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6-5-2018

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Katherine A. Shaw

Benjamin N. Cardozo School of Law, kshaw2@yu.edu

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Recommended Citation

Shaw, Katherine A., "Why Did Liberals Join the Majority in the Masterpiece Case?" (2018). *Online Publications*. 30.

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Why Did Liberals Join the Majority in the Masterpiece Case?

By Kate Shaw

Ms. Shaw is a law professor who covers the Supreme Court for ABC News.

June 5, 2018

It was no surprise that Justice Anthony Kennedy, who has cast the decisive vote in so many important Supreme Court cases, wrote Monday's majority opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. The court ruled in favor of a Colorado baker named Jack Phillips who, on religious grounds, had refused to make a wedding cake for a gay couple.

What was surprising was the lopsided 7-2 vote count. Only Ruth Bader Ginsburg and Sonia Sotomayor, the two dissenting justices, would have ruled that the First Amendment's protection of the free exercise of religion did not shield Mr. Phillips from a Colorado anti-discrimination law.

As is often the case, however, the overall vote count obscured deep disagreements among the justices who joined the majority opinion. Justice Neil Gorsuch, joined by Justice Samuel Alito, thought Justice Kennedy's opinion didn't go far enough. And Justice Clarence Thomas, joined by Justice Gorsuch, argued that Mr. Phillips had a right to refuse service not just under the First Amendment's "free exercise of religion" clause but also under its "free speech" provision.

But what to make of the concurring opinion of Justices Elena Kagan and Stephen Breyer, two liberal-leaning members of the court, who surprised many observers by joining Justice Kennedy's opinion in full?

One explanation is simple pragmatism. Justice Kennedy's opinion placed considerable emphasis on statements by several members of the Colorado Civil Rights Commission, which had ruled against Mr. Phillips, that Justice Kennedy read as disparaging religion. Arguing that this hostile language undermined the constitutionality of the commission's proceedings allowed the court to conveniently sidestep the difficult questions at the heart of the case — questions about the proper balance between a state's power to protect its gay and lesbian citizens from discrimination, on the one hand, and the constitutional guarantee of religious freedom, on the other.

Since those questions don't necessarily have clear answers, Justices Kagan and Breyer may have deemed it wiser to table them for the time being. By joining Justice Kennedy, they positioned themselves to have far more influence on the reasoning and implications of his opinion than they would have done by adding a third and fourth vote to Justice Ginsburg's dissent.

Their concurring opinion, for example, focused on an interesting aspect of Justice Kennedy's opinion: the emphasis he placed on the fact that the Colorado commission had deemed it acceptable for bakers to refuse to make a cake for a customer who wanted cakes bearing anti-gay messages. Justice Kennedy pointed to this disparate treatment — one refusal to make cakes was deemed impermissible, the other acceptable — as a reason to find for Mr. Phillips.

In their concurring opinion, Justices Kagan and Breyer noted — without drawing an objection from Justice Kennedy — that the commission erred in failing to identify an important distinction between the two sorts of cases: Mr. Phillips made wedding cakes for opposite-sex couples but refused to do so for same-sex couples, denying same-sex couples full equality under state law; but bakers who refused to bake a cake "denigrating gay people and same-sex marriage" would not have baked such a cake for *any* customer — and therefore engaged in no denial of equal treatment.

By joining Justice Kennedy's opinion, Justices Kagan and Breyer were thus able to give the Colorado commission some clear instructions: A do-over without the religious hostility and with a better explanation of its rationale could well result in a constitutionally sound victory for the same-sex couple denied their cake by Mr. Phillips.

That is the power of joining an opinion: It allows justices to help shape the interpretation of that opinion by lower courts, state agencies and other bodies that have to implement the court's ruling — an influence that is difficult to have from a position of dissent.

When it comes to discerning the precise legal standard emanating from Monday's fractured decision in the Masterpiece case, lower courts have their work cut out for them. But at least one possibility they can consider as a result of the concurring opinion of Justices Kagan and Breyer is that so long as careful and respectful consideration of all sides is given, state and local bodies may do what Colorado did here — ruling against a baker like Mr. Phillips — without running afoul of the Constitution.

Kate Shaw (@kateashaw1) is an associate professor at the Benjamin N. Cardozo School of Law and a director of the Floersheimer Center for Constitutional Democracy.

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