

Of wedding cakes and our tenuous freedoms

On June 4, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the U.S. Supreme Court delivered a limited victory for religious freedom.

Jack Phillips, a devoutly Christian baker, declined to use his artistry to create a custom wedding cake for two men, because his faith holds that marriage is only between one man and one woman. The men sued, and he was found guilty of violating Colorado's law against discrimination on the basis of sexual orientation.

The Supreme Court decided 7-2 that Colorado's civil rights commission violated Phillips' First Amendment right to free exercise of religion.

Seven justices agreed that one or both of the following facts, which may or may not apply in future cases, were decisive. First, the commission exhibited hostility toward Phillips' faith, with some members suggesting that religion is often an excuse for injustice.

Second, the same commission had rejected claims against bakers who refused (apparently on secular grounds) to bake cakes with messages against gay marriage. So the commission went after Phillips because he is a man of faith, and/or because his particular religious beliefs offend them. Justice Anthony Kennedy's majority opinion found that his religious objection "was not considered with the neutrality that the free exercise clause requires."

Here the consensus ends.

Justices Elena Kagan and Stephen Breyer discounted the second prong of the court's argument. They said the bakers who refused to decorate cakes with anti-gay messages objected to the message itself, whereas Phillips refused to produce the same kind of cake for same-sex couples that he would have made for any opposite-sex couple. So these cases are different.

In rebuttal, Justices Clarence Thomas and Neil Gorsuch observed that whatever else

a wedding cake may say, it communicates the basic fact that “this is a wedding.” And that is exactly the claim that Phillips’ faith could not endorse.

Justices Samuel Alito, Gorsuch and Thomas favored a more ringing defense of Phillips’ religious freedom — and the last two would decide in his favor on free speech grounds as well, as he was being compelled to redefine marriage in a way contradictory to his faith. (As the late Justice Antonin Scalia said in dissenting from the court’s landmark 2015 decision on same-sex marriage, Phillips’ view of marriage was, “until 15 years ago, the unanimous judgment of all generations and all societies.”)

Ironies abound in the justices’ opinions.

Kennedy’s opinion is ironic because the prejudice against religious views of marriage that he criticizes in Colorado officials can be found in his own 2015 opinion on same-sex marriage. While he gave lip service to the idea that “reasonable and sincere people” may disagree with the court, he also suggested that such people are guilty of bigotry and ignorance. So Kennedy’s rhetoric helped create the problem in Colorado. Either he has mellowed since or he is not very self-aware.

There is also irony, perhaps deliberate, in conservative justices’ argument for Phillips’ freedom of speech. To those who say decorating a custom wedding cake is not speech, they cite past decisions sacred to the most liberal judges: It is at least as much “speech” as nude dancing, cross burning by white supremacists and flag burning.

And in answer to those who say Phillips’ views are too offensive to protect, they cite a past court decision declaring that other people’s finding a view offensive “is a reason for according it constitutional protection.” The court said that in defense of the free speech of Hustler magazine.

So for now, Christians who accept the millennia-old definition of marriage have as much constitutional protection as racists and pornographers. And some justices disagree even with that.

Copyright ©2018 Catholic News Service/U.S. Conference of Catholic Bishops.