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## FINANCE

### **That Colorado wedding cake case: How libertarians view it**

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The Supreme Court ruled narrowly last week in the case of the Colorado bakery that refused to make a cake for a gay wedding, handing down a 7-2 decision in favor of baker Jack Phillips that mostly skirted the larger issues of discrimination at stake. The ruling was closely watched by gay rights advocates (who were disappointed by the outcome), by Christian fundamentalists (who would have preferred a more sweeping opinion affirming Phillips's religious freedom claims) — and by the small but vocal segment of the American public that calls itself libertarian.

For libertarians, the issue was neither marriage equality nor the prerogatives of religion, but (as in most disputes, in the libertarian view) the free market.

The perspective of the Cato Institute, a libertarian think tank, is that the government should have no oversight over discrimination in private business transactions, such as the sale of a wedding cake or almost anything else. It is a private business owner's right to choose whom to sell to; free markets will regulate discrimination.

Bob Levy, chairman of the board of directors at the Cato Institute, said the Supreme Court ruling was really a nonverdict.

"I'm pleased that they held for the baker," he said. "I'm disappointed in the opinion because it has no precedent-setting effect... So the same issues that were posed in the case when it started are still pending."

Levy said that the true libertarian view was not before the court. Rather, the baker was arguing for freedom of religion and that he be allowed to express himself according to his beliefs.

"The rights involved are not about free speech or free exercise of religion," Levy said. "The rights are property rights, privacy rights and, most importantly, freedom of association, the right to associate with whoever you please."

Levy said libertarians support same-sex marriage, but that it's not the issue at hand with the case of the Colorado baker.

“The general rule is that free markets tend toward promoting nondiscrimination whereas free markets will penalize bigots and will reward nondiscrimination, will reward tolerance,” Levy said.

Levy’s view is consistent with the platform of the Libertarian Party, which won nearly 4.5 million votes in 2016 for its presidential ticket of former New Mexico Gov. Gary Johnson and former Massachusetts Gov. William Weld. In the section on “Economic Liberty,” the party platform says in part: “For voluntary dealings among private entities, parties should be free to choose with whom they trade and set whatever trade terms are mutually agreeable.” (Party officials did not respond to a request for comment on the Colorado case.)

The decision also inspired some controversial interpretations.

A hardware store owner in Tennessee put a sign in his window that said ‘No Gays Allowed’ to celebrate the verdict. It wasn’t the first time he put the sign up; he had previously displayed it in 2015.

Robert Tuttle, a law professor at George Washington University Law School, said the owner of the store had a right to put up the sign because there are no anti-discrimination protections for the LGBTQ community in the state. In Colorado, he could have been charged for it.

A South Dakota Republican state representative, Michael Clark, posted on Facebook that in light of the case, business owners should be allowed to refuse service to people of color. He seemed unaware that discrimination by race or color has been illegal everywhere in the United States since the Civil Rights Act of 1964.

Clark ultimately apologized for the comments and the Facebook post was taken down.

Rose Saxe, a senior attorney at ACLU who worked on the Supreme Court case, said that there’s a risk the decision could be misinterpreted and that the headlines immediately following the verdict might have been confusing to some readers.

“I think one of the most important things is that the court did not accept [that] there’s a constitutional right for businesses open to the public to refuse people just because they’re part of a same-sex couple or gay or lesbian,” Saxe said.

Tuttle said the Supreme Court chose not to address the hard question of the case. In the verdict, the court found that the Colorado Civil Rights Commission showed hostility to the baker’s religion.

“The problem is, by taking that approach what they’re essentially doing is conceding the field to those who want more exceptions,” Tuttle said.

Tuttle said people who are in business to serve have a duty to do so — no matter their religious beliefs.

“All of this is about providing a very specific product to a specific person... The six justices, apart from Thomas, in the majority clearly believe that people who are in business have a general

obligation to serve all people who are protected” in that particular jurisdiction’s interpretation of the Civil Rights Act, he said.

Tuttle said he doesn’t see the verdict as a good sign for those who support legal protections for the LGBTQ community. The opinion left many open questions, but in his view the decision tilted toward those who feel discriminated against because of their religious beliefs.

The Supreme Court will have to decide whether it wants to take another case on LGBTQ rights and religious freedom. One possibility is *Arlene’s Flowers Inc. v. Washington*, where a florist in the city of Richland, Wash., refused to arrange flowers for a long-time client’s same-sex wedding.