held religious beliefs, not a desire to demean same-sex couples. The commissioner’s hostility was characterized by a clear willingness to disregard Phillips’ beliefs by accusing him of instrumentalization of religion for rhetorical purposes (13-14).

The violation of the neutrality requirement is based on the majority opinion in *West Virginia State Board of Education v. Barnette* (1943)¹¹ and *Church of Lukumi Babalu*

¹¹ The Supreme Court ruled that compelling children in public schools to salute the US flag represents a violation of their freedom of speech and religion.

Aye v. Hiialeah (1993).¹² In the former case, the Court held that it is not for government officials to determine the extent to which an expressive message may constitute an offense, nor to define the scope of the offense in that the concept itself is so subjective that it may lead to interpretative bias in favor of one side or the other: “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” (*Barnette* 1943 quoted in *Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm’n* 2018, 16. In the second case, the Court called on the government to honor the principle of free exercise of religion by refraining from making any disapproving comments that could disqualify the religious beliefs of Americans.

The jurisprudential framework applied to this case allowed Kennedy to argue that the Commission was neither neutral nor tolerant toward the petitioner. By comparing Phillips' deeply held religious beliefs with slavery and the Holocaust, the Commission created a breach of equal treatment with three other bakers whose conscientious objection prevailed. The latter had declined a request from a client (William Jack) to make cakes with a religious message denigrating same-sex marriage. Participating in the making of the product was tantamount to supporting the political/religious message associated with the cake, or even participating in the celebration of a marital union between two men/women, as in Phillips' situation. According to Kennedy, the odious comparison made during his hearing was sufficient to demonstrate that the Commission exceeded the limits of its prerogatives by ruling on the consistency of Phillips' conscientious objection with a negative statement on the petitioner's faith (17).

In a separate concurring opinion, Justice Kagan qualified Kennedy's opinion by noting that the difference between the two cases was the enforcement of Colorado's anti-discrimination law, which prohibits discrimination on the basis of sexual orientation in public places (CADA, as amended in 2007 and 2008) (5). According to the justice, the William Jack case did not fall under CADA as the refusal of the three bakers

¹² The Supreme Court ruled that an ordinance banning religious animal sacrifice represents a violation of the Free Exercise Clause of the First Amendment.

was not motivated by a feeling of hostility towards religious beliefs. Refusing to make this kind of cake applied uniformly, regardless of the immutable characteristic of the customer concerned (2). Conversely, Phillips' rejection did violate CADA, which guarantees "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed" (2). In this case, Phillips refused to accommodate a couple's request because of their sexual orientation, even though he offers this service to his heterosexual customers. However, the argument that the baker's actions established a breach of equal treatment is neutralized insofar as it was the duty of the Commission to observe neutral standards in applying CADA, "untainted by any bias against a religious belief" (2-3) according to Justice Kagan.

Ultimately, Kennedy merely reiterated the principles of non-discrimination and equal dignity of same-sex couples, reminding that "religious and philosophical objections to same-sex marriage" are justifiable, depending on the contexts in which they arise: "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" (9). This social and legal recognition cannot be hindered because of strict religious objections in the public and business domains: 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 accommodations law (*ibid.*).

Yet Kennedy identified a mitigating circumstance that would sustain the exceptional nature of the plaintiff's religious objection, faced with a double bind situation in the process of refusing to serve a same-sex couple: the state prohibits discrimination on the basis of sexual orientation and yet same-sex couples were denied marriage licenses, giving full force and effect to Phillips' religious belief. Thus, Kennedy argued that Phillips did not act excessively or irrationally because the legal context, which was unfavorable to same-sex marriage, attested to the baker's good faith.

This argument thus allowed Kennedy to avoid making any real decision on the merits of the case, focusing instead on the extraordinary nature of the situation at hand, leaving the constitutionality of sexual orientation discrimination for deeply held

religious beliefs in abeyance until the jurisprudence was further consolidated unless Congress passes the Equality Act.¹³ The decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc* (2006) is particularly illuminating, as the federal government is entitled to intervene to regulate discriminatory business practices. No business can claim a right to “choose its customers” on the basis of immutable characteristics under the guise of “religious freedom”: Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct (*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* 2006 quoted in *Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm’n* 2018, 12).

According to Sarah Huckabee, the White House spokesperson, Donald Trump would not have objected to businesses refusing to serve LGBTQ+ customers as long as this information was displayed on their storefront (Broverman 2017). This political offer of compromise proposed by the 45th president would establish a legalized discrimination through the use of signs to accommodate deep and abiding religious convictions. Under this principle, religious expression would be granted preferential treatment taking precedence over the force of law governing anti-discrimination measures based on sexual orientation and gender identity. Even though *Masterpiece Cakeshop* is a private business supposed to serve the common interest by offering goods and services in the public sphere, Trump's application of benign neutrality is anything but neutral, as it approves, endorses, and normalizes the Christian moral code of some believers. They are determined to seek refuge for some of their negative attitudes towards LGBTQ+ Americans, which would allow them to be exempted from enforcing existing public accommodation laws. This commitment to religious freedom equates to a form of empowerment of religious policymakers and activists whose politicized faith pretends to be able to make sexual orientation and gender identity invisible.

¹³ The bill was adopted by the House of Representatives on February 25, 2021, but the Democrats in the Senate are unlikely to reach the 60 votes required to pass it.

Although Kennedy warned that the display of openly hostile branding, as seen in the *Rumsfeld* case against same-sex marriage, “would impose a serious stigma on gay people” (*Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Comm’n* 2018, 12) contrary to the benevolent principle of neutrality that secular officials must adhere to. A few weeks before his retirement from the Supreme Court in July 2018, Kennedy sent a strong signal to anyone who might believe that their religious beliefs would escape the binding force of state anti-discrimination laws, the Constitution, or even Title VII of the Civil Rights Act (1964):

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 accommodations law. (9)

In other words, Kennedy’s compromise provides an opportunity for Christians’ moral beliefs to be protected from anti-discrimination provisions (“under a neutral and generally applicable public accommodations law”), implying that exemptions are permissible for certain tailored religious beliefs, without business owners having to make disparaging comments on a person’s sexual orientation and/or gender identity directly.

CONCLUSION

The purpose of the above analysis was to take stock of the remaining ideological obstacles faced by the movement for LGBTQ+ equality to overcome an excruciating double bind situation formulated by Supreme Court decisions, making it a fully politicized institution of its own right. More precisely, the continuous legal requests founded on First and Fourteenth Amendment considerations remain contentious and divisive.

From Scalia’s perspective, the normalization of homosexuality is not only ahistorical, but constitutes a violent imposition on many Americans’ moral beliefs grounded in their faith, contrary to states’ right to police same-sex sexuality: “It is clear

from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed” (*Lawrence v. Texas* 2003, 18). Conversely, far from being neutral, Scalia’s position demonstrates that he is a full-fledged actor in the culture war against homosexuality, despite his observation that he has “nothing against homosexuals” (19). By reducing it to an antiquated formula, homosexuality, as an expressive conduct, turns out to be impervious to due process, denying standing to all homosexual citizens whose fundamental rights must be constantly submitted to the principle of deliberative democracy.

From Kennedy’s perspective, the effective enforcement of same-sex equal dignity remains ambiguous, caught between the equal protection clause and the protection of certain religious beliefs, erected as a shield, contrary to states’ inclusive policies. In fact, Kennedy’s loophole in *Masterpiece Cakeshop* allows private businesses to be exempted from enforcing accommodation public laws within the framework of state antidiscrimination laws to fight against the social exclusion of same-sex couples. Secular officials are warned that religious beliefs cannot be submitted to prejudiced and disparaging statements while business owners can rebuke same-sex couples’ dignity by refusing to offer them goods and services granted to any other customer. Nevertheless, the application of equal treatment of LGBTQ+ persons in accord with sincerely held religious beliefs is deficient as countless religious objections are currently being reviewed not only in the business domain but also in the family and education affairs, making it virtually impossible for reducing homophobia within hardline religious circles. One possible response lies in the depoliticization of religion, centered instead on everyone’s shared common humanity, away from the politics of disgust:

Religion makes a big mistake when its primary public posture is to protect itself and its own interests. It’s even worse when religion tries to use politics to enforce its own codes and beliefs or to use the force of law to control the behavior of others. Religion does much better when it *leads*—when it actually cares about the needs of everybody, not just its own community, and when it makes the best inspirational and commonsense case, in a pluralistic democracy, for public policies that express the core values of faith in regard to how we should all treat our neighbors. (Wallis 2013, 6)

When unequal treatment is condoned as an expressive conduct by virtue of the First Amendment and/or as a compelling state interest, certain religious beliefs are weaponized to make them antinomic to equal dignity, without judges having to claim religion to deliver a license to discriminate in the strictest sense of the term.

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