

## Free Exercise or Due Process?

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The *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case, decided by the United States Supreme Court, was expected to be a blockbuster. People waited for the decision with the kind of anticipation reserved for Marvel Comics movies. Unfortunately for those salivating at the trough of news entertainment, the Court failed to deliver.

Justice Kennedy delivered the opinion of the Court and properly framed the issue as to the rights of the cakemaker to refrain from violating his own religious precepts. The Court noted that a myriad of issues arise when a businessowner is asked to do something that tramples upon the First Amendment right to freely exercise one's religious convictions. At issue was the right of a business that serves the public to refrain from creating a product that disagreed with the sincerely held convictions of the proprietor. Could the cakemaker be forced to go to the gay wedding? Could the cakemaker be forced to put any image or words regardless of whether they offend the cakemaker's religious views? The Court frankly admitted that it was being asked to enter into a bramble of thorny bushes.

What Justice Kennedy did was nothing short of brilliant, although there are those who would say that he was simply kicking the can down the road. While the Court never used the term "due process," what essentially happened here is that the State Human Relations Commission which first considered the question did not give the cakemaker a fair hearing. The Commission was biased. Oftentimes we forget that there are not three branches of government anymore, but four branches. Yes, we have the executive, legislative and judicial, but thanks to the complexity of society post-new deal, we also have the administrative branch. Claims of discrimination typically must first go through state and sometimes federal agencies. Those agencies frequently do a bad job. The Pennsylvania Human Relations Commission, for example, is slow, inefficient, and fails to weigh in even on the most significant and serious claims. Lawyers consider the Pennsylvania Human Relations Commission a joke. The Equal Employment Opportunity Commission is not much better.

The Colorado Civil Rights Commission showed, according to Kennedy, "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his [the cakemaker's] objection." In reviewing the record, the State Commission decidedly did not appreciate the balance between the obligation of businesses to respect the civil rights laws as opposed to legitimate and sincere religious convictions. Undergirding the court decision is a message that gay people have rights, but at the same time individual liberties have not been swept out to sea with the tide of modern change. This difficult tightrope walking is a mainstay of judicial discipline.

Justice Kennedy has sent a good message to other judges and those who run our state and federal administrative agencies: have respect for both sides of a dispute. The

rights of some should not be negated by the principles of others. The Court did not give a hint how it would ultimately decide the case had the Colorado Civil Rights Commission been fair in reviewing both sides of the dispute.

To some extent, Kennedy's message is *sub silentio*. In other words, civil servants adjudicating our rights on a daily basis must be serious and discreet in respecting the rights of everyone before them. Unfortunately, the Court's message is frequently swept aside by bureaucrats and administrators of state institutions. We receive phone calls weekly about how zoning boards, councils, and a myriad of other agencies which control our lives make decisions based upon personal animus rather than serious discreet evaluations. Sometimes the fault lies with the lawyers who represent these agencies, and other times those lawyers have little to say about popular pressure which may be at the root of arbitrary decisions.

As a public, we will continue to debate whose rights are being protected more; those of the minority group such as gay citizens as opposed to the legitimate religious conscience of those who do business with the public.

Unfortunately, neither Justice Kennedy nor the entire conscience of America can make biased decisionmakers into the paragon of justice. Clearly, members of the Colorado Civil Rights Commission have their bias and are going to consider religious convictions as antiquated notions undeserving of much respect. Nevertheless, the United States Supreme Court has spoken with a decisive voice about the need to provide due process which means a fair tribunal truly capable of considering seriously conflicting concepts that must coexist for civilization to remain peaceful. In the last 20 years, the courts have simply given lip service to the entire concept of due process. While such cases used to be heard regularly by the courts, which would assure fair and honest tribunals, due process today frequently is shunt aside as a relic of an earlier day. Perhaps *Masterpiece Cakeshop v. Colorado Civil Rights Commission* will alert state and federal courts to the necessity to look beyond the decisions of the administrative agencies which are such an intrinsic part of our regulatory structure.

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