

Opinion

# Drawing a Line in the 'Gay Wedding Cake' Case

John Corvino

THE STONE NOV. 27, 2017

At first glance, the Masterpiece Cakeshop case — for which the United States Supreme Court will hear arguments on Dec. 5 — looks easy. In 2012 Charlie Craig and David Mullins attempted to buy a wedding cake at Masterpiece Cakeshop in Lakewood, Colo. The owner, an evangelical Christian named Jack Phillips, refused to sell them one. The Colorado Civil Rights Commission found Phillips liable for sexual-orientation discrimination, which is prohibited by the state's public accommodations law. State courts have upheld the commission's decision.

The reason the nation's high court is giving the case a second glance is Phillips's First Amendment claim that he was not, in fact, discriminating on the basis of sexual orientation, but on the basis of a particular message: endorsement of same-sex marriage. Phillips made it clear to the gay couple that he would happily sell them other items: birthday cakes, cookies, and so on. He welcomes LGBT customers; he is simply unwilling to use his artistic talents in the service of a message that he deems immoral.

One might better appreciate Phillips's position by considering a second case. In 2014, not long after the commission announced its Masterpiece decision, William Jack attempted to buy a cake at Azucar Bakery in Denver, Colo. Specifically, he requested a Bible-shaped cake decorated with an image of two grooms covered by a red X, plus the words "God hates sin. Psalm 45:7" and "Homosexuality is a detestable sin. Leviticus 18:22." The owner, Marjorie Silva, refused to create such an image or message, which conflicts with her moral beliefs. She did, however, offer to sell him a Bible-shaped cake and provide an icing bag so that he could decorate it as he saw fit. The customer filed a complaint alleging religious discrimination, which is also prohibited by Colorado's public accommodations law. But the commission disagreed, arguing that Silva's refusal was based not on the customer's religion, but on the cake's particular message.

Jack Phillips's supporters have been crying foul since. If the First Amendment protects Marjorie Silva's right not to condemn same-sex relationships, they argue, then it protects Jack Phillips's right not to celebrate them. But there is a key difference between the cases, and the difference points to a useful line-drawing principle.

Put aside the plausible objection that treating cakes as speech — especially cakes without writing, as in the Masterpiece case — abuses the First Amendment. And put aside the even more plausible objection that whatever "speech" is involved is clearly that of the customers, not of the baker: As law professors Dale Carpenter and Eugene Volokh explain in a Masterpiece brief, "No one looks at a wedding cake and reflects, 'the baker has blessed this union.'" After all, that objection is arguably just as applicable to the Bible-cake case.

Finally, put aside the objection that "It's just cake!" That could be said to any of the parties in these disputes, and it doesn't alter the deeper rationale for anti-discrimination laws, which are about ensuring equal access in the public sphere — not just for cakes, flowers, and frills, but for a wide range of vital goods and services.

It is tempting to describe Marjorie Silva's Bible-cake refusal as the moral mirror-image of Jack Phillips's wedding-cake refusal: Neither baker was willing to assist in conveying a message to which they were morally opposed.

But that's not quite right. For recall that Silva was willing to sell the customer a Bible-shaped cake and even to provide an icing bag, knowing full well what the customer intended to write. She was willing to sell this customer the very same items that she would sell to any other customer; what he did with them after leaving her store was, quite literally, none of her business.

Therein lies the crucial difference between the cases: Silva's objection was about what she sold; a design-based objection. Phillips's objection was about to whom it was sold; a user-based objection. The gay couple never even had the opportunity to discuss designs with Phillips, because the baker made it immediately clear that he would not sell them any wedding cake at all. Indeed, Masterpiece once even refused a cupcake order to lesbians upon learning that they were for the couple's commitment ceremony.

Business owners generally have wide discretion over what they do and do not sell: A vegan bakery needn't sell real buttercream cakes. A kosher bakery needn't sell cakes topped with candied bacon, or in the shape of crosses. By contrast, business owners generally do not have discretion over how their products are later used: A kosher bakery may not refuse to sell bread to non-Jews, who might use it for ham-and-cheese sandwiches.

(Of course, there are times when the buyer's identity or the intended use is legally relevant. It is permitted — indeed, required — to refuse alcohol to minors, or torches to someone who announces that he is about to commit arson. But that legal concern does not apply here.)

In his defense, Phillips has pointed out that he refuses to sell Halloween cakes or demon-themed cakes; he analogizes these refusals to his unwillingness to sell gay wedding cakes. In other words, he maintains that his turning away the gay couple was about what was requested, not who was requesting it.

The problem with this retort is that “gay wedding cakes” are not a thing. Same-sex couples order their cakes from the same catalogs as everyone else, with the same options for size, shape, icing, filling, and so on. Although Phillips's cakes are undeniably quite artistic, he did not reject a particular design option, such as a topper with two grooms — in which case, his First Amendment argument would be

more compelling. Instead, he flatly told Craig and Mullins that he would not sell them a wedding cake.

Imagine a fabric shop owner who makes artistic silk-screened fabrics. It would be one thing if she declined to create a particular pattern, perhaps because she found it obscene. It would be quite another if she offered that pattern to some customers, but wouldn't sell it to Muslims who intend it for hijabs. The Bible-cake case is like the first, design-based refusal; the Masterpiece case is like the second, user-based one.

Or imagine a winemaker. It would be one thing if she declined to produce a special blend. It would be another if she offered that blend, but refused to sell it to Catholic priests who intended it for sacramental use. The latter would run afoul of Colorado's public accommodations law, which prohibits religious discrimination.

But wait: Isn't there a difference between discrimination that's user-based and discrimination that's use-based? The winemaker in our example is not refusing to sell wine to Catholics, or even to priests; she is merely refusing to sell the wine for a particular purpose. Same with the fabric-store owner, who might happily sell to Muslims making curtains. In a similar vein, Jack Phillips is explicitly willing to sell LGBT people a wide range of baked goods, as long as they are not to be used for same-sex weddings.

This kind of sophistry has been rejected by the Court before. As the late Justice Scalia once wrote, "A tax on wearing yarmulkes is a tax on Jews." Some activities are so fundamental to certain identities that discrimination according to one is effectively discrimination according to the other. That's certainly true of wearing hijabs and religion, or celebrating mass and religion; likewise of same-sex weddings and sexual orientation. In such cases, use-based discrimination and user-based discrimination amount to the same thing.

But couldn't one argue in the Bible-cake case that a commitment to a traditional Biblical understanding of sexuality is similarly fundamental to William Jack's identity? Of course. But it doesn't follow that Marjorie Silva, the baker in that case, must alter what she sells in order to help him express that identity. While Jack Phillips, the Masterpiece baker, is akin to the winemaker who won't sell wine for

mass, Silva is more like one who sells wine to all customers, but declines to put crosses on the labels. Again, her refusal is design-based, not identity-based or use-based. Unlike Phillips, she is willing to sell this customer the same items she sells to any other customer.

We've seen Jack Phillips's First Amendment argument before. Back in 1964, when Maurice Bessinger of Piggie Park BBQ fought public accommodations laws that required him to serve black customers equally, he invoked his rights to freedom of speech and freedom of religion. Bessinger noted that he was happy to sell black customers takeout food; he simply did not want to be complicit in what he saw as the evil of integrated dining. The Supreme Court unanimously rejected this argument.

The details of the current cases are different, as is the social context. As I've argued before at the Stone, it's a mistake to treat sexual-orientation discrimination as exactly like racial discrimination — just as it's a mistake to treat it as entirely dissimilar. But the underlying principle from Piggie Park holds in the case at hand: Freedom of speech and freedom of religion do not exempt business owners from public accommodations laws, which require them to serve customers equally. The Court should uphold the commission's decision and rule against Phillips.

John Corvino is a professor of philosophy at Wayne State University and a co-author of "Debating Religious Liberty and Discrimination."

**Now in print:** "Modern Ethics in 77 Arguments," and "The Stone Reader: Modern Philosophy in 133 Arguments," with essays from the series, edited by Peter Catapano and Simon Critchley, published by Liveright Books.

*Follow The New York Times Opinion section on Facebook and Twitter, and sign up for the Opinion Today newsletter.*