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Masterpiece or Mixed Bag? 7 Takeaways from the Supreme Court’s Bakery Case

The Supreme Court’s highly-anticipated decision in the *Masterpiece Cakeshop* case, announced on June 4, 2018, has major implications for religious liberty. (This was the case where baker Jack Phillips was punished by the Colorado Civil Rights Commission after he declined to create a custom wedding cake to celebrate a same-sex union.) Because the decision was ultimately based on narrower grounds than most had expected, it left many questions unanswered. Still, there are several key takeaways worth considering.

1. The harshest political rhetoric will receive the strongest rebuke from the Supreme Court.

In the last ten years, verbal darts have been hurled at religious conservatives that would have been unthinkable a generation ago. Emblematic of these attacks were statements made by members of the Colorado Civil Rights Commission against Jack Phillips, the owner of Masterpiece Cakeshop. These comments by the commissioners were the single biggest reason why 7 of the Justices felt that Phillips’ religious rights had been violated. The Supreme Court condemned such attacks as Free Exercise violations when they represent the sentiments of governmental decision-makers.

From Pages 14-15 of Justice Kennedy’s majority opinion:

To describe a man’s faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s anti-discrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

2. The government cannot be in the business of siding with one group’s sense of being offended while discounting others’ sense of what is offensive.

From Page 16 of the majority opinion:

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal v. Tam*, 582 U. S. ___, ___–___ (2017) (opinion of ALITO, J.) (slip op., at 22–23). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs.

3. Clergy continue to enjoy the strongest protections of the First Amendment in refusing same-sex marriages.

In this regard, the Court wrote on Page 10:

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.

4. The Supreme Court is unsure how far to extend religious freedom protections to believers in the marketplace.

Following the above statement about the clergy, Justice Kennedy continued on Page 10,

Yet if that [clergy] exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

5. Conflicts in this area will be resolved on a case-by-case basis for the near future.

For better or worse, the Court has largely put off for another day the conflict at the heart of this case between religious freedom and the sexual revolution.

From Page 18 of the majority opinion:

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

6. Justice Gorsuch continues to emerge as a forceful and articulate voice for religious freedom and constitutional originalism.

Perhaps the most encouraging signal from the Court is the continued emergence of Justice Gorsuch as a forceful advocate for constitutional originalism.

Here are two excerpts from Pages 2 and 7 of Justice Gorsuch's concurrence:

As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." *Ibid.* That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise.

7. Religious freedom continues to hang in the balance at the Supreme Court.

There are encouraging signals in the Supreme Court's decision. It was, after all, 7-2 in favor of the religious objector, Jack Phillips. But there are ominous warning signs.

In the majority opinion, Justice Kennedy expressed the view that the State has better arguments available to it going forward that could more effectively silence dissenters like Phillips. The majority opined on Page 12:

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in

effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

In their concurrence, Justices Kagan and Breyer made clear that, in another case with a cleaner process, the State would have the upper hand.

In dissent, Justices Ginsburg and Sotomayor predictably could not see any way for LGBT rights to yield to religious freedom, even though the latter is enshrined in the First Amendment.

The divergence of views among the Court’s three most recent additions—Kagan, Sotomayor and Gorsuch—together with the continued unpredictability and retirement rumors surrounding Justice Kennedy, underscore the importance of national election outcomes. It continues to be the case that we could be one Presidency away from losing fundamental freedoms through strategic retirements and replacements on the Court.

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