



Of Gays and Wedding Cakes

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Last week the U.S. Supreme Court heard oral arguments in the case known as *Masterpiece Cakeshop, Ltd., and Jack C. Phillips v. Colorado Civil Rights Commission, Charlie Craig, and David Mullins*. Phillips is the Lakewood, Colorado, baker who, citing religious reasons, refused in 2012 to make a wedding cake for Craig and Mullins, a same-sex couple.

So far, Craig and Mullins have been winning. When they took their case to the Colorado Civil Rights Commission, it ruled that when a baker refuses to sell a wedding cake to a couple because they're gay, it amounts to an illegal refusal of service by a public accommodation on the basis of sexual orientation. Phillips, an evangelical Christian, took the case to the Colorado Court of Appeals, which in 2015 unanimously affirmed the commission's ruling. This June, after the Colorado Supreme Court chose not to review the case, the U.S. Supreme Court agreed to hear it, apparently because of one detail of Phillip's defense: he said that his refusal was not an act of discrimination – he would've been glad to bake, say, a birthday cake for the couple – but he didn't want to bake a wedding cake for them, because that would have felt to him like an implicit endorsement of something he found morally objectionable.

The most commonly heard argument for Phillips is that the First Amendment, by guaranteeing his freedom of religion, also guarantees his right to turn down any job that would involve him in an activity that is at odds with his religious beliefs. This argument doesn't work for me, because my first reaction to it is to picture a devout Muslim doctor presented with the case of a gay or Jew or Muslim apostate who's on the verge of death and whose life he, the doctor, is in a position to save. Let's say the doctor, aware that Islam commands him to kill such people, not save them, allows the patient to die. Does he have First Amendment religious protections on his side?

Twenty-one years ago I edited an influential book of essays entitled *Beyond Queer: Challenging Gay Left Orthodoxy*, which sought to stake out alternatives to the lockstep far-left positions on various subjects – marriage, religion, family, etc. – that dominated the gay-rights movement at the time. Many of the conservatives, moderates, libertarians, and classical liberals who contributed to *Beyond Queer* were early proponents of same-sex marriage at a time when the queer left regarded the very idea as a vile capitulation to straight, conservative values. Only later, when they realized that most gays *wanted* the right to marry, did the gay left change its tune. Now it's the same gay left, which once despised gay marriage, that is out gunning for those, like Jack Phillips, who have moral misgivings about it.

Several of my old *BQ* confrères have weighed in on the cake case. They're split. *BQ* contributor Dale Carpenter, who teaches law at SMU, has joined with Eugene Volokh (a heterosexual UCLA prof whom I know only by reputation) in writing a **brief** supporting Craig and Mullins. While

acknowledging that a “freelance writer cannot be punished for refusing to write press releases for the Church of Scientology” and “a photographer...should not be punished for choosing not to create photographs celebrating a same-sex wedding,” Carpenter and Volokh distinguish between these actions and cake-making. Writing a press release, they contend, is a speech act; making a cake is not. “A chef, however brilliant, cannot claim a Free Speech clause right not to serve certain people at his restaurant, even if his dishes look stunning,” they write. “The same is true for bakers.”

Hmm. First of all, I can't see how taking wedding pictures is any more of a speech act than baking a wedding cake. Nor can I see how denying restaurant service to people – a clear accommodation issue – is the same as refusing to bake a cake to order for a specific occasion. If you don't think a cake designer qualifies as an expressive artist, take a spin around the nearest contemporary art museum and keep in mind that every painting, sculpture, collage, and installation there – from the giant, all-black canvas to the heap of ten thousand marbles on the floor – is considered a work of expressive art and is thus fully protected by the First Amendment. Is a beautiful cake any less of an expressive work?

Also taking the side of Craig and Mullins is John Corvino, who teaches philosophy at Wayne State (and who would have been in *BQ* if he'd been just a year or two older at the time). Corvino makes a very careful, logical **case**: imagine, he says, a vintner who would gladly sell wine to Catholic priests, but not if they wanted it “for sacramental use.” Or a fabric-store owner “who creates artistic silk-screened fabrics” that she would sell to Muslims, but not for the purpose of making hijabs. Corvino rejects any legitimate “difference between discrimination that’s user-based” (“I won't sell to priests”) and “discrimination that’s use-based” (“I'll gladly sell to priests, but won't provide wine for a Mass”). I respectfully disagree. In fact, his hijab example points up exactly why I'm on Phillips's side: hijabs are symbols of female oppression, and I don't think anyone should be forced by the law to have anything to do with creating one.

While Carpenter and Corvino have stepped up to the plate for Craig and Mullins, *BQ* contributor Andrew Sullivan – who in 1989, in the *New Republic*, wrote the first major article proposing same-sex marriage – **comes** down on the side of Phillips. He makes a point – not so much legal as ethical – with which I entirely concur: those of us who pioneered the idea of gay marriage two decades ago have won fast and won big. We didn't just win in the Supreme Court; we won in the court of public opinion. And that happened because fair-minded heterosexuals decided that civil gay marriage was a simple matter of live and let live. Why can't gay people return the favor? “[I]f there are alternative solutions, like finding another baker, why force the point?” asks Sullivan. “[I]t seems deeply insensitive and intolerant to force the clear losers in a culture war into not just defeat but personal humiliation.” Besides, “[a] law that controls an individual’s conscience violates a core liberal idea.” Absolutely.

The Cato Institute (home to two *BQ* alums) also takes Phillips's side, and has joined with the Reason Foundation and the Individual Rights Foundation in writing a **brief** in his support. They reject Carpenter's and Volokh's distinction between a wedding photographer and a wedding cake-baker; both are “expressive professionals” who “must have the right to decide which speech to create or commissions to take.” They elaborate: “When hired to make a wedding cake, Jack Phillips sits down with the couple to discuss their particular desires, interests, and tastes, then spends hours designing the cake, baking it, making fillings and decorations, and sculpting the finished product....The fact that Jack’s media are icing and chocolate rather than ink or paint

does nothing to diminish the artistic content of his work.” If Phillips could be forced to create a cake for a gay wedding, they write, then “a graphic designer who thinks Scientology is a fraud would violate Colorado law...if he refused to design flyers to be used at Scientologists’ meetings.”

That's exactly the argument that speaks to me. Yes, I'm a gay man in a same-sex marriage. But I'm also a writer who, for many years now, has spent a lot of time working as a translator and ghostwriter. Some of the materials I've translated or ghostwritten express views with which I disagree. That's okay. On a couple of occasions, however, I've been asked to be involved in the production of texts with which I disagreed to such an extent that my dissent rose to the level of moral objection. In those cases, I turned down the assignments without hesitation. It never occurred to me to be grateful for the right to do so: in a free country, it only makes sense that I shouldn't have to write or translate anything from which I violently dissent.

Phillips should have the same right. He has the First Amendment on his side – not because of its protection of the exercise of religion, but because of its protection of freedom of expression. Yes, like a grocer or haberdasher, Phillips is selling a product; yes, like a doctor or firefighter, he's also providing a service. But unlike those professions, his work also involves expression of a kind and to a degree that, to my mind, should be recognized as being covered by the First Amendment. A **picture** in the *Guardian* shows Phillips working on a big, three-tiered white cake: he has a brush in his hand, and in the foreground of the photograph are a couple of cups full of brushes and an array of containers of what I would assume to be frosting. He looks like an artist, only with a cake as his canvas.

Two decades ago, the honchos of the queer-left movement tried to quash the very idea of same-sex marriage. They demonized those of us who advocated for it by calling us traitors: gays, they maintained, were supposed to be vanguards of a rebellion against capitalism, bourgeois domesticity, and other values that they abhorred as reactionary; to want to marry was to surrender entirely to the enemy. They've long since embraced same-sex marriage, on tactical grounds, and now that it's the law of the land, they're out to use it as a cudgel with which to beat those whom they still view as their ideological foes. It's disgusting – and it's stupid. Queer-left “leaders” don't seem to realize that the rapid success of the gay-rights movement in the U.S. has depended to a great extent on (to borrow a phrase from Tennessee Williams) the kindness of strangers – on, that is, the basic decency of ordinary Americans. To accept their decency and then turn around and treat their own deepest convictions with palpable contempt seems to me the very height of indecency.