



Written by [Selwyn Duke](#) on February 23, 2015

How to Win the Christian Baker/Same-Sex “Wedding” Cake Debate

A homosexual couple goes into a known Christian bakery and [asks](#) for a wedding cake for a same-sex “marriage,” is refused and then files a government complaint or sues. “Intolerance! Bigotry! Equal access!” is the cry. Many Americans have read of [such stories](#) in the news. Often the attempted purchase is a set-up, with activist-minded individuals targeting bakers they know will decline the request and then be vulnerable to state persecution by zealous bureaucrats.



It’s a new front in the war on faith, legitimate freedom and private property rights. Many point out that it constitutes an unprecedented trampling of religious liberty, and this is true. It also violates the principle of freedom of association, which isn’t explicitly mentioned in the Constitution but should be upheld. But neither of these arguments should be the centerpiece of the fight against the tyranny in question. There is another, far more powerful argument:

Freedom of speech.

Usually missed in the commentary on this subject is that the bakers in question are not refusing service to a type of *people* — they are refusing to be party to a type of *message*. This is not debatable. When you put writing on a same-sex “wedding” cake, you’re crafting a message; if you place figurines (of two men, for instance) on that cake, you’re erecting symbols relating that message. Note here that the Supreme Court has already ruled that “Symbolic Speech” — a legal term in U.S. law — is protected under the First Amendment; examples of such rulings would be that pertaining to flag-burning and the [Tinker v. Des Moines](#) case.

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And can we compel people to participate in the creation of a message? Forced speech is not free speech.

Some homosexuality activists have likened the bakers’ refusal to provide faux-wedding cakes to a denial of service to blacks. This is a false analogy. A race-specific refusal is denying service based on *what a person is*; in the wedding-cake incidents, denial was based on *what message was being requested*.

In point of fact, none of the targeted bakers had erected signs stating “No shoes, no shirt, no heterosexuality, no service.” Nor did they apply a sexuality test to customers. Homosexuals could patronize their establishments and purchase cookies, bread, or any products anyone else could; they could even buy wedding cakes for normal weddings — as anyone else could. And, of course, probability would dictate that homosexuals did buy from those bakers at times.

What actually is analogous to the wedding-cake controversy is a black person asking a baker for a cake expressing a racial message such as “Black Power” or “Fight the Blue-eyed Devils.” Of course, it could



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also be a white person with a white-power message or a neo-Nazi asking a Jewish baker to craft an anti-Semitic one.

Some may now assert that while a faux-marriage message is positive (in their eyes, anyway), the above messages would be hateful. But the nature of a message doesn't change the fact that it's still a message. To drive the point home, should a liberal baker be compelled to craft the message, "Celebrate Gun Rights," "Life Begins at Conception" or "Marriage is One Man, One Woman"?

Here's another point: It has often been emphasized that unless the First Amendment protects even unpopular speech, its "protection" is a sham. After all, popular speech's popularity is protection enough. Likewise, however, it's also true that if the right to refuse to participate in speech doesn't include the right to refuse to participate in popular speech, it is no right at all.

Note here that many commentators have made the "Nazi and Jewish baker" and "white supremacist and black baker" arguments, but they often take a freedom-of-association approach. This gives the other side the opportunity to counter with, "But Nazis and white supremacists aren't 'protected groups'; homosexuals are" (I reject the notion of "protected groups," but the principle currently exists in law, and this is about crafting airtight legal arguments). Emphasizing the speech aspect presents the opposition with no such avenue of attack.

Some may now claim that messages vs. people in the baker controversies is a distinction without a difference, asking "Who else but homosexuals would request a faux-wedding cake?" First, there are many heterosexuals advancing the homosexual agenda, and it's conceivable that such a person could order such a cake, for symbolic value, to serve at an activist gathering. This is in the same way a white person (N.Y.C.'s mayor Bolshevik Bill comes to mind) could order a cake with a black-power message. Or, a heterosexual wedding planner could attempt to order a faux-wedding cake. None of this matters, though. That a message may be characteristic of a certain group doesn't change the fact that it's a *message*. And forced speech isn't free speech.

In the baker controversy, the free-speech argument should be superior in the courts of both law and of public opinion. While we ought to enjoy completely unfettered freedom of association, Americans long ago became inured to its trampling, and the courts universally accept the "public accommodation" rationalization. So it's currently a non-starter. The religious-freedom argument is more effective, but it has two weaknesses relative to the free-speech strategy. First, there are many more limitations placed on religious practice than on speech; examples would be the outlawing of human sacrifice and polygamy. Thus, there's more of a precedent for further limitations on religious practice. In the area of speech, not much is out of bounds aside from "yelling 'fire!' in a movie theater" and issuing threats.

This difference is evident in the burden placed on a person whose religious practice has been outlawed. As the *Harvard Political Review* [points out](#), the "'Sherbert Test' requires that an individual must prove sincere religious beliefs and substantial burden through government action. If these are established, the law is unconstitutional unless the government proves a 'compelling state interest.'" No such burden is placed on those exercising unpopular speech, however, and the government cannot prohibit it based on "compelling state interest."

The second issue is that in these secular times, many Americans aren't sympathetic to religious-freedom arguments. But freedom of speech enjoys much broader support, and the fear of its violation is far greater. Remember, only the religious engage in religious practice — but both the religious and non-religious engage in speech.



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Of course, it should lastly be mentioned that the argument I've outlined would be applicable not just to bakeries, but any time a message-oriented product or service is at issue.

It's hard to imagine a sane court (which, unfortunately, leaves out a good portion of today's judiciary) not finding in favor of the free-speech argument. It is airtight, and rationalizing it away would take far more complex intellectual contortions than the freedom-of-religion argument would require. Because, quite simply, forced speech is not free speech.

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