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Masterpiece Cakeshop ruling: No Constitutional Right to Discriminate (For Now)

Masterpiece Cakeshop ruling: No Constitutional Right to Discriminate (For Now)

June 5, 2018 Edward Fitzpatrick

Jared A. Goldstein, RWU law professor who teaches constitutional law and former U.S. Department of Justice attorney:

By cutting a narrow slice of the wedding cake case, the U.S. Supreme Court has created little new law, meaning there remains no constitutional right to discriminate – at least for now.

On June 4, the U.S. Supreme Court issued its long-awaited decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* – the case of a cake shop owner who refused to bake a wedding cake for a same-sex marriage. Although the court ruled in favor of the cake shop, the decision was a

significant relief for LGBT rights advocates, who feared that the decision might result in the recognition of a constitutional right of religious persons to discriminate against LGBT persons.

The case arose in 2012 when Charlie Craig and Dave Mullins went to Masterpiece Cakeshop in Lakewood, Colo., looking for a cake for their upcoming wedding ceremony. Jack Phillips, the shop's owner, told them that he believes that same-sex marriage violates Christian teachings, and he refused to make a cake for their ceremony. After Craig and Mullins complained to state officials, the Colorado Civil Rights Commission filed a complaint against Masterpiece under Colorado law, which prohibits stores and other places of public accommodation from discriminating against customers or employees on the basis of disability, race, creed, color, sex, sexual orientation, marital status, national origin or ancestry. Because Phillips would have made a wedding cake for an opposite-sex couple, Colorado ruled, his refusal to make a wedding cake for a same-sex couple amounted to anti-gay discrimination.

Phillips argued that if Colorado law requires him to make a cake for a same-sex wedding, it would violate his constitutional right to free speech, protected by the First Amendment of the U.S. Constitution. It would effectively require him to express — through a wedding cake — a message that he opposes. He also argued that requiring him to make a cake in support of same-sex marriage would violate his right to the free exercise of religion, also in violation of the First Amendment. The Colorado courts ruled rejected Phillips' arguments, and he asked the Supreme Court to review the case.

The Masterpiece Cakeshop case threatened to do significant harm to anti-discrimination law. If a baker has a constitutionally protected free speech right to refuse to make a cake for gay customers, it is hard to see how far that principle would reach. If the baker is engaging in "speech" when he makes a wedding cake, what about the florist who makes the bouquets, the hairdresser who styles the participants' hair, the photographer who takes pictures, and the caterer who prepares hors d'oeuvres? Are they all engaging in "speech" protected by the Constitution, and do each of them have a constitutional right to refuse to serve same-sex couples because doing so would express a message they might oppose? Would a victory for a baker refusing to make a wedding cake for a same-sex couple allow others to refuse service on the basis of race or sex?

Rhode Island, like Colorado, prohibits discrimination by businesses and employers against people because of their LGBT status, but most states do not provide such basic protections. The Masterpiece

Cakeshop case threatened to create a constitutional right to discriminate. The First Amendment protects a person's right to express any opinions they have, including opposition to same-sex marriage. But it does not protect a right to discriminate. When businesses open themselves up to the public, they have to play by the rules. In Colorado, those rules include a prohibition against anti-gay discrimination. If the owner of Masterpiece Cakeshop didn't have to play by those rules because of his religious objection, it would set a precedent that could justify discrimination by others.

Although the court ruled in favor of the baker, it did not address his free speech claim. Instead, it ruled that the Colorado Civil Rights Commission violated Phillips' right to the free exercise of religion because, in the course of its investigation and ruling, the Commission expressed bias against Phillips' religious beliefs. In this specific case, the Supreme Court ruled, Colorado did not treat the baker fairly because of anti-religious bias. The court made no broad ruling about the rights of free speech or free exercise. Instead, the court left in place the Colorado anti-discrimination law.

By issuing a narrow ruling on the specific facts of this case, the court suggested – without explicitly saying so – that Colorado can continue to enforce its anti-discrimination and protect LGBT people from discrimination, as long as it does not express anti-religious bias in doing so.

For today, at least, the Supreme Court has decided not to recognize a constitutional right to discriminate.