Religion Today
June 13th, 2018

"The Supreme Court and the Refusal to Bake a Cake"

Paul V.M. Flesher

It seems that nearly everyone who has written about the U.S. Supreme Court decision on the Masterpiece Cakeshop case agrees: The Supreme Court wimped out.

Its June 4 decision gave no legal guidance as to whether a person running a public business can refuse a sale to someone on the basis of deeply held religious beliefs -- in this case, a baker who refused to decorate a custom cake for a gay wedding.

The lack of guidance is disappointing because more cases arguing a person's "religious freedom" to refuse service on the basis of religious beliefs are heading to the court, and SCOTUS will not be able to avoid a decision forever.

I will go out on a limb in this column and lay out a way to resolve this religious freedom issue, taking into account more than two centuries of USA law, legislation and legal precedent.

The First Amendment says that laws cannot be made "respecting an establishment of religion, or prohibiting the free exercise thereof." The claimed right to refuse service on the basis of one's beliefs is based on the amendment's second phrase -- its religious freedom.

There are two barriers that prevent acceding to that claim by acknowledging a wholesale right that religious people can deny service on the basis of their beliefs. The first is the Equal Protection clause of the Constitution's 14th Amendment. That amendment prevents states from passing laws treating some classes of citizens differently from others. This amendment holds that a state may not "deny to any person … the equal protection of the laws."

The second barrier lies in the First Amendment's first phrase, the so-called "establishment clause." More than half a century ago, the Supreme Court established the "Lemon Test" to determine if a law violated the prohibition on government establishment of religion and has consistently used it since then in church and state cases like this one.

A law must pass all three components of the Lemon Test to be valid. First, does the law have a secular purpose? Second, is the primary effect either to advance or inhibit religion? Third, does the law foster an excessive governmental entanglement with religion? If the study of a law results in a "no" to the first question OR "yes" to the second OR third, then that law is unconstitutional.

The goal to establish a religious freedom right to deny service on the basis of belief fails not just one but all three tests: No, the claim's purpose is religious, not secular; yes, the primary purpose is to advance religion; and yes, it fosters an excessive governmental entanglement with religion.

The test of governmental entanglement in religion is the most telling. Going against it in the Masterpiece Cakeshop case would have the greatest impact because it would require the courts to rule on matters of religious belief. Given that few judges and lawyers have any training in religion, this would be a disaster.

It is solidly established in American law that the government cannot deny service on the basis of membership in an identifiable religious group. In the past two years, that principle has been on display with the decisions concerning a religious test for admitting Muslims entry into the country.

But the baker's claim of the religious right to deny service to a gay couple for their wedding cake is not a matter of their belonging to a particular religion. Rather, it is a question of doctrine within a single religion, that of Christianity. And that doctrine is disputed. Not all Christians or all Christian denominations believe that gay marriage is against Christian belief.

Is the government going to make a decision that allows individual believers (any believer?!) to deny service to members of the same religion on the basis of whatever belief they hold deeply and sincerely? Is it going to get involved in theological and doctrinal disputes? No, it isn't. That would violate the 14th Amendment as well as the First.

And just to be explicit, the Supreme Court could not rule that only Christians have the right to deny service on the basis of their beliefs. If it decided, against all precedent, that there was a right to religious denial of service, then it would apply to members of all religions -- Judaism, Islam, Hinduism, etc.

If SCOTUS ruled in this direction, it would likely remove the "religious" moniker from the ruling and give the right to anyone with a deeply held belief, religious or not. So, denial of service, in this scenario, would be permissible on moral, political, racial and social justice grounds, as well as religious. That would at least allow the Supreme Court to avoid the entanglement issue.

I will stick my neck out and predict none of this will happen. Instead, I predict two possible decisions. The first would be a complete ruling against a religious-based denial of service as a violation of the 14th Amendment.

The second would be a compromise that classifies the baker as an artist and the baking and decorating of a wedding cake as the commission of an artwork. Just as an artist does not have to take every commission offered to him or her, so the baker would not have to create every cake design that someone asked of him or her.

Flesher is a professor in UW's Religious Studies Program. Past columns and more information about the program can be found on the Web at www.uwyo.edu/relstds. To comment on this column, visit http://religion-today.blogspot.com.