The Slowly Boiled Frog

The Stutzman hobby horse emerges at Heritage Foundation's blog

David Hart

November 29, 2016

Jim Campbell is a lawyer with Alliance Defending Freedom. You would think that he would know better. At Heritage Foundation's blog Campbell writes: "Artists' Free Speech Rights at Stake in Washington Florist Case." You know where this is going but first off, a florist is not an artist. ADF has trotted this out with every one of their bigoted clients and no court has bought the idea. They absurdly claimed that bakers are cake artists and so on. The most exquisite floral arrangement is not a work of art while still being expressive. It has no intrinsic value and it is unoriginal as we generally understand the term *originality*. *Expression* and *art* are two entirely different things. Things go downhill from there:

An African American marketer should not be forced to create an advertising campaign for a white supremacist group. Nor should a Muslim graphic designer be required to develop a webpagepromoting Jewish teachings, or a Democrat freelance writer be ordered to draft political speeches for Republicans.

White supremacists are not a protected class. In the second sentence, substitute Christian for Jewish and you know where Campbell is likely to stand. Moreover, suggesting Muslim discrimination against Jews is an appeal to stereotype. Furthermore, that graphic designer is responsible for design over content. Even if identified, no reasonable person would assign responsibility for content to the guy who chooses typefaces, colors and element placement on the site. There is no reason that he should not accept the assignment. And that Republican is also not a protected class. the Democratic writer is free to turn down a writing assignment for a GOPer in any municipality or state in the land.

Most agree with this, but Washington state Attorney General Bob Ferguson apparently does not.

Through his advocacy, he is trying to construct a real-life dystopia in which these and similar professionals will be forced to create expressive materials—like advertising campaigns and webpages—to promote, and even celebrate, ideas that violate their convictions.

What? Did Campbell do a survey or something? Moreover, this has nothing to do with what Bob Ferguson agrees with. There is no religious exemption in Washington's nondiscrimination law. In fact there are rarely religious exemptions to any laws. As Scalia explained in *Employment Division v. Smith* religious exemptions make most otherwise valid laws unenforceable. A "dystopia" exists when people have to shop around to find out who will take their money which amounts to finding a public accommodation whose owner does not disapprove of them.

The most recent evidence of this came when the Washington Supreme Court heard arguments in Ferguson's case against Barronelle Stutzman.

Stutzman is a 72-year-old floral artist who serves everyone in her community, regardless of their race, sex, religion, or sexual orientation. But because of her deeply held religious beliefs about marriage, she cannot custom design floral arrangements to celebrate a same-sex wedding. So while she has been glad to serve Rob Ingersoll—a gay man—for nearly a decade, she could not use her artistic expression to celebrate his nuptials.

Stutzman's age is irrelevant. Equally irrelevant is who she has historically deemed worthy of her flowers. She refused to serve a gay couple for their wedding. It stands alone as an act of discrimination regardless of anything that she has done in the past. Even more disingenuous than calling her flowers "artistic expressions" is claiming that arranging the flowers means "to celebrate" the couple's wedding.

If that were the case then Stutzman is doing a whole lot of celebrating. The good Christian has celebrated second or third marriages, possibly where the bride is already pregnant. She might have even celebrated a divorce or two as well as some interfaith Jewish-Christian marriages which means, in her world, that both of the betrothed are destined for Hell. No one forced Stutzman to own and operate a flower shop. She chose to do so and the civic bargain is that she agrees to obey laws pertaining to how she runs that business.

To Ferguson, this sort of conscientious objection is, well, legally objectionable.

Some who oppose Stutzman's desire to peacefully live out her convictions argue that designing floral arrangements is not art or constitutionally protected expression. That argument—which ignores the many U.S. Supreme Court cases that so broadly define expression that even nude dancing is considered constitutionally protected—is not Ferguson's. He admitted that Stutzman's floral design work is "a form of expression," and that "arranging these flowers is no less speech than writing a poem celebrating a particular message."

Conscientious objection? What? Is this a Vietnam replay? Give me a break. Campbell is deliberately introducing confusion. Floral arrangements are protected speech as works of expression. That does not mean that they are works of art created by an artist. Mr. Ferguson is apparently more intellectually honest than Mr. Campbell. I would bet that the Washington Supreme Court won't buy the argument either.

I will remind Mr. Campbell that *with* Scalia still among the living, the Supreme Court of the United States refused to hear the case of their bigoted photographer who didn't want to photograph a commitment ceremony in New Mexico. There are photographs that are works of art yet a commercial photographer is not an artist per se. At least not according to the New Mexico Supreme Court.

So Ferguson's position is that if an artist makes a living through her expression, she must accept all requests to create expression, regardless of whether she considers some messages deeply offensive. Or she must be punished.

We know this because one of the justices asked Ferguson whether constitutional principles of

free expression ever protect a business owner who is accused of violating a so-called nondiscrimination law. And he said that they would not.

Again, Campbell is confusing constitutionally protected expression with artistry. The answer to the justice's question is “no.” Could a bartender refuse to serve a customer because of their race and then claim that his ethereal cocktails are temporal works of art?

Further highlighting his extreme views, Ferguson went so far as to say that Stutzman could not “do the wedding flowers for heterosexual couples and have another employee handle it for same-sex folks.”

So it’s not enough for, say, an LGBT business owner who designs shirts for a gay pride festival to have her employee design shirts for the group protesting the festival. She must actually do it herself. Are we really to believe that American law, rightly understood, is such a conscience-crushing steamroller?

Frankly, I did not hear Ferguson say that. If he did I would disagree with him but that has little or no bearing on this case. The judge in the Kim Davis case allowed for specific deputy clerks to handle the same-sex weddings but I don't see how or where this applies. As for that simile, how about the gay couples who are sick and tired of being steamrolled out of society by conservative Christians?

We’re not talking about business owners refusing to provide someone a mundane, unexpressive product—like a meal or a box of laundry detergent—because they dislike that person’s race, religious, or sexual orientation. We’re talking about compelling people to use their artistic talents to create messages or actively participate in expressive events that they cannot in good conscience support.

The expressiveness of the goods is irrelevant. And a chef might very well consider that “meal” he cooked to be an expressive work of art. The compelled speech argument is a non-starter and no reasonable person would confuse selling flowers with participation in the event that the flowers are destined for.

Imagine that you’re a black citizen living in America, that you worked hard to build a profitable marketing company, and that you’ve developed successful advertising campaigns for various black community groups. Now suppose that a white supremacist organization asks you to develop a similar campaign for their local chapter. You, of course, are happy to do work for white customers, but understandably will not create advertisements that promote a group whose goals conflict with your identity as a black man or woman. You are obviously not rejecting a customer based on race. You are opting not to promote an idea you reject.

This schmuck is repeating himself. White supremacists are probably not a protected class anywhere in the U.S. *including* Alabama.

Yet Ferguson, it seems, would have you create that speech, your conscience be damned. You “voluntarily” entered into business, he would say; now you must accept the “consequences” of the law as he sees it. Capitulate or close your business. Never mind that your family would lose its only means of financial support. You should’ve thought of that, so his argument goes, before pursuing your career aspirations.

It's not how Ferguson interprets the law — it is how it is written. There doesn't seem to be any ambiguity and there sure as hell isn't a religious exemption and for good reason. We cannot test religious belief. Anyone could claim any kind of religious belief to support denying service to just about anyone for just about any reason.

Skipping over some repetition:

But Ferguson is simply mistaken about the law. The U.S. Supreme Court has long recognized that the First Amendment prohibits the government from forcing citizens to express (or help communicate) messages that they find objectionable. The government cannot force an individual to be an "instrument for fostering public adherence to an ideological point of view he finds unacceptable."

Cato Institute and Eugene Volokh filed amicus briefs with a compelled speech argument in *Elane Photography v. Willock* (the New Mexico photography case). The Supreme Court declined to hear the case. Volokh is a libertarian and I understand the argument. However I would be rather miffed if some baker declined my nephew's bar mitzva cake because all Jews are destined to burn in Hell. Do I really have to shop around to find a willing baker? Were the compelled speech argument to hold up it would render just about every nondiscrimination law in the country unenforceable.Anyone can claim that their particular endeavor is expressive and protected speech.

But unless the Washington Supreme Court sets Ferguson straight, all who create expression in the marketplace have ample cause for concern, whether you're a floral artist with conservative Christian views about marriage or an LGBT promotional printer who doesn't want to create materials that criticize same-sex marriage.

I am not sure if refusing the printing job constitutes religious discrimination. I would take the job after making it abundantly clear that I would donate the profits to HRC. Is he working the refs or does Campbell have some other agenda?