

A Wedding Cake With A Message Comes Before The Court

Roger Pilon

December 8, 2017

Is it possible to preserve religious liberty alongside modern anti-discrimination law? The Supreme Court took up that question yesterday in one of its most-watched cases this term, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

The case arose when Charlie Craig and David Mullins, a gay couple, sought to buy a custom-made wedding cake at Masterpiece Cakeshop, owned and operated by Jack Phillips, a devout Christian. Phillips had no problem with selling the couple any of his ready-made goods, but declined, for religious reasons, to make the custom-made cake the couple requested. Still, he was willing to direct the couple to nearby bakers who had no such reservations, as he had done with others.

Unsatisfied, Craig and Mullins filed a complaint with the Colorado Civil Rights Commission alleging that Phillips had violated the Colorado Anti-Discrimination Act. The commission found in their favor, as did the Colorado Court of Appeals. Worse still for Phillips, after supporters of Craig and Mullins picketed the bakery, he lost 40 percent of his business and most of his employees. To avoid the problem, he's no longer making wedding cakes.

This won't be an easy case for the Court to decide, because the two principles at issue, religious liberty and anti-discrimination, conflict. In a free society, individuals are free to associate with others, or not, as they wish. They're free to discriminate, that is, for whatever reason they choose. And we do it all the time, not only in religious contexts but in many others as well.

But it gets a bit more complicated in the business context, as here. Merchants like Phillips hold themselves out as "open to the public." That doesn't mean they give up all rights to discriminate. They can order unruly customers out of their store, for example. But can they discriminate in other ways? That's where the difficulties arise, and they're complicated by our history of slavery and Jim Crow segregation in the South.

With the Civil Rights Act of 1964, we began the process of banning "invidious discrimination" over a wide range of contexts and on a growing list of grounds that today includes "sexual orientation" in many jurisdictions. But Phillips wasn't discriminating on any of those grounds. He was perfectly willing to sell his ready-made goods to anyone, straight and gay alike, and he did.

It's the next step where the problem arose. Craig and Mullins wanted a custom-made cake. In fact, they bought a "rainbow" cake nearby, a cake that symbolized the gay-rights movement. Had Phillips been forced to make such a cake, not only his religious but his speech rights would have been implicated as well. He would have been compelled to make a cake that supported —

indeed, promoted — views that he found abhorrent. Imagine if Craig and Mullins had asked for a cake with writing that said “Gay Marriage Is God’s Will.” Would we force a devout Christian like Phillips to make such a cake?

The old judge-made common law had a way of dealing with issues like this. Monopolies, common carriers and public utilities had to serve all at reasonable rates. So, too, isolated inns and taverns. But with merchants in competitive markets, where customers had options, judges adjudicating disputes invoked what was called an “invitation to treat,” which described the process by which private parties negotiated the terms of their association and, if they could not agree, simply walked away, no harm done. Merchants held themselves out as “open to the public,” but they were not bound to provide members of the public whatever they might demand. Meanwhile, merchants who engaged in “invidious discrimination” would soon find that they paid a price for it — but it wasn’t because the law came down upon them.

Like so many hot-button cases before the Court, this one may be decided by Justice Anthony Kennedy, whose vote two years ago in *Obergefell v. Hodges* removed state barriers to same-sex marriage. If so, Phillips may be in good hands since Kennedy wrote in that opinion that “it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” If Phillips were forced to advocate just the opposite, through his chosen profession, far more than speech would be chilled.

Roger Pilon is vice president for legal affairs at the Cato Institute, which filed an amicus brief supporting the appellants in the Masterpiece Cakeshop case.