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Do Bakers Have to Bake Cakes for Same-Sex Weddings?

Abstract

"As to the underlying issue of whether wedding cakes are something that the government can compel a baker to bake for same-sex couples, well, the jury is still out."

Posting about a recent ruling from the Supreme Court regarding free expression vs. public accommodation from *In All Things* - an online journal for critical reflection on faith, culture, art, and every ordinary-yet-graced square inch of God's creation.

<https://inallthings.org/do-bakers-have-to-bake-cakes-for-same-sex-weddings/>

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in all things

June 6, 2018

Do Bakers Have to Bake Cakes for Same-Sex Weddings?

Donald Roth

On June 4, the Supreme Court handed down its opinion in [*Masterpiece Cakeshop v. Colorado Civil Rights Commission*](#), a case closely watched by many in the Christian community. In this case, Masterpiece Cakeshop won by a 7-2 margin, but this was not a total victory. Instead, this was a case decided very much on the narrow facts presented, and the implications that this case might have for future disputes is very much up in the air. For those of you who don't have a legal background, I'll save you 59 pages of reading with a summary and some analysis of what this case said and what it means for the future (spoiler alert: it's not much).

The Facts

In 2012, Charlie Craig and Dave Mullins asked Jack Phillips, the owner of Masterpiece Cakeshop, to bake a cake for their wedding reception (Colorado did not recognize same-sex marriage at the time, so the couple were getting married in Massachusetts). They appear to have been looking for one of the standard cakes that Phillips made, not requesting a custom work that made specific reference to the gay couple (this is an important fact for several justices). Phillips refused to make a cake for the couple because of his religious beliefs, and he asserted that all of his all of his wedding cakes were highly customized, expressive art. The couple then filed a discrimination claim against Phillips with the State of Colorado, which found in their favor and ordered Phillips to cease all discrimination based on sexual orientation and take a number of other remedial steps.

The Majority Opinion

Justice Anthony Kennedy authored the opinion for the 7-2 majority, and his particular judicial philosophy shines throughout the text. Kennedy is a devout Roman Catholic marked by a libertarian judicial philosophy that puts him at an odd sort of tension over LGBT issues, trying to maintain robust legal protection for both religious belief and the personal choices of the LGBT community. As he famously said in [*Planned Parenthood v. Casey*](#), "at the heart of liberty is the

right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." There is a ton that could be unpacked here; however, this sensibility gives Kennedy a strong conviction about the basic dignity of both sides and a desire to maximize liberty all around. This is why he went to great lengths to be conciliatory in ruling against many people's religiously-motivated beliefs in *Obergefell v. Hodges*, and it animates much of the force and fire behind his reasoning in this case.

The majority opinion starts its legal analysis by pointing to the reasonability of the main issue that both sides are concerned about. It points out that it is "unexceptional" that Colorado can protect gay persons "in acquiring whatever products or services they choose on the same terms and conditions as are offered to other members of the public." It also mentions that Phillips considered wedding cakes to be a special order, requiring him to apply his own expressive talents in a way that is different from, say, selling a premade cupcake to anyone walking in off the street. It also notes that Phillips' objection was even more reasonable at the time, as same-sex marriage was still unrecognized in Colorado.

The Court acknowledges that there is a thorny interplay between the line of free expression and public accommodation, but that is about all the hand-waving the Court makes at this core issue that many people were hoping this case would resolve.

Instead, the determinative factor in this case is that Colorado was obligated to give Jack Phillips a fair and neutral hearing of his case, and it failed to do so. At the hearings conducted by the Civil Rights Commission, several commissioners showed hostility to the idea that religious beliefs have any bearing on commercial activity. At one point, a commissioner went so far as to say,

"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."

The majority takes serious exception to this comment as it disparages Jack Phillip's faith by calling his belief both despicable and "merely rhetorical—something insubstantial or even insincere." This is then set against three specific rulings that the Commission made in favor of bakers who refused to bake cakes that carried anti-same-sex marriage messages because the bakers (and the Commission) found the messages offensive. Colorado courts took sides based on what they judged to be offensive or inoffensive in a way that officially disapproved of Jack Phillips' religious beliefs, and, therefore the Civil Rights Commission's finding against Phillips was invalidated.

In short, Kennedy's majority opinion is that he doesn't want to pick sides in main event, but he will ding Colorado here for failing to maintain a proper sense of decorum and respect toward the other side.

The Concurrences

To those who follow the Supreme Court, it may have been initially surprising to see Justices Kagan and Breyer signing on to the majority opinion, since they are usually grouped in with the Progressive wing of the Court. However, they make it clear in Kagan's concurrence (which Breyer joined) that their votes are tied explicitly to the reasoning used by the Colorado courts in judging what made Masterpiece Cakeshop different from the three bakeries that were not compelled to make anti-gay cakes. Essentially, Kagan's concurrence argues that Colorado could have distinguished these by saying that the three bakeries refused to make any hateful cakes for anyone, while Jack Phillips refused to make a cake he would have made for others explicitly because of the sexual orientation of the potential customers. By weighing in to call views of people like Phillips "offensive in nature," the Colorado Court of Appeals made its own judgment of offensiveness the line between what was legal or illegal, and that is impermissible.

Justice Gorsuch also authored a concurring opinion joined by Justice Alito, which divides the issue differently. In their opinion, all four cases were similar in that a baker was unwilling to make a certain cake for a customer based on their personal beliefs, but in all four cases, the bakers were willing to serve other baked goods to those potential customers. According to these justices, this suggests that it is protected personal belief and not legally-impermissible discrimination against a class of people that motivated all four bakers. Making an analogy to criminal law, Justice Gorsuch says that the Colorado court allowed the three other bakers to refuse service, knowing it would affect someone in a legally-protected class (religious belief), because they were not intentionally trying to harm those customers based on their protected characteristics. However, when it came to Jack Phillips, the Colorado court collapsed its analysis and considered refusing service to a gay couple to be the same thing as intending to harm them.

While primarily condemning the Colorado court for this double standard, Gorsuch's concurrence does give some strong hints that both he and Justice Alito consider specialty cakes to be a form of expressive activity subject to heightened protection under the First Amendment. However, it is only Justice Thomas' concurrence (joined by Gorsuch) which goes on to explicitly consider the core issue. Thomas identifies Phillips' wedding cakes as inherently expressive activities because of the extensive efforts Phillips takes to customize every cake to every couple. He then cites *Hurley v. GLIB1* to assert that Phillips' cakes are something that he cannot be compelled to make without Colorado law surviving strict scrutiny.

The Dissent

Although Justice Ginsberg and Kagan dissent, they do so because they read the facts differently from the majority, not because they reject the principles expressed by that opinion. In Justice

Ginsberg's dissent (joined by Justice Sotomayor), she makes a distinction between the anti-gay cakes and the cake at issue in this case because the anti-gay cakes were highly customized, shaped like a Bible, and including imagery and text that made them far more expressive, while the cake at issue in this case was a generic wedding cake like what would be sold to any heterosexual couple. In the eyes of the dissent, the issue is over whether Phillips would sell a wedding cake to a same-sex couple, not whether Phillips would make a distinct "same-sex wedding cake." Further, because there were multiple levels of judicial review of Phillips' case, and because there was no independent showing of disfavor toward Phillips' religious beliefs at every level of that review, the dissent argues that the neutrality of any level of review effectively immunizes the overall holding.

The Future

So, what is the upshot of all of this? The Court made it abundantly clear that their ruling applied to pretty much this case alone. That is, the big takeaway for government officials dealing with these sorts of cases is not to base discrimination adjudications on the fact that the government finds the views of the alleged perpetrator to be despicable. With the other qualifications about the setting in time and ample statements about acceptable means of reaching the same result, it is quite possible the Colorado Commission on Civil Rights could just start up a further investigation of Masterpiece Cakeshop and whack them all over again, just being careful to do it right this time.

As to the underlying issue of whether wedding cakes are something that the government can compel a baker to bake for same-sex couples, well, the jury is still out. It's clear that the government can compel businesses to make their services available to everyone on an equal basis when they count as "public accommodations." That is, if Jack Phillips refused to sell cupcakes to gay people, he would probably lose his appeal in the Supreme Court 9-0. On the other end of things, it's very unlikely that Colorado could force Phillips to make a cake that depicted a gay couple kissing over the words "To Bill and Ted, as They Start Their Excellent Adventure."² Having looked at some of Jack Phillips' cakes, he clearly falls somewhere in the middle. Justice Thomas makes a big deal of the artistic customization that Phillips puts into every cake. Justice Ginsburg makes a big deal of the fact that they all end up looking like wedding cakes. They both have a point.

Ultimately, there's ample evidence to suggest that this same case tried on slightly different facts would have at least four justices finding against Phillips. Justice Kennedy has a deep regard for both sides of the issue, but he scrupulously avoids revealing which side he would come down on. It's hard to know what to make of Justice Alito or Roberts not joining in with Justice Thomas (if anything). So, here we are six years after Craig and Mullins walked into Masterpiece Cakeshop without a really clear sense of whether ordering a wedding cake is more like commissioning an artist to paint a portrait or picking what toppings go into your Blizzard at Dairy Queen. We have some vague ideas, but even at 2,000 words into a summary of 59 pages of legal reasoning, that's about all I can give you.

So what advice should Christian business owners take from this? Well, [a similar case](#) from Oregon might make its way to the Supreme Court in the coming years, but I'm not sure if the facts are distinct enough that the Court will take it up. Some Christians have just dropped their wedding-related business; others have stood by, saying they will serve anyone who comes in, [but refusing to cater same-sex weddings](#). This case gives some clear indications that Christian business owners shouldn't deny potential customers the right to buy anything that comes straight off the shelf (so that probably means companies that specialize in catering). It also clearly shows that a custom request that would be denied in other settings (e.g. not putting any sexual imagery on a cake for gay or straight couples) is protected. Highly customized requests that clearly tie the company to the piece are probably protected as well, so Christians could lean their business toward work that is more overtly expressive. But for the people who just make pretty cakes or take pretty pictures, the answer is still unclear.

FOOTNOTES

1. In which the Supreme Court overturned the application of a public accommodations regulation that would have required the sponsors of a St. Patrick's Day parade to include a float from an LGBT group, saying that parades are inherently expressive and therefore subject to more extensive First Amendment protection
2. This is based on Justice Thomas' extensive interaction with the decision in [Hurley](#) and based on the fact that Ginsburg joined the unanimous majority in that case, as well as the factual distinction she drew in her dissent.