

What the Colorado baker who refused to sell to a gay couple gets wrong

Suzanne B Goldberg

The law says that if you open a shop on Main Street or anywhere else, you can't pick and choose to whom you sell your products

Last week, I listened as the US supreme court wrestled with [whether a Colorado baker](#) could refuse to sell a wedding cake to a gay couple. The baker's lawyer said her client shouldn't have to express support for gay people marrying by baking a cake for them – a stance that would create a giant exception in American civil rights laws. During the argument, it became clear that the baker's lawyers had also missed a basic lesson in how anti-discrimination laws work.

First, she argued, with great passion, that if the baker, Jack Phillips, was required to sell his cakes to gay couples on the same basis as he sells cakes to non-gay couples, then African-American bakers would have to sell cakes to members of the Klu Klux Klan.

But that's not really true. Bakers, whether African-American or not, must sell to people of all races equally because the law forbids discrimination based on race. That is, the law says the baker cannot treat customers, including Klan members, differently based on race.

If the Klan customer asked for a custom-designed cake with a cross to celebrate white supremacy, a baker can refuse, if she wants. Why? Because the state does not prohibit discrimination based on political or social opinion. Just like Phillips isn't violating the law when he refuses to sell cakes that celebrate Halloween.

Now, most businesses don't ask for their customers' views or require a political litmus test before making a sale. But that's a business choice, not a legal matter, so long as the business is not using political views as a cover-up for other forms of unlawful discrimination.

Mistake number 2: when several of the justices asked whether the baker could refuse to sell a wedding cake to an interracial couple if he had religious objections to interracial marriage, his lawyer said that was different because the state has a distinct, compelling interest in forbidding race discrimination. That may be true in a sociological or historical sense, but not under the law here.

Instead, Colorado's law prohibits discrimination based on race, sex, and sexual orientation in the same way. In other words, it's a good thing that the baker agrees with the part of the law that prohibits race discrimination. But the state does not say that some protected categories deserve less protection than others or leave businesses to decide which parts of the law they will follow and which they won't.

Mistake number 3: the baker's lawyer says that requiring Phillips to sell his cakes to a gay couple would be the same as compelling him to speak in support of marriage equality for same-sex couples, and that this would violate his dignity and religious freedom.

Common sense helps here: why would any couple want to put a baker's views in the middle of their wedding? To the extent a wedding cake expresses anything, it expresses the couple's commitment, not the baker's.

And there is more. This baker seems to be arguing that the law is telling him what to believe or do. But, to state the obvious, the law does not require him to sell wedding cakes.

Instead, the law says that if you open a shop on Main Street or anywhere else, you can't pick and choose to whom you sell your products, just like you can't pick and choose which tax laws or safety laws you'll comply with.

As Justice Sonia Sotomayor said at the argument's end: "It's not denigrating to say ... you can choose to sell cakes or not. You can choose to sell cupcakes or not." Instead, the point is: "Whatever it is you choose to sell, you have to sell it to everyone who knocks on your door, if you open your door to everyone."

Suzanne B Goldberg is Herbert and Doris Wechsler Clinical Professor of Law, Columbia Law School