

Let them eat cake: Analyzing the social construction of human rights in the context of right-wing populism

Isabel L. Krakoff
Sociology
York University
Toronto, ON

Abstract

The *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case marked a key moment in the ongoing tension between the rights of LGBTQ people to live free of discrimination and the freedom to act in accordance with one's religious beliefs. Because this case ultimately reached the Supreme Court during the Trump administration, much of the surrounding discourse emerged under a leader widely considered to be an example of a contemporary right-wing populist leader who staunchly advocated for a broadened scope of and re-invigorated protection for religious freedom. Given Trump's use of right-wing populist political strategies, the tensions between contemporary articulations of the right to religious freedom and the LGBTQ community's right to non-discrimination, as evidenced in the *Masterpiece Cakeshop* case, offer a compelling site to investigate how right-wing populism affects the social construction of human rights claims. Grounded in a theoretical understanding of populism as an embodied performative and relational practice, this study explores the discursive manifestation of populism in court documents supporting the *Masterpiece Cakeshop* owner, Jack Phillips. The mobilization of right-wing populist discursive framings exacerbates the hierarchization of rights claims wherein rights directly addressed in the Constitution are considered fundamental aspects of American freedom, while those relying on Constitutional interpretation are deemed 'special interests.'

Introduction

In 2012, the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case began its way to the Supreme Court of the United States, marking a key moment in what is an ongoing tension between the rights of LGBTQ people to live free of discrimination and the freedom to act in accordance with one's religious beliefs. The premise of the case was that Jack Phillips, the Christian owner of *Masterpiece Cakeshop* in Colorado, refused to make a cake for a gay couple's wedding, citing his religious beliefs. This sparked a controversy over whether owners of public accommodations can refuse certain services based on claims of both free speech and free exercise of religion.¹ This claim would effectively grant religious owners of public accommodations an exemption from laws protecting people from discrimination in public accommodations. This question of discrimination in public accommodations was a new moment in manifestations of the tension that has always existed in anti-discrimination law wherein laws prohibiting discrimination against various groups is perceived to inevitably infringe on an individual's freedoms, in this case to choose whom to serve (Cherminsky, 2018).

¹ According to the United States Department of Justice, a public accommodation is defined as "privately-owned spaces that serve and are open to the general public. They may be owned by private companies or individuals but are intended for public use" including establishments for temporary guests, spaces where people can buy food to eat on site, gas stations, and places of entertainment but excluding most retail stores where food is not stored, religious buildings, and private clubs where membership is required (U.S. Department of Justice, 2022).

Though the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case was filed in 2012 during the Obama administration, it ultimately reached the Supreme Court during the Trump administration; therefore, much of the surrounding discourse emerged in the context of Donald Trump’s presidency. This is significant, because scholars widely consider Donald Trump to be an example of a contemporary right-wing populist leader as a result of his frequent invocation of the unified will of a disillusioned ‘people’—defined in racial, nationalist, anti-immigrant, anti-diversity terms—against what he claimed to be a corrupt establishment ‘elite’ pandering to minority interests (Kazin, 2016; Montgomery, 2017; Pierson, 2017). As a result, support for Jack Phillips emerged within, and was potentially shaped by, the context and effects of a right-wing populist leader who, through executive actions like Executive Order 13798 passed in 2017 promoting free speech and religious liberty, and departmental rules like the 2019 Department of Health and Human Services ‘Conscience rule,’ staunchly advocated for a broadened scope of and re-invigorated protection for religious freedom.

Human rights claims consist of allegations by diverse social and demographic groups that their fundamental freedoms are being unduly infringed upon. Human rights claims are inherently “claims about how [people] deserve to be treated in the public sphere” (Kazyak et al., 2018, p.2). Advocates and those making human rights claims across the political spectrum in the United States reference the Constitution as the source of their undeniable freedoms, which can place rights claims in tension with one another (Kazyak et al., 2018). This is especially true as political actors mobilize human rights causes for political gain (Bílková, 2018; Kazyak et al., 2018; Kováts, 2018). In an increasingly polarized United States, religious Americans and those “who reject organized religion as authoritarian and hypocritical, especially with respect to sexuality” increasingly see “the other’s values as threatening and incomprehensible” (Movsesian, 2019, p.713). Donald Trump capitalized on this tension between religious freedom and equality for women and sexual minorities, establishing a hierarchy of rights with religious freedom at the top and equality initiatives for minority groups at the bottom (Haynes, 2020). In fact, Donald Trump’s secretary of State, Mike Pompeo, presented the Commission on Unalienable Rights in 2019 which sought to “protect and promote ‘fundamental’ or ‘unalienable’ rights, said to be foundational in both the USA’s ‘founding principles and the 1948 Universal Declaration of Human rights (UDHR)” (Haynes, 2020, p.8). While these rights—most importantly freedom of religion or belief—were portrayed by the Commission as emerging from the Declaration of Independence and ‘natural law,’ and therefore essential and worthy of domestic and international protection, other ‘novel’ human rights like reproductive health, and LGBTQ equality were said to be ‘inessential’ and unworthy of “international oversight” (Haynes, 2020, p.10).

Though human rights projects have always been characterized by struggle rather than consensus, as right-wing populism has expanded across the globe, we have increasingly seen government efforts to “challenge and dilute existing human rights standards” and institutions that seek to protect human rights (Alston, 2017, p.4). Additionally, many people, particularly those adversely affected by “globalization-driven economic change,” feel as though “they have no stake in the human rights enterprise” which perceive to be unduly protecting “‘asylum seekers’, ‘felons’, ‘terrorists’, and the like” (Alston 2017, p.6). Right-wing populist leaders are therefore often inclined to make “repeated appeals to the preferential treatment (allegedly) accorded to certain groups at the expense of the majority” (Bílková, 2018, p.155). Understanding how human rights claims are framed in the context of right-wing populism is particularly important because

when right-wing populist actors and institutions vilify elites for prioritizing certain (minority) rights (Alston, 2017; Bílková, 2018), it contributes to the environment in which polarized rights claims clash and compete. It also contributes to the ‘us vs. them’ mentality that is central to right-wing populism’s scapegoating of the ‘other’ as an enemy that must “not only be excluded from the community,” but has “to be publicly despised, humiliated and, if need be, mistreated” (Bílková, 2018, p.154). The result is a zero-sum game in which expanding the rights of some is seen as infringing upon the rights of others, establishing hierarchies wherein some rights are deemed more important than others.

A majority of studies on populism have typically centered a focus on the ‘supply side’ of populism, analyzing the framing in party manifestos, political speeches and newspaper articles as the ‘source’ of populism (Hawkins et al. 2018; Mudde & Kaltwasser, 2012). As Ostiguy and Moffitt (2021) argue, however, populism must be understood as a relational phenomenon between populist parties and leaders and their supporting people and institutions. In other words, populism cannot be conceived of in terms of ‘supply’ from a party and leader and blind ‘consumption’ by supporters. Instead, from a relational perspective, the populist leader not only makes claims on behalf of ‘the people,’ but those claims and the associated political identity are shaped by and through societal institutions like the courts and social actors—‘the people’ themselves (Ostiguy & Moffitt, 2021). According to Ostiguy and Moffitt (2021), populism emerges as much by virtue of what a leader says and does as it does by how supporters and institutions interpret the leader’s performance and the symbolic meanings they impose upon the leader. It is important to consider the relational dynamics of populism because social actors, institutions, and the populist leader engage with populist discourses in distinct ways. Though social actors and institutions are positioned in relation to the populist leader, they are also positioned in relation to each other, as well as to various systems, institutions, and discourses, shaping the way they create, influence and interact with populist discourse. As such, this study seeks to operationalize Ostiguy and Moffitt’s (2021) relational understanding of populism exploring how a right-wing populist political context affects socio-legal institutional rhetoric by those supportive of the right-wing populist agenda in the United States in their claims of human rights violations. Specifically, the objective is to understand how human rights claims are constructed by the political right in court-based discourse in the context of an increasingly right-wing populist political climate. Based on a qualitative analysis of court documents and amicus briefs filed on behalf and in support of Jack Phillips, this paper examines how right-wing populist framing strategies appeared in the articulation of the baker’s rights claim.

This paper begins with an overview with the literature on populism, its right-wing manifestations, and the relationship between populism, constitutions, and the law. I then outline the conceptual framework and methodology, detailing both how I approach the measurement of right-wing populism in human rights claims and my sampling and analysis strategy. The findings section demonstrates how right-wing populism manifests in legal discourse around the themes of ‘the people,’ ‘elites’ or accusations of elitism, conceptions of ‘the general will,’ and ‘the other’ or anti-pluralist sentiment. Finally, the conclusion highlights the implications of the findings for understanding how right-wing populist framing strategies influence the construction of human rights claims in legal discourse.

Understanding Populism and its Right-wing Manifestations

Populism is characterized by a moralistic antagonism between ‘the people’ and ‘the elite,’ wherein the populist leader is portrayed as the only person capable of truly representing the unified, general will of ‘the people’ (Halmai, 2019; Müller, 2017; Mudde & Kaltwasser, 2012; Petrov, 2020; Walker, 2019). While a populist leader vilifies ‘the elite,’ an ‘other’ is often portrayed as the root cause of ‘the people’s’ suffering. This phenomenon typically emerges when social groups feel as though their demands have not been heard or acknowledged by way of normal liberal democratic political processes for long periods of time (Zembylas, 2021). Populism, however, must be regarded as “a dimension of certain sorts of politics” rather than a phenomenon driving social and political change in and of itself (DeCleen, 2021, p.4). In other words, populism is “a general, abstract concept about politics and society that is open to a diversity of more concrete political ideas and programs, depending on both national and historical context” (Reinemann et al., 2017, p.13). All movements and political acts have the potential to adopt a populist logic that manifests through the performativity of a leader and resonates with ‘the people’ by symbolically representing the material identities of those who feel they have been ‘forgotten’ or ‘left behind’—the ‘non-elite’ (Laclau, 2005; Ostiguy & Moffitt, 2021; Zembylas, 2020). Populism is therefore an avenue for mobilizing diverse political ideologies through a *vertical* antagonism wherein “‘the people’ is discursively constructed as a large powerless group through opposition to ‘the elite’ conceived as a small and illegitimate powerful group” (Stavrakakis and De Cleen, 2017, p. 310). Populism further appeals to ‘the people’ by encouraging “*horizontal* opposition to those outside,” who do not conform to ethnic, racial, gendered formation of ‘the people’ (Brubaker, 2020, p.44, emphasis added; Obradovic et al., 2020).

Right-wing populism, a particular articulation of right-wing conservative political values, capitalizes on the tensions that emerge between right- and left-wing pursuits of freedom (Berlant, 1997). For right-wing movements in Europe and the United States that have adopted populist strategies and rhetoric, ‘the people’ has been defined in terms of whiteness and oriented to typically Christian nationalism and xenophobia. ‘The nation’ and its ‘true’ citizens are subsequently portrayed as being threatened by high immigration rates, multiculturalism, and the growing power of international and supranational organizations (De Cleen, 2017; Moffitt, 2020). Multiculturalism, in particular, is seen as threatening this nativism by deconstructing the integrity of the nation and the identities that are constitutive of the ‘true people’ (Pelinka, 2013; Zembylas, 2021). Right-wing populist leaders capitalize on their supporters’ nostalgic fantasies of past status and power, allowing them to express feelings of anger towards policies and laws perceived to exclude them from social, economic, and cultural privilege (Anderson, 2017; Inglehart & Norris, 2017; Zembylas, 2021).

Additionally, right-wing populist leaders in liberal democracies around the world often have complicated relationships with their respective countries’ constitutions (Halmai, 2019). In these contexts, right-wing populists criticize ‘the elite’ for their perceived weaponization of the constitution and its institutions to impose progressive measures surrounding LGBTQ rights, gender equality, and reproductive rights in direct conflict with political unity and the execution of the will of the alleged ‘majority’—the ‘true people’ (Blokker, 2018; De Cleen, 2017). These ‘minority,’ special interest rights are seen as threats to rights like free speech and freedom of religion which are constructed as being more fundamental to national identity, culture, and security (Brysk, 2019; Gostin et al., 2020). Donald Trump, for example, constructed minority

rights as such a threat by emphasizing religious freedom as a fundamental, Constitutional right being threatened by expanding LGBTQ rights. Trump’s support of religious freedom in conflict with expanding LGBTQ rights was based on the right-wing populist tendency to frame rights claims in hierarchical terms, wherein certain rights are seen as indispensable to national identity while others are considered to be fringe claims made by the ‘elite’ on behalf of special interest groups and minorities. In the United States, where some laws are considered to be addressed in the Constitution—and are, in other words, fundamental aspects of American freedom—others are left up to a judge’s interpretation and philosophy and not always treated as Constitutional rights (Greene, 2021). In cases that seek to address institutional and structural inequalities, the side that can appeal most clearly to Constitutional rights is often successful, regardless of whether or not such decisions reinforce these underlying inequalities (Greene, 2021). In the context of the tension between religious freedom and LGBTQ rights, religious freedom is legitimized by its clear ties to the Constitution, while LGBTQ rights are deemed special interests stemming from interpretations of Constitutional rights.

Conceptual Approach and Methodology

Measuring Populism Relationally

Mudde and Kaltwasser (2012) proposed that, though populism cannot be understood as a consistent or universal set of actions, the phenomenon could be identified and measured according to three primary strategies used to mobilize particular narratives across the political spectrum: the people, the elite, and the general will, which can only be represented by the populist leader. Discourse can also be classified as populist when it condemns the opposites of these concepts—elitism and pluralism—which threaten the will of the people. Mudde and Kaltwasser’s (2012) ‘minimal’ definition decenters the populist leader as the sole engineer of populism, and allows for recognition that “the formation, propagation, and transformation of the populism ideology depends on [both] skillful political entrepreneurs and social groups” who are motivated to support a populist agenda (Mudde & Kaltwasser, 2012, p.10). In line with Ostiguy and Moffitt’s (2021) emphasis on the ‘bottom-up’ component of populism—discourses emerging from actors and institutions rather than the populist leader or party—this approach is apt for analyzing populism in court documents, given that courts and the justice system operate somewhat independently from the president in the United States.

Critiques of Mudde and Kaltwasser (2012), however, suggest that the broad and general nature of their approach limit the ability to evaluate the specificities of different populist politics (De Cleen, 2021; Katsambekis, 2022). Laclau (2005), in contrast, proposes the “discourse theoretical” approach which emphasizes how demands are *articulated* (De Cleen, 2021, p.2). This approach focuses on the articulation of a *vertical* antagonism wherein “‘the people’ is discursively constructed as a large powerless group in opposition to ‘the elite’ conceived as a small and illegitimate powerful group” (Stavrakakis and De Clee, 2017, p.310). Populism also appeals to ‘the people’ by encouraging “*horizontal* opposition to those outside,” who do not conform to ethnic, racial, gendered, and in this case, religious formations of ‘the people’ (Brubaker, 2020, p.44, emphasis added; Obradovic et al., 2020).

This paper balances the identification of discursive articulations of Mudde and Kaltwasser’s (2012) core components with a relationally oriented, ‘discourse theoretical’ approach as envisioned by Laclau (2005) to draw conclusions about populism as a practice and set of

strategies that influence the construction of human rights rather than simply a categorical use of certain tropes. According to the ‘discourse theoretical’ approach, populism is not attached to a single political ideology or even specific actions or practices, but rather is identified “in a particular *mode of articulation* of whatever social political and ideological contents (Laclau, 2005, p.34, original emphasis). Specifically, it allows for flexibility when analyzing how populism manifests in court documents because of the nature of legal discourse as compared to, for example, a political speech. With court documents it is particularly interesting to discern how populism appears because all language is portrayed as an ‘objective’ presentation facts that draw on prior case law and cannot easily be disputed. As such, populist language in court documents appears more in the construction of the argument, and the facts and precedent that are relied on to craft a particular narrative. For the purposes of this paper, I seek to identify if and how references to the ‘people,’ the ‘elite,’ the general will of ‘the people,’ and an ‘other’ manifest in court documents. Though I begin my analysis with these conceptual frames in alignment with Mudde and Kaltwasser’s (2012) approach to measuring populism, rather than classifying text as populist based on the number dimensions found in a given piece of text as suggested by Mudde and Kaltwasser (2012) and Hawkins and Kaltwasser (2019), I emphasize the *articulation* of each dimension and whether or not it qualifies as populist in nature as proposed in the ‘discourse theoretical’ approach (Laclau, 2005). Given the differences between court documents and political discourse, this flexibility is particularly important to allow for new strategies for measuring populism to emerge from the data itself.

Process for analysis

This paper focuses on analyzing court documents pertaining to the *Masterpiece Cakeshop* case filed by Jack Phillips and his lawyers from the Alliance Defending Freedom in both lower courts (decisions and appeals by Phillips’ defense) and the Supreme Court (oral arguments and decision), as well as amicus briefs filed in support of Jack Phillips. These documents were gathered from the Alliance Defending Freedom case webpage² and the Supreme Court website.³ Using R software, the first step was to import the court documents and break each document into paragraphs. I chose this unit of analysis as it allows for a more granular analysis of the data than would a classification of each document in its entirety, and it allows for more discursive context to be analyzed than a word-level analysis would allow for. Simply identifying explicit use of ‘the people,’ ‘elites,’ ‘the general will’ and ‘others’ is insufficient because right-wing populism emerges when these concepts are framed in particular ways. As such, paragraph-level analysis provides the contextual detail necessary to more accurately determine how these concepts are presenting, and if they are being invoked in line with a right-wing populist style. I then randomly sampled 65 percent of the paragraphs using a subsetting function in R for qualitative, manual coding. Each paragraph in the sample was then coded according to the presence of themes resonant with ‘the people,’ ‘elites’ or accusations of elitism, conceptions of ‘the general will,’ and ‘the other’ or anti-pluralist sentiment. Only 65 percent of the paragraphs were sampled because in subsequent phases of this project, I intend to use word embedding⁴ techniques to

² <https://adflegal.org/case/masterpiece-cakeshop-v-colorado-civil-rights-commission>

³ <https://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/>

⁴ Word embedding is a supervised machine learning technique (wherein text is analyzed and classified according to pre-determined categories) that analyzes text by looking at the order and context of words. Specifically, this method is a way of representing texts based on their meaning and the information that they convey by examining the semantic relationship between words (Dai, 2018). Words are represented as vectors of numbers in space wherein semantically similar words are positioned close together and dissimilar words are farther apart (Dai, 2018). The

classify the remaining paragraphs as populist or not. For the purposes of this paper, however, I relied on the themes that emerged from the manual coding to understand how populism appears in court documents.

Findings

By relying on the ‘discourse theoretical’ approach to understanding how the populist frames of ‘the people,’ ‘the elite,’ ‘the general will,’ and ‘the other’ might be articulated, I found that similar themes emerged; however, these concepts were not explicitly invoked. Rather than conceptions of a homogenous, restrictively defined ‘people,’ I found an emphasis on a moralistic, *individual* sovereignty. The notion that ‘the people’ themselves are “the legitimacy basis of politics and the legal order,” and have directly connected to constitutions and their norms rather than a relationship mediated by a judicial body is an intrinsic component of populism (Blokker, 2018, p.5). This direct, unmediated relationship to the Constitution was clearly apparent in the way advocates for Jack Phillips crafted their argument for individual rights and more limited institutional (judicial) power, however; the emphasis was on each person as an individual rather than an exclusively defined collective. This framing was also apparent in accusations against the courts, the government, and the Colorado Civil Rights Commission of bias against religious identity specifically, but any individual who seeks to invoke their First Amendment rights in conflict with ‘mainstream,’ ‘socially acceptable’ points of view. The ‘general will’ was less apparent, as the focus of the arguments were on the superiority of the First Amendment over antidiscrimination laws in a hierarchy of rights. A unified ‘will of the people’ was apparent insofar as it was framed as being in the best interests of all Americans to reinforce this hierarchy to protect the legitimacy of the country’s founding documents. Finally, the ‘other’ emerged through the baker’s (and religious Americans’ by extension) claim to victimhood as a result of restrictions on their right to freely express their identity as they see fit. Rather than directly blaming LGBTQ people for the alleged discrimination faced by religious Americans, the focus was on discrediting the legitimacy of Craig and Mullins’ claim of discrimination.

Individuality and Individual sovereignty

In these court documents, ‘the people’ were conceived of by Jack Phillips’ lawyers and supporters as those religious Americans who are being discriminated against and forced to express or endorse views they disagree with. This reflects the populist tendency to conceive of the sovereign people as “a collective actor constituted through relations of antagonism with the status quo” (Panizza & Miorella, 2009, p.41) Arguments about ‘the people,’ however, focused primarily on individuality and individual sovereignty—specifically the right to freely practice religion and the right to freedom of speech and expression without government or judicial interference. Central to this claim is the argument that there is “a constitutional right of personal identity for all citizens, including the right to identify by the religious beliefs and practices central to one’s identity” (Christian Business Owners, 2017).

Additionally, petitioners and Amici Curiae argued that Phillips’ cake design business constituted a form of speech and expression “whose liberty is safeguarded by the first amendment” (International Christian Photographers, 2017). The Cato Institute (2017) argued in an amicus brief that “the art of baking and decorating cakes, particularly wedding cakes, exhibits all the

approach emerges from the distribution theory in linguistics which posits that words that appear in similar semantic contexts are likely to have similar meaning (Firth, 1957).

characteristics of other expressive formats that this court has recognized as Constitutionally protect,” particularly given that producing a wedding cake would amount to ‘condoning’ the ceremony. As such, it was argued that Phillips could not, in any way, be coerced by the government to produce a cake for Craig and Mullins’ wedding—a ceremony he objected to on religious grounds. Creative professionals “ought not to face punishment just because [they] want to promote ideas and events consistent with [their] own views,” in the same way as authors, writers, and artists (479 Creative Professionals, 2017). Though lower courts had ruled in favor of Craig and Mullins, in part by arguing that Phillips’ expression was not protected by the First Amendment given its production as part of a large-scale business, supporters of Phillips argued that “the Constitution broadly guarantees liberty of religion and conscience to citizens who participate in public life according to their moral, ethical, and religious convictions” (Family Research Council, 2017). ‘The people’ here are thereby permitted to express themselves, whether for profit or not, in ways that align with their religious beliefs as protected by the First Amendment.

The argument for a protection of the right to freely practice religion went beyond constitutional claims, and cited language from *Obergefell v. Hodges* (2015), the landmark case that legalized same-sex marriage in the United States. Because the *Obergefell* case had emphasized the need to recognize the right of religious groups and individuals to advocate that same-sex marriage is wrong, the application of Colorado’s Anti-Discrimination Act (CADA) as it stood would violate the Constitution by “forc[ing] Mr. Phillips to ‘condone’ same-sex marriage by both his active assistance and his symbolic expression, seriously compromising his ability to ‘advocate with the utmost, sincere conviction’ against such marriages” (American College of Pediatricians et al., 2017). Specifically, Amici Curiae pointed to the language in *Obergefell* that people’s “right live their lives and conduct their businesses free from government coercion to act contrary to [their] decent and honorable [religious or philosophical] beliefs should be protected” (Concerned Women for America, 2017).

The emphasis on individual sovereignty as the right to practice religion free from government or judicial intervention or coercion also leads to claims that Phillips’ denial of service to Craig and Mullins did not amount to discrimination against them because of their homosexuality, but that he had simply “declined to participate (directly or in-directly) in their same-sex wedding because, whether one agrees with him or not, for religious reasons he viewed that ceremony as reflecting a moral choice—a choice that, also for religious reasons, he could not support” (Council for Christian Colleges and Universities (CCCU), 2017). This implies that for religious individuals, there is a distinction between such an objection and outright discrimination. While ‘the people’ might believe that “all men are created equal [...] they reserve the liberty to abstain from affirming that all *conduct* of men is equal” when such conduct “violates the religious faith central to their identity” (Christian Business Owners, 2017, emphasis added). While the Colorado Court of Appeals “held that [the Colorado Anti-Discrimination Act] forbids cake artists from declining requests for reasons ‘closely correlated’ to a protected characteristic” (Writ of Certiorari, 2017), by arguing that Phillips would have been willing to sell Craig and Mullins a cake for any other purpose than a wedding, the petitioners sought to separate LGBTQ identity from LGBTQ conduct. In so doing, the petitioners were able to defend Phillips’ denial of service as unrelated to Craig and Mullins’ LGBTQ identity. The rights of each individual American to choose if and how to condone *actions* and *behaviors* is the crux of Phillips’ defense. Even as ‘the

people’ in this case are assumed to be religious Americans, Phillips’ defense focuses on the rights of every individual American to freely act on their moral convictions, regardless of the potential negative effects on others, without interference from the government or the judiciary.

Limiting institutional power

In the court documents, Phillips’ defense does not directly refer to the government, the courts, nor, the Colorado Civil Rights Commission as ‘elites,’ but instead focuses on the ways in which these institutions unlawfully infringe on individual, Constitutional rights. For example, Amici Curiae and petitioners repeatedly argue that the Colorado Civil Rights Commission and the courts overstepped their role by coercing an artist to create something. In fact, the States of Texas, Arizona, Alabama, and 17 others (2017) argued in their amicus brief in support of Phillips that the Supreme Court “has never allowed a government entity to compel art or expressive conduct,” and “cannot force a citizen to engage in or endorse expression—whether saluting a flag, or even passively carrying a message on a license plate.” As a result, attempts to ‘force’ Phillips to comply with the Colorado Anti-Discrimination Act by designing a cake for Craig and Mullins were seen as a particularly egregious violation of the First Amendment. The Colorado Civil Rights Commission is portrayed here as unduly assuming the power to compel someone to ‘speak’ in the name of anti-discrimination, despite the established precedent limiting their right to do so. This was also tied to the right to *not* speak, particularly if speaking “propounds a particular point of view,” a choice that “is presumed to lie beyond the government’s power to control” by virtue of falling within the First Amendment (479 Creative Professionals, 2017). Though cases like *Obergefell v. Hodges* had pointed to the right for religious individuals to maintain a belief system in which same-sex marriage cannot be condoned, petitioners in a Writ of Certiorari to the Colorado Court of Appeals pursuing a judicial review of the decision to uphold the Colorado Civil Rights Commission’s ruling against Phillips maintained that, in ruling against Phillips, the Commission and the Colorado Court of Appeals “approved nothing less than the ‘outright compulsion of speech’” (2016).

Anti-elitism does, however, emerge clearly in the accusations of favoritism for certain minority identities over religious identity. Jack Phillips’ supporters adamantly claimed that a ruling against Phillips was wrong because it marked a departure from previous legal decisions in similar circumstances, which highlighted that the courts were biased against religion as a motivation for protecting speech and expression. In pointing to a separate decision wherein the court ruled that a secular baker could decline to bake a cake displaying an offensive message denigrating same-sex relationships under the First Amendment (*Jack v. Gateaux, Ltd.*, 2015), Amici Curiae argued that the court was discriminating against religious Americans by not adhering to the same legal precedent in the ruling against Phillips. Whereas in the *Jack* case, the court “readily accepted that their cakes would communicate a message and that they could refuse to express it,” petitioners accused the Colorado Civil Rights Commission of telling Phillips “(1) that his custom wedding cakes do not communicate anything, (2) that even if they did, the expression was not his but his clients, and (3) that no one would attribute meaning to his cakes beyond compliance with [the Colorado Anti-Discrimination Act]” (Writ of Certiorari, 2017). Amici Curiae argued that “the free exercise clause protects ‘religious observers against unequal treatment,’” and that “if a law burdens the free exercise of religion and leaves analogous sexual conduct unregulated, it is not a generally applicable law” (Christian Legal Society, 2017). As a result of the courts’ inconsistency in interpreting the basis of a denial of service as demonstrated

through a comparison of the *Jack* and *Masterpiece* cases, Jack Phillips’ supporters argued that “the same law that makes it impossible for religious individuals to honor their own beliefs allows other merchants to express their political beliefs” (Law and Economics Scholars, 2017). In line with the right-wing populist strategy of “alleg[ing] a nefarious alliance between” the powerful elite—political actors and institutions like courts alike—and “unworthy” minorities (Kazin, 2016, p.17), Phillips’ supporters constructed a narrative in which the Colorado Civil Rights Commission and the courts are accused of inconsistently applying anti-discrimination laws to protect favorable secular political views over less favorable religious convictions. As a result, human rights are portrayed as being “turned into a tool of oppression that the alienated elites use to promote the interests of a few at the expense of the interests of many” (Bílková, 2018. p.161). Petitioners used this apparent double standard as the basis for calls to dismiss the cease-and-desist order against Phillips.

Similarly, the governmental and judicial elite were further accused of protecting minority interests at the expense of Constitutionally protected rights more tied to national identity (Brysk, 2019; Gostin et al., 2020) by punishing religious beliefs deemed to be socially unacceptable. Amicus Curiae, the Liberty Counsel (2017) argued in support of Phillips that “the state is impermissibly treating religious freedom as a personal preference that can be swept aside for convenience” rather than a sincerely held conviction that occupies “a preferred position” in the Constitution. This was considered to set a “dangerous precedent” (Christian Business Owners, 2017) wherein religious Americans are victimized by a government and justice system committed to eliminating ‘unfavorable’ views and opinions. In particular,

in its refusal to protect Jack from discrimination, the commission demeaned Jack’s religious beliefs as being discriminatory and not worthy of governmental protection. [...] government officials have unconstitutionally applied their laws to discriminate against people who believe—as a matter of deeply held religious conviction—that marriage is inherently a union between one man and one woman (William Jack and the National Center for Legal Policy, 2017).

Rather than truly achieving the goal of preventing discrimination, the courts and the Colorado Commission are accused of unduly burdening—and even outright discriminating against—religious Americans by circumventing and threatening their Constitutionally enshrined liberties. Anti-elitism in the legal documents took the form of an argument that the Colorado Civil Rights Commission and Court of Appeals were not only abusing their power by compelling speech in violation of the First Amendment, but that the perceived inconsistency in anti-discrimination cases pointed to the preferential treatment of minority groups—the LGBTQ community in this case.

The hierarchization of rights

The petitioners and Amici Curiae not only accuse the courts of unduly burdening religious people, but of forcing agreement with societal trends and government policies that are deemed favorable. Specifically, that “governments may not interfere with someone’s expression simply because they find his message harmful and demeaning” (Sherif Gergis, 2017). The shared understanding among the petitioners and Amici Curiae was that “consideration must be provided for those like Jack Phillips in a landscape increasingly hostile to his views” (Restoring Religious

Freedom, 2017). The need to protect opinions and viewpoints regardless of whether they are broadly perceived to be socially acceptable is portrayed by Phillips’ supporters as central to the general will and interests of ‘the people’—both religious Americans and others—who hold views that counter the mainstream. As explored further below, Jack Phillips and religious Americans (‘the people’) are constructed as the true victims in this case by virtue of their beliefs that run contrary to what the government deems to be socially appropriate views. In their amicus brief in support of Jack Phillips, the Becket Fund for Religious Liberty argued:

by enforcing the Colorado Anti-Discrimination law against Phillips without regard to his free speech rights, the government is telling him to ‘get with the program’ in a way that badly distorts the marketplace of ideas by strengthening service providers who toe the government line and financially crippling those who refuse to say what the government demands (2017).

Jack Phillips’ supporters argued that forcing conformity with dominant ‘social trends’ victimizes those who dare to oppose these trends. In particular, “while first amendment protections for Phillips would not undermine any of the legitimate purposes of sex or sexual orientation nondiscrimination statuses, a ruling against him would undermine his equal status in society” (Ryan Anderson et al., 2017). Amicus Curiae 479 Creative Professionals (2017) similarly argue, “First Amendment rights [...] protect the dignity of the human person as people try to live life in conformity with what they believe to be the truth, particularly the truth about morality and the divine. A ruling against Phillips would therefore threaten his dignity.” Petitioners and Amici Curiae thereby sought to establish that creating a hierarchy that places sex and sexual orientation nondiscrimination laws above the Constitutional rights to freedom of speech and religion relegates religious Americans to second-class status. This example represents the right-wing populist strategy of criticizing contemporary human rights movements as serving particular groups and promoting particular agendas as opposed to their original purpose of “protect[ing] the people, [and] reflecting the concerns of the majority of society” (Bílková, 2018, p. 161).

In many constitutional democracies, laws and norms originate and gain legitimacy from the country's constitution. Though constituent power (‘the people’) is responsible for the initial determination of the norms and laws enshrined in the constitution, once established, constitutional institutions become influential themselves (Pin, 2019; Scholtes, 2019). As a result, many right-wing populist leaders become skeptical of how well constitutions represent “the people” and their ‘general will’ in the present moment. Right-wing populism in the United States has an interesting relationship with constitutionalism, given that the country's founding centered around a constitution. While right-wing populist leaders often seek to undermine the constitutional order in favor of what they perceive to be laws that better represent ‘the people,’ in the United States, conservative ideology, broadly speaking, advocates for an ‘originalist’ reading of the Constitution in all questions of norms and laws. In other words, conservative leaders, institutions, and individuals reinforce the importance not only of the Constitution, but of the Constitution as we deduce what the Founding Fathers intended the text to mean in 1776. In the context of right-wing populism, this means that where legal questions arise, those rights that are explicitly enshrined in the Constitution must take precedence over all other laws that rely on interpretations of the Constitution—deductions of what the text means in the context of and at the time when it is interpreted (Greene, 2021). ‘Originalism’ as such contributes to the right-

wing populist arguments that though “human rights once enshrined the most basic principles of human freedom and dignity”—as demonstrated in documents like the U.S. Constitution—“the sheer quantity and variety of rights, which protect virtually all human interests [...] deviates attention and resources away from those human rights that are truly fundamental” (Bílková, 2018, p.162).

Arguments on behalf of Phillips can be seen in the context of this ‘originalism,’ as they seek to afford primacy to Constitutional freedoms over anti-discrimination and public accommodations laws at all costs. The Foundation for Moral Law argued in their amicus brief,

the [Colorado Court of Appeals (CCA)] has twisted the newly-minted right to same-sex marriage into an imaginary right of same-sex couples to force others to promote their same-sex weddings. Worse, the CCA has elevated this supposed right above the Constitutionally enumerated rights of free exercise of religion and free speech.

This argument represents supporters of Phillips’ attempts to portray the relatively new right to same-sex marriage as contributing to overexpanded civil rights that force religious individuals to compromise their values. The Foundation for Moral Law (2017) points to the enshrinement of religious freedom and free speech rights in the Constitution to directly contrast with rights like same-sex marriage which emerged from an *interpretation* of the Constitutionally enumerated rights. As stated in an amicus brief by 479 Creative Professionals (2017):

while societal winds are susceptible to shifts, the First Amendment is supposed to be the constant. It should protect those who decline to promote same-sex marriage, along with those who want to promote same-sex marriage. Indeed, this historically-based freedom is (or at least, should be) for everyone, regardless of viewpoint.

This quotation demonstrates the hierarchization of rights that is often seen in right-wing populism (Greene, 2021; Haynes, 2020; Kazyak et al. 2018), wherein the First Amendment is part of the fabric of American identity and enshrined in the country’s most sacred of founding documents; the Constitution. Rights like that of same-sex marriage, on the other hand, are portrayed as part of the “societal winds” (479 Creative Professionals, 2017) that shift and reflect the ever-changing predominant social viewpoint at a given time.

In light of the perceived clash between civil rights laws and religious freedom, Jack Phillips’ case rested on the argument that “government entities are not free to employ non-discrimination and public accommodation laws as a means to compel creative professionals to ‘modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own” (479 Creative Professionals, 2017). In the Supreme Court’s 2018 decision, Justice Clarence Thomas goes so far as to state that a ruling against Phillips “flouts bedrock principles of our free-speech jurisprudence and would justify *virtually any law* that compels individuals to speak” (emphasis added). Once again, a ruling against Phillips is portrayed as something of a ‘Pandora’s box’ that would allow the Constitutional freedom of religion and right to free speech to be regularly circumvented. In several instances, amici curiae reference the words of James Madison, a founding father, to confirm the precedence of religious

freedom over all other rights (Center for Constitutional Jurisprudence and National Organization for Marriage, 2017).

Overall, Jack Phillips’ supporters attempt to caution against a ruling that would allegedly undermine the First Amendment by affording primacy to civil rights and public accommodation laws. Clarence Thomas argued in the 2018 Supreme Court decision that “when a public accommodations law ‘ha[s] the effect of declaring... speech itself to be the public accommodation,’ the First Amendment applies with full force.” In other words, neither the government, nor the court has a right to enforce a public accommodation law when the resulting accommodation or service constitutes an expressive act or speech. Ultimately, Jack Phillips’ supporters demand that the right to freedom of religion and speech be prioritized over anti-discrimination and public accommodations laws. Accordingly, “state law rights cannot trump Constitutional rights” because “legislatively created ‘equality’ rights do not justify the suppression of free expression” (Colorado Civil Rights Commission Department of Regulatory Agencies, 2014). Not only did Jack Phillips’ lawyers and advocates construct a hierarchy of rights by emphasizing an originalist perspective, this hierarchy—most notably the protection of the First Amendment above all else—was portrayed and representing the ‘common interests’ of all Americans to protect the Constitution and the rights enshrined therein from the shifting social trends and ‘political correctness’ that characterize the contemporary human rights project.

Redefining ‘otherness’

Interestingly, no claims were explicitly made in the court documents that ‘the people’ constitute a *majority*, but rather that they are the group responsible for bearing the burden of protecting the Constitutional right to religious freedom and freedom of speech. Religious Americans and anyone concerned with upholding Constitutional rights and freedoms are portrayed as “the common people [who] are neglected [...] ignored or, even, discriminated against” in the face of minority groups “clamouring for more and more rights” (Bílková, 2018, p.161). Arguments in support of Jack Phillips expand how the ‘other’ is typically presented by right-wing populist actors by portraying Phillips and religious Americans more broadly as the true victims in a ‘politically correct’ system that punishes dissenting views. In other words, ‘the people’ themselves are the ones being ‘othered’ as an elitist court panders to minority interests, as well as views and opinions deemed to be ‘socially acceptable.’ The Family Research Council argued in their amicus brief:

this case is not really about LGBT rights or discrimination. That smokescreen obscures the invidious inequality Colorado has created. Citizens who graciously serve, interact with, and employ LGBT persons, but oppose redefining the institution of marriage, are now treated as unequal. Colorado imposes crippling penalties to punish a dissenting view of marriage. This blatant viewpoint discrimination is anathema to the first amendment.(2017).

This quote exemplifies how, again, Phillips is constructed as a victim in a system that seems to want to undermine Constitutional protections in favor of civil rights. Furthermore, petitioners sought to expand the implications of the case to apply not only to the protection of religious freedom and expression, but to the rights of all people who wish to protect their right to *not*

speak or express themselves when the message is offensive to them. Specifically, petitioners argued to the Colorado Supreme Court:

the legal principle Phillips seeks to vindicate would not only protect him, but also ensure that a gay tailor could decline to create a jacket embossed with messages favoring marriage between one man and one woman, or that a black tailor could decline to make shirts displaying the confederate flag. Freedom from compelled speech is a fundamental right all citizens enjoy, not just those with ‘acceptable’ beliefs. (2015).

Not only would ruling against Phillips stifle the rights of religious objectors to, for example, same-sex marriage, petitioners argued it would effectively force all creatives to produce morally or politically objectionable messaging. This strategy effectively grouped Phillips and religious Americans’ plight of compelled speech under public accommodation and anti-discrimination laws together with the experience of race-based minorities who might object to producing an overtly racist message.

In reference to the ‘other’—LGBTQ people—petitioners and Amici Curiae also argued that public accommodation laws—designed to protect minority groups from discrimination and ensure their access to services—could not be extended to a bakery like Phillips’. This is because, “these businesses are not monopolies providing essential services for life. They operate in an economy of thriving competition, where consumers can find another provider with little to no trouble at all” (Thomas More Society, 2017). In fact, from this perspective, Craig and Mullins could not even claim to be discriminated against under this premise because they could have sought business elsewhere in a competitive market (which they ultimately did, successfully). Jack Phillips’ supporters aimed to convince the court that in cases where there is a competitive market in which services can readily be sought elsewhere, exceptions to state anti-discrimination laws can and should be granted because they do not constitute “a threat to meaningful participation in commercial life” (Law and Economics Scholars, 2017). The discourse in the court documents on the delegitimation of Craig and Mullins’ claims of discrimination rather than directly vilifying the LGBTQ community for the alleged discrimination faced by religious Americans, while ‘the people’ themselves were constructed as the true ‘other’ in society by way of shifting laws and social values that limit and infringe upon their rights.

Conclusion

As Bílková (2018) points out, questioning the legitimacy of human rights is a typical stand taken by right-wing populist leaders around the world who feel that human rights have been ‘hijacked’ by minorities and, as a result, no longer protect the most basic and fundamental rights of the ‘true majority.’ However, this sentiment has not widely been studied in the context of actual court cases dealing with contentious, partisan human rights claims. This study sought to operationalize Ostiguy and Moffitt’s (2021) relational approach to populism by exploring the way socio-legal discourse is shaped by a right-wing populist political context. The findings suggest that Mudde and Kaltwasser’s (2012) more rigid measurement of populism according to the presence of references to ‘the people,’ the ‘elite,’ and a ‘general will’ is insufficient for understanding how human rights claims are articulated by the political right. Right-wing populist framing strategies were apparent in the sampled court documents, and Laclau’s ‘discourse theoretical’ approach allowed for sufficient flexibility to understand how such strategies manifested. The findings of

this paper further support a relational approach to studying populism as they suggest that right-wing populism does not only emanate from a political party or leader, but pervades the institutional landscape as well. Ultimately, if one seeks to develop an approach to measuring right-wing populism (or populism more broadly) in socio-legal discourse that mirror's that of Mudde and Kaltwasser (2012), new dimensions or frames are necessary to fully capture how right-wing populist framing strategies influence the articulation of a human rights claim.

As this study is part of a larger dissertation project, I will subsequently apply a similar analytic strategy to Twitter data gathered through the identification of hashtags relevant to the *Masterpiece* case from its filing in 2012 through the Supreme Court decision in 2018. This next step will shed light on how more colloquial, mainstream conversations about such human rights claims are shaped by the overarching right-wing populist political context. Additionally, given the importance of emotion and affect in the study of populist political discourse, I will conduct a sentiment analysis of both the court documents and the Twitter data to assess whether affect is similarly apparent in socio-legal and mainstream discourse surrounding a human rights claim.