

‘Trib Talk’: Can atheist bakers refuse to serve Mormons?

(AP Photo | Brennan Linsley) In this March 10, 2014, file photo, Masterpiece Cakeshop owner Jack Phillips decorates a cake inside his store in Lakewood, Colo. The Supreme Court is setting aside a Colorado court ruling against a baker who wouldn't make a wedding cake for a same-sex couple. But the court is not deciding the big issue in the case, whether a business can refuse to serve gay and lesbian people.

Salt Lake Tribune

May 7, 2018

Article link: <https://www.sltrib.com/news/2018/06/06/trib-talk-can-atheist-bakers-refuse-to-serve-mormons/>

TribTalk link: https://www.sltrib.com/podcasts/trib_talk/

Audio Link: <https://dts.podtrac.com/redirect.mp3/feeds.soundcloud.com/stream/454774281-tribtalk-can-atheist-bakers-refuse-to-serve-mormons-episode-8.mp3>

In this week's episode of "Trib Talk," Tribune reporter Benjamin Wood discusses this week's Supreme Court decision in the Masterpiece Cakeshop case with John Mejia, legal director for the ACLU of Utah, and Bill Duncan, director of The Sutherland Institute's Center for Family and Society.

A lightly edited transcript of their conversation is included below.

Benjamin Wood: On Monday, the United States Supreme Court ruled in favor of a Colorado baker who refused to create a cake for a same-sex couple.

But the court focused on the specific factors at play in the Colorado case, leaving unresolved the broader question of whether, and under what circumstances, business owners have a right to discriminate based on their religious beliefs.

From The Salt Lake Tribune, this is Trib Talk.

I'm Benjamin Wood, joined today in the studio by John Mejia, legal director for ACLU of Utah. And on the phone we have Bill Duncan, director of the Sutherland Institute's Center for Family and Society. John, Bill, thanks for joining us today.

John Mejia: Sure

Bill Duncan: Thanks for having us.

Wood: I want to start off with a little bit of a synopsis of the decision. After it came out on Monday, I saw a lot of reports explaining what it wasn't. How it wasn't a sweeping precedent and a major setback for the LGBT community, nor a triumphant victory for religious freedom advocates. To both of you I'm hoping you can maybe describe what this decision is, and why it's not what we might expect it to be.

Mejia: So in this case the baker who had refused to provide a wedding cake to celebrate the marriage of two gay men was claiming a right to an exemption under the Colorado civil rights law that allowed him to refuse service to that couple based on his religious objection to doing so. That was the rule that the baker sought The Supreme Court to make. The reason that we say it's narrow is because The Supreme Court did not give the baker that ruling.

The Supreme Court did find in favor of the baker but on the basis that in the process of denying his request for an exemption the Colorado Civil Rights Commission made some comments that The Supreme Court considered derogatory of the baker's religion. So it was limited to that sort of particular circumstance of this particular case.

Wood: So focused on how it happened, more so than that happened?

Mejia: Yes, it was a process decision. It was about the process and the process that The Supreme Court did not believe was fair. But I would add that several times in its decision The Supreme Court emphasized that Colorado could protect LGBT people from discrimination and that their laws in doing so were perfectly appropriate.

Wood: Bill, I want to get you in here. Anything you would add or anything you might contend with from that description?

Duncan: No I think that description is right. The reason we think of it as narrow, any decision as narrow, is when it doesn't seem to have a significant application to other cases going forward. Because the most salient feature of the decision seems to be the focus on the very specific actions and words of the Colorado Civil Rights Commission, it's hard to imagine that exact scenario would ever happen again. Not impossible, but presumably other commissions would be warned by what The Supreme Court did to not say intemperate things that would suggest some kind of bias against a person involved in this kind of litigation. And therefore that would be avoided.

So all of the key questions — the religious liberty questions, the questions of whether there can ever be an exemption to a public accommodation statute, the free speech questions that the baker raised — all of those kinds of issues will have to be dealt with, as the court says very clearly, in other cases coming in the future.

Wood: Bill, you mention some of the questions there, those are still out there to be answered at a later date. Is that kind of what you're saying?

Duncan: That's right and some of the justices speculated a little bit on those. But the majority opinion focused entirely on the question of — a way to think of it is that the court has a constitutional claim before it, and it can decide on all kinds of grounds. It could say the baker's free speech was infringed because he had to send a message he didn't agree with or his religious freedom was, or that neither one was and that he just needs to make the cake. Any of those could have been decisions that the court could have made, and would have had some applicability. But in fact, the court said "Well, we don't really need to deal with all those cases, because the vast majority of us — at least seven of the justices — felt comfortable saying that it was unconstitutional for the state to publicly denigrate the religious beliefs of the baker." And as a result [they] created a clear inference that they were disfavoring purely because of his religious beliefs.

Wood: Both of you mentioned how this was a narrow ruling. Legally yes, that means there may not be this sweeping precedent set, but that also doesn't mean that individual business owners, customers, litigants, potential cases moving through the courts and lower court judges, — I want to ask you guys to speculate a little bit — but what kind of effect might this have on the national attitude toward this subject.

Mejia: From our perspective, we saw a lot in the opinion that was very reaffirming of the rights of LGBT people to equal dignity and a reluctance to credit sort of broad religious and philosophical objections of business owners to serving all people.

From our perspective, we saw a lot in this decision that sort of gives us some confidence that the baker might have won this battle but has lost the war because there was a lot of re-affirmation of the importance of laws that protect everybody, and that put everybody on an equal footing.

Wood: Bill, you've written about the need for protections for religious beliefs. Does this decision empower religious individuals?

Duncan: I think it does in this sense, well maybe in two sense. First is that the court was very clear that in any kind of official action the government can't denigrate the religious beliefs of its citizens. And in many ways it obviously was not all that controversial because the vast majority of the justices agreed. It's still an important point to make and given some of the things that were said in the litigation in Colorado, a point that needed to be made, certainly, in this case. So in that sense I think it certainly is [empowering], and in another sense I've been interested and I've noted that so many people, regardless of their position on the underlying dispute in this case, found something that they felt was positive in the decision. And I think perhaps one of the things the court may be doing, or even if they're not intending this to have this effect, is to suggest that there really are valid considerations on both sides. And I think the court, as John described, made some effort to underscore that.

And that suggests that it could be that legislators can deal with some of these issues on their own, right? Through legislation that addresses or tries to create some kind of balance and allow for free speech and religious freedom kinds of concerns to be taken into consideration as well as the anti-discrimination protections that the state, the court clearly said, are important and valid as well.

In that sense the court didn't necessarily do anything that I think you could sort of cash a check on essentially. But [it] clearly did some things that suggest that they would like to see these issues resolved, perhaps even outside of court in a way that accommodates the different kinds of interests that are involved.

Wood: John, I saw you nodding a little bit. Anything you'd want to add there?

Mejia: I think that it is uncontroversial that the government should respect people's religious liberty and keep out of religious practices. I think that the clear, sort of, dividing line here is when people are using religion as a reason to discriminate against somebody based upon who they are.

I'm encouraged that there would be additional protections for LGBT people in anti-discrimination laws and we, at the ACLU, support the Equality Act, which is a proposed federal statute that would protect LGBT people and women from discrimination on a federal level. But I would be a little wary of any attempt by individual states to strike balances that go too far in attempting to accommodate religious or philosophical objections to serving certain people. We don't live in a society where you are allowed to put up a sign in your window that says "Your kind not served here." That's sort of the clear dividing line that I see where the Constitution steps in and allows people to be defended, allows state and federal government to protect LGBT people from discrimination.

Wood: I want to pull back a little bit from the Masterpiece Cakeshop case, because obviously narrow or not narrow the conversation that has followed this case has been about these broader topics. Just this morning one of my Facebook friends posted the hypothetical scenario where you try to check out at a grocery store and you can't find a cashier because one objects

to your contraceptives, the other objects to the meat in your basket, et cetera, et cetera, et cetera.

At times it can be reductive but let's talk about this for a second. This raises the hypothetical question of a Baptist baker or an agnostic baker refusing service to, perhaps, a Mormon couple here in Utah. Is that the question that is being brought up here?

Duncan: Partially. One of the things I think is important as you think about the hypothetical of someone who is a vegetarian or something, not wanting to serve, the laws are meant to respond to historic injustices against identified groups and not just that you have to serve everybody with no exceptions and all of that. There are always [exceptions]. A reductive way to say it is that you can discriminate against nonpaying customers for instance. But that you can't take out a characteristic that has no connection to fitness to pay or something like that for discrimination.

This is a very reasonable set of laws that has to do with rejecting the principle of white supremacy and some of those things that happened in the past. And the challenges have come as that principle, which in the past was not uncontroversial but has become, thankfully, less controversial over time, has extended to areas where there are good faith, I think, concerns from religious people, not as a pretext but as an actual concern that they have that they might be asked to do something that violates their conscience.

But I think the other piece that may be most helpful here is the focus that the baker made on the idea that, in this specific case, on the idea of free speech. Four of the justices, at least, picked up on that and felt that was worth dealing with, maybe in more detail than the majority did. And so I think we can probably draw lines that allow people to receive equal treatment but don't require a person to send a message that they don't agree with, or endorse a message they don't agree with. That's a relatively uncontroversial set of cases that The Supreme Court has dealt with in the past. That may be one way of dealing with that specific question.

And of course there's a possibility that you could have a business that caters to people who like meat and those who don't and that kind of thing. We think that's OK, because that's a different set of concerns. It doesn't raise the specific historic injustice that people have received because of some trait totally unconnected to the purpose of the business or anything like that.

Wood: John, your take?

Mejia: I think it was interesting in The Supreme Court's decision in Masterpiece that it cited to Newman v. Piggie Park Enterprises. And that was a case where a business in South Carolina said that it would infringe on the business' religious beliefs to have to serve black and white customers together as required by the 1964 Civil Rights Act. The Supreme Court in that case called that argument frivolous.

So I think that we don't need to be too alarmist about these protections being whittled away here, and I think the reason it doesn't raise, at least in my mind, a huge concern — this case — is because the court did sort of repeatedly say protections for groups that face discrimination are completely appropriate and in some cases necessary.

I think that is correct that The Supreme Court's majority opinion in Masterpiece sort of sidestepped the free speech issue and any sort of free speech arguments that the baker had made. We'll see, coming forward, whether that's a successful argument. I'd note that there is a case that is potentially coming up before The Supreme Court called Ingersoll v. Arlene's Flowers

where a florist in Washington state refused to provide flowers for a wedding between gay people.

Wood: That segways nicely into the next question I had. In the lead-up to Monday's decision there was a lot of discussion about what I saw being phrased as "the bespoke nature" of a wedding cake, this idea that the couple hadn't gone in and ordered cookies off the rack. They had asked for a custom product and that is where some of these free speech arguments came in.

I'm curious, to both of you, how likely is that distinction — of the mass-produced product versus the custom product — how likely is that to be a point of contention in cases of this type moving forward?

Duncan: I would think that could be an important distinction. That specific question was addressed by the majority, although they I think studiously avoided deciding it, they did recognize it's not a frivolous claim. There's been similar kinds of cases where a person, not involving the discrimination context but in other contexts have said "I want to block out part of my license plate because it sends a message I don't agree with." Those kinds of things. So there is precedent for an almost absolutist free speech approach, that if a person doesn't want to send a message or feels that the government is requiring them to send a message they don't agree with, they can't do it.

The court recognized that's not in any way frivolous, it's something the court will have to deal with. The hard question of course comes with determining which actions have that kind of expressive speech element and which don't. Justice Thomas, I think probably, perhaps being a little sarcastic maybe says "The court has held that nude dancing is [speech] so almost anything could be."

I'm not sure the court is going to see it that way, that the majority would see it that way if the case came forward, but there may very well be some things that are not traditional speech in the sense of giving a presentation or writing something or publishing an article or something, that would still be considered expressive enough. In this case the focus was on the artistic nature, the person has to use their creativity and all of that and you're right, that decision will come later but like the question of discrimination the court was open to the serious nature of that consideration.

Mejia: Yeah, from our perspective, what was at issue here was selling a wedding cake. And if you start allowing free speech considerations to sort of trump everything else, then you sort of face a situation where you leave a couple like Dave and Charlie, who were trying to buy the cake, in that same situation where they're facing the exact same kind of stigma and ostracization that these laws are meant to avoid.

Obviously free speech and freedom of religion are protected rights. And then you have to sort of balance them in these cases with protecting equality for all. I can't speculate as to how important the court or what balance the court will decide to strike or what lines they'll decide to make. But in the Masterpiece Cakeshop, the majority certainly did recognize that in balancing these considerations of religion and free speech and equality, you need to avoid the slippery slope. Society needs to be able to enforce laws that make everybody equal and avoid the sort of stigmas and isolation and different discrimination that people have faced.

Wood: It kind of opens up an interesting mental exercise. If a cake is speech, are flowers? Are tuxedos? Are the bottles of champagne? Bill, if I could follow up with you, you alluded there being a line to draw in this question. Do you have a picture in your head of where that line is?

Duncan: No and, of course, that's a great question because that's precisely the kind of thing that at some point, presumably, the court will be asked. This is an area where legislatures often are in a better position to respond to those kinds of claims, to, in a representative process, trying to determine what's actually happening and what are the actual people who are claiming that they are being asked to present a message that they don't want to. Are there very many people? What categories do they fit in? Is there a way to reasonably accommodate that? There's always been religious accommodations and free speech accommodations in the law, all through our history. A really compelling issue would be service in the military and a draft. Very early, even really in colonial times, the government made the decision that it would be valid to allow some people just to be exempt from the draft even though, presumably, you could argue that if lots of people took advantage of that exemption we'd be undefended. But they felt like, and I think, my perception is the reason for that is that there's an identifiable group, in those early times it was Quakers, who were unwilling but are also a relatively small minority of people. Allowing them to act on their beliefs and not to serve in the military didn't create that much of a risk.

And similar things have happened with Social Security taxes and the Amish or other circumstances. So I think the legislators really ought to be looking at this question and not just waiting for the court to figure out how to do these lines, because I think as a lawyer I don't know exactly where the right line would be. But I think some give and take in the normal political process could help us identify ways to allow all people to get service but allow for the probably, my guess would be very few people, who would want to step away from service and maybe would defer to someone else to provide that service for them or something along those lines.

Wood: I want to pull us back to the Masterpiece decision as we kind of wrap up here. The decision was 7-2, a consensus decision. Justice Kennedy, the presumed swing vote was the author, he also authored the Obergefell decision that legalized same-sex marriage nationwide. In the [Masterpiece] decision he make frequent mention that the Masterpiece case originated before Obergefell, before same-sex marriages were legal in Colorado.

I'm not a lawyer, I just play one on the podcast. I'm curious, does that suggest that Justice Kennedy at least is saying, in a post-Obergefell America where these marriages are legal everywhere, the circumstances are different.

Mejia: Honestly from my perspective, I don't really have much of a take on that. I wouldn't want to speculate as to what exactly was in his mind. But I think that Obergefell itself was such an important decision because it reaffirmed the fundamental importance of making sure that everybody has fundamental rights regardless of who they are.

Wood: Bill, your thoughts?

Duncan: I had the same question as I read that decision. I thought that was a somewhat striking passage. There is a possibility that part of what he's saying and hearkening back to in the Obergefell decision is his own writing in that decision about trying to reassure. Some of the dissents in the same-sex marriage case had argued that that this is going to have implications

for religious freedom, for free speech. It could tip the balance against people of faith who have objections to same-sex marriage or similar kinds of things.

Justice Kennedy went to some effort, I think, in the decision to say “No, no, no, there’s no reason that has to happen, those views are ancient, they’re longstanding. They’re not pretexts that are made to shore up what’s really racial discrimination, or something like that.” Those opinions are not inherently invalid, and I think he could be also pointing to that and saying after Obergefell we have to now balance some of these potentially competing, or at least apparently competing, considerations and that may be the best way to do it in the wake of what The Supreme Court essentially has said now is a *fait accompli*. This issue, the issue of marriage, is now done from The Supreme Court’s perspective, but it should be done in a way that still leaves room for those who just can’t agree with The Supreme Court’s view of what marriage is and will be in the future.

Wood: There’s another element to this debate, which is the practical economic realities of running a business. In the post-Obergefell America, where marriage equality is the law of the land, does it make sense to turn away a paying customer?

Duncan: I don’t know the economics of each business. There’s probably room in every market for a different emphases. Maybe someone likes an owner who has certain positions and others who don’t, and of course that’s pretty common now. I do think in some ways that has been the way typically we’ve dealt with these kinds of considerations in the past, is to say “Look if someone is not willing to do business, then they’ve essentially given themselves the consequence.” Right? They’ve chosen to lose whatever part of the market share that they would have by providing the service, which I think is a suggestion of the sincerity of the baker or others in a similar circumstance. They think that even though they may, very reasonably, can assume that they will lose business, that it’s still worth it to them to share the message that they feel is critical.

I think we should honor that and recognize that suggests a certain sincerity that is worthy of respect. And I think the court did in this case and made some effort to point out that it’s not like the baker was just completely without any grounds for coming to the conclusion that he did in determining that he had the right to refuse service in this specific case. Even though that question hasn’t been resolved the court did suggest that that is a sincere belief that he holds and should be [owed] at least some certainly procedural respect and perhaps more.

Mejia: From my perspective, we have examples of where the market has obviously gotten it wrong. Look at the South, look at segregation, look at whites-only business, whites-only hotels. The reason that states and the federal government pass anti-discrimination laws is because there is a very strong government interest in ensuring equality for all people, regardless of what individual business owners think.

From the perspective of Dave and Charlie, who wanted to celebrate their marriage just like any other married couple, the answer of “Just go to another shop,” imagine the embarrassment they must have felt when they said because of who you are, you cannot buy a cake from me. The government has a strong interest in being able to say, if you put up a sign that says you’re open to all, that means you’re really open to all and you can’t have a situation where certain people are outcasts from your business.

We live in a society where we believe in equality and where the government is empowered to create laws that put everybody on an equal footing. And so, from my perspective, it’s not that

there would never be, necessarily, consideration of people's beliefs. But when you open a business to all that means it should be open to all.

Wood: Well it's a discussion that's far from finalized and we'll continue to follow that at The Salt Lake Tribune and sltrib.com. John Mejia, Bill Duncan, thank you so much for joining us today.

Mejia: Anytime.

Duncan: Thanks for having us.

Wood: Trib Talk is produced by Sara Weber, with additional editing by Dan Harrie. Special thanks to Smangarang for the theme music to this week's episode.

We want to hear from you. Yes, you! What's working? What's not working? We want "Trib Talk" to be the Podcast that you want it to be, so send us an email at tribtalk@sltrib.com, or tweet to us [@tribtalk](https://twitter.com/tribtalk) on Twitter. You can also tweet to me [@Bjaminwood](https://twitter.com/Bjaminwood). We'll be back next week, thanks for listening.