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Anti-discrimination laws in jeopardy across the board

By Sanford Jay Rosen
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Masterpiece Cakeshop v. Colorado Civil Rights Comm
Oral Argument: TBD

New York Times News Service

Jack Phillips, the operator of Masterpiece Cakeshop in Lakewood, Colorado, Oct. 30, 2014.

Advocates for a religious scruples exception to the Colorado law say there is no harm in making an LGBTQ couple buy their cake elsewhere. They ignore the lost liberty of the people on the receiving end of the discrimination who are being told 'you are not full and equal members of the polis.'

A Colorado civil rights law prohibits sexual orientation discrimination in public accommodations. This term, the U.S. Supreme Court will decide whether a self-styled designer baker in Colorado may nevertheless refuse to bake a wedding cake for a same-sex couple, claiming that the law violates his First Amendment free exercise of religion and free speech rights. The court's decision almost surely will have an enormous impact LGBTQ people's rights, and First Amendment and equal protection jurisprudence.

Fortunately, the exception-favoring Religious Freedom Restoration Act does not apply to the *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* case because that act applies only to federal laws. Unlike in *Burwell v. Hobby Lobby Stores, Inc.*, where the Patient Protection and Affordable Care Act's employer contraceptive coverage requirement was subjected to the employer's religious scruples, no federal statute is involved.

Doctrinally, the answer to the baker's pure First Amendment religious scruples argument may be easy, because Colorado's anti- discrimination law does not target religion or treat religious and non-religious conduct differently. In Employment Division, Dep't of Human Resources of *Oregon v. Smith, the Supreme Court* held that the First Amendment's free exercise clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) performance of an act that does not square with her religious beliefs.

For this reason, the Colorado baker principally argues that compelling him to sell wedding cakes for a same-sex wedding unconstitutionally requires him to "speak" a pro-LGBTQ message. Precedent is against him once again.

Sometimes conduct is protected free speech. But conduct is not protected speech unless observers would likely impute some particular message to the conduct, such as the Supreme Court determined in cases involving the burning of the American flag outside of the 1984 Republican National Convention and the wearing black armbands by high school students to protest the Vietnam War. By contrast with the sale of a cake, the messages communicated in those cases were unmistakable.

In *Smith*, Justice Antonin Scalia warned that a constitutional system of religious scruples exceptions would render each person "a law unto himself" contradicting "both constitutional tradition and common sense." Scalia's warning rings equally true as to the petitioner's free speech claim.

The baker's reliance on *West Virginia State Board of Education v. Barnette*, where the Supreme Court held that Jehovah's Witness children constitutionally could not be required to recite the pledge of allegiance in public school, ignores the commercial nature of his cake baking and the private venue at which it would be enjoyed. A decision in the baker's favor would make little sense under the intermediate scrutiny approach to the regulation of commercial speech the Supreme Court adopted in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.

Escalating the Trump administration's antipathy to the rights of LGBTQ people, Jeff Sessions' Justice Department filed an amicus brief in support of the baker. Given the Congress' dysfunction, we can expect little help from it in protecting LGBTQ people's rights. Much will ride with the federal courts.

The states and municipalities will play important roles. Many like Colorado have stepped up to protect LGBTQ people's rights, and others will. All state and local protections of LGBTQ people are at risk if the Colorado baker wins his case.

Unfortunately, some states have passed or will pass LGBTQ-phobic laws. Smacking of discriminatory laws that once prohibited cross-racial adoption, in June Texas enacted a law that allows child welfare groups to refuse adoptions that contradict their "sincerely held religious beliefs." These laws would be superfluous if the Colorado baker prevails on his religious scruples argument. If Colorado's law survives, laws like the Texas law should not survive constitutional scrutiny.

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receiving end of the discrimination who are being told "you are not full and equal members of the polis."

Anti-discrimination laws protect members of historically vulnerable groups. If the Supreme Court were to decide that religious or expressive freedoms protect discrimination against LGBTQ people, why not also against those of a certain race, color, religion or national origin?

When Congress debated the Civil Rights Act of 1964, Robert Bork wrote in the New Republic that the act's guarantee of equal access to public accommodations regardless of race would infringe some people's free association rights. He complained that the act entailed official moral line drawing which could be justified only by "a principle of unsurpassed ugliness," that the government might know best.

A similar position had been bandied in the aftermath of the *Brown v. Board of Education of Topeka* decision. In his 1959 essay "Toward Neutral Principles of Constitutional Law," Herbert Wechsler wrote that the constitutional battle over racial segregation was really a battle between conflicting associational rights, between those who did and those who did not want to associate with members of another race. In response, Charles Black, who was born and raised in Texas and knew Jim Crow first hand, got to the heart of the matter. He lamented that "simplicity is out of fashion." In his article "The Lawfulness of the Segregation Decisions," Black argued that where a group is barred from the common life of the community, the law must take notice in name and in application. Black's "judicial restraint" Yale Law School colleague, Alex Bickel got to the same place, if by a more tortuous route, in his seminal book, "The Least Dangerous Branch."

Wechsler protested the Brown decision in part because he preferred for societal problems to be solved by legislatures, not courts. The Colorado Legislature made a valid determination that a person's being LGBTQ is not an acceptable reason to deny equal treatment in public places, services, and goods.

As the Supreme Court recognized in *Obergefell v. Hodges*, sexual orientation discrimination is a constitutional wrong, just as racial discrimination is a constitutional wrong. In dicta the court noted that the First Amendment protects an individual's right to hold anti-same sex marriage views. That insight does not render government powerless to prohibit discrimination against LGBTQ people when a discriminator claims a First Amendment exemption. Nor do the Supreme Court's pre-*Obergefell* freedom of association decisions that parade organizers could not be compelled to accept participants with a pro-LGBTQ message (*Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*), or that the Boy Scouts could refuse to have LGBTQ scoutmasters (*Boy Scouts of America v. Dale*).

Now is not the time for the Supreme Court to backtrack from *Obergefell* and the *Smith* and *Hudson* decisions.

It took the Civil War to reverse *Dred Scott*, one of the Supreme Court's greatest "self-inflicted wounds." It took the better part of a century for the court to begin to reversing the damage of its 1866 "separate but equal" *Plessy v. Ferguson* decision and its 1883 *Civil Rights Cases* decision that Congress lacked constitutional authority to prohibit private discrimination. The Supreme Court should not stand against the tide of history again.

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