

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

2020

LGBT Equality, Religious Liberty, and *Masterpiece Cakeshop*

Dale Carpenter

Southern Methodist University, Dedman School of Law

Recommended Citation

Dale Carpenter, LGBT Equality, Religious Liberty, and Masterpiece Cakeshop, 83 Tex. B. J. 464 (2020)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Reprinted with permission of the Texas Bar Journal

LGBT EQUALITY, RELIGIOUS LIBERTY, AND MASTERPIECE CAKESHOP

Issues to consider.

WRITTEN BY DALE CARPENTER



In recent sessions, the Texas Legislature has been pulled in seemingly opposite directions over LGBT equality and religious liberty. But the U.S. Supreme Court has intimated that these interests can, and should, be reconciled.

LGBT-equality advocates cite evidence of considerable discrimination against gay and transgender people in employment, housing, and public accommodations.¹ Religious-liberty advocates say they fear an increasingly hostile culture toward traditional views about human sexuality, gender, and marriage.² Both claim a need to be legally protected not just in constitutionally sensitive *private* spheres (like homes and churches) but in heavily regulated *public* ones (like employment and business services).

One major debate, whether states must recognize same-sex marriages, was decided in favor of gay couples in *Obergefell v. Hodges* (2015).³ More than 513,000 same-sex couples are now married in the United States.⁴ The celebration of these marriages has also occasioned a few high-profile confrontations between gay couples and wedding-service providers. The larger issue of interest-reconciliation received suggestive treatment in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* (2018), which held that such disputes could not be adjudicated with animus toward religion.⁵

Enter the Texas Legislature, where clashes between LGBT-equality advocates and religious traditionalists have repeatedly erupted.

In the 2019 session, more than 20 bills opposed by Equality Texas, the statewide LGBT-lobbying organization, were filed.⁶ Several of the bills sought specific faith-based exemptions from occupational regulations and local nondiscrimination laws.⁷ One, dubbed the “license to discriminate” bill by opponents, would have prohibited licensing agencies or other state regulatory authorities from taking adverse action against a service provider who claimed a regulation burdened their religious beliefs. The bill was not limited to shielding religious objections based on sexual orientation or gender identity. However, it would have had a disparate impact by permitting widespread denials of service to LGBT people, who are not otherwise protected by state or federal law.⁸ The bill passed the Senate but died in the House.⁹

The only religious-liberty measure that actually became law, commonly known as the “Save Chick-fil-A” bill, amended the Texas Government Code to prohibit adverse state action against an individual or business based on membership in, or support of, a religious organization.¹⁰ The law is not limited to protecting only those who oppose LGBT equality. However, impetus for the bill arose after San Antonio decided not to award an airport-concession contract to Chick-fil-A, which had previously donated funds to Christian groups opposed to same-sex marriage.¹¹ In many respects, the law duplicates existing constitutional protection against government action targeting religion.

LGBT-equality advocates countered with proposals of their own in 2019. These included bills to ban discrimination based on sexual orientation and gender identity in employment, housing, public accommodations, state contracting, and other domains. The bills generally exempted religious organizations.¹² Other bills banned “conversion therapy” by mental health providers to try to change a minor’s sexual orientation or gender identity,¹³ a practice opposed by the major

national mental health associations.

These bills did not pass either. The net result was a stand-off in 2019.

Controversies may flare again in the 2021 session. In January, Virginia became the first Southern state to approve a comprehensive LGBT nondiscrimination statute.¹⁴ In May, a bipartisan group of Texas lawmakers announced plans to introduce similar legislation in 2021.¹⁵ They are touting benefits to the state economy from such a law.¹⁶

Opponents of such nondiscrimination laws may demand new religious exemptions. Texas Values, a religious-conservative lobby, has identified several priorities.¹⁷ The Baptist General Convention of Texas has called for laws allowing “faith-based family service providers” to refuse service “based on their deeply held religious beliefs.”¹⁸

Is there a way forward? In *Masterpiece Cakeshop*, the U.S. Supreme Court unanimously affirmed that states have the power to broadly protect LGBT Americans from private discrimination.¹⁹ Even the most conservative members of the court agreed:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.²⁰

The court noted that religious objections to same-sex marriage are “in some instances protected forms of expression.” But it added that “such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”²¹

The U.S. Constitution does not require Texas to protect LGBT persons from such private discrimination. Nor does it require Texas to excuse all faith-based objections from compliance with nondiscrimination laws. The Legislature could choose a winner-take-all approach.

Or the Texas Legislature could choose to accommodate the core needs of both LGBT residents and religious traditionalists. Specifically admonishing only adjudicators, the court concluded its *Masterpiece Cakeshop* decision with words that might also guide legislators in the next session: “[T]hese disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”²² **TBJ**

NOTES

- Christy Mallory, Taylor N.T. Brown, Stephen Russell & Brad Sears, *The Impact of Stigma and Discrimination Against LGBT People in Texas*, UCLA Sch. of Law Williams Inst., April 2017, at 25-30, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-TX-Apr-2017.pdf>.
- Lathan Watts, *CNN's Opinion Column Grossly Mischaracterized Those of Us Who Fight for Religious Freedom*, FIRST LIBERTY INST. (May 29, 2020), <https://firstliberty.org/news/cnns-opinion-grossly-mischaracterized-religious-freedom/>.
- Obergefell v. Hodges*, 135 S.Ct. 2584, 2608 (2015).
- Christy Mallory & Brad Sears, *The Economic Impact of Marriage Equality Five Years After Obergefell v. Hodges*, UCLA Sch. of Law Williams Inst., May 2020, at 1, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Economic-Impact-SS-Marriage-May-2020.pdf>.
- Masterpiece Cakeshop Ltd., v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (holding that Colorado could not enforce a nondiscrimination law against a baker who refused to make a wedding cake for a gay couple). The court side-stepped larger questions about whether wedding-service providers must be generally excused from compliance

with nondiscrimination laws under Free Speech or Free Exercise principles.

- 2019 Equality Texas Legislative Scorecard, Equality Tex. 22, <https://www.equalitytexas.org/wp-content/uploads/2019/10/EQTX-2019-Legislative-Scorecard.pdf> (last visited June 3, 2020).
- See Tex. H.B. 4497, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB4497/2019>; Tex. H.B. 1035, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB1035/2019> (religious exemption for “marriage-related goods and services” and for the belief that “male,” “man,” “female,” and “woman” refer to “immutable biological sex” as determined by “anatomy and genetics” at birth); Tex. S.B. 1107, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/SB1107/2019>; Tex. H.B. 2892, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB2892/2019> (conscience exemption for health care providers to refuse services); Tex. S.B. 85, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/SB85/2019> (religious exemption to permit psychologists to refuse services); Tex. H.B. 4357, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB4357/2019> (religious exemption to permit mental health providers to refuse services); Tex. H.B. 4512, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB4512/2019>; Tex. S.B. 1009, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/SB1009/2019> (religious exemption allowing refusal to solemnize marriages).
- Unlike most states, Texas has no law prohibiting discrimination in public accommodations. As of this writing, three related cases before the Supreme Court may determine whether sexual-orientation and gender-identity employment discrimination are already prohibited as forms of sex discrimination under Title VII. Amy Howe, *Argument Analysis: Justices Divided on Federal Protections for LGBT Employees (UPDATED)*, SCOTUSblog (Oct. 8, 2019, 2:14 PM), <https://www.scotusblog.com/2019/10/argumentanalysis-justices-divided-on-federal-protections-for-lgbt-employees/>. However the cases are decided, the outcome may influence how sex discrimination is understood for purposes of other federal and state nondiscrimination laws.
- Progress of S.B. 17 Through the Texas Legislature, Tex. Leg. Online, <https://www.legis.state.tx.us/BillLookup/BillStages.aspx?LegSess=86R&Bill=SB17>.
- Tex. Gov't Code Ann. § 2400.002.
- Rebekah Allen & Lauren McGaughy, *Save Chick-fil-A Bill Signed into Law by Texas Gov. Greg Abbott*, Dallas Morning News (June 11, 2019 3:30 PM), <https://www.dallasnews.com/news/politics/2019/06/11/save-chick-fil-a-bill-signed-into-law-by-texas-gov-greg-abbott/>.
- Tex. S.B. 151, 86th Leg., R.S. (2019) <https://legiscan.com/TX/text/SB151/2019>; Tex. H.B. 244, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB244/2019>; Tex. H.B. 254, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB254/2019>; Tex. H.B. 2692, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB2692/2019>.
- Tex. H.B. 4466, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB4466/2019>; Tex. S.B. 1251, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/SB1251/2019>; Tex. H.B. 1190, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB1190/2019>; Tex. H.B. 517, 86th Leg., R.S. (2019), <https://legiscan.com/TX/text/HB517/2019>.
- H.B. 1049, 2020 Gen. Assemb., R.S. (Va. 2020), <https://legiscan.com/VA/text/HB1049/id/2182961>.
- Allie Morris, *LGBTQ Texans Would Get Nondiscrimination Protection Under Proposed Bipartisan Texas House Legislation*, Dallas Morning News (May 27, 2020, 12:26 PM) <https://www.dallasnews.com/news/politics/2020/05/27/lgbt-texans-would-get-nondiscrimination-protection-under-proposed-bipartisan-texas-house-legislation/>.
- One economist projects an increase of \$19.8 billion in annual tech and tourism gross product and 180,000 new jobs by 2025. *The Potential Impact of a Comprehensive Nondiscrimination Act on Business Activity in Texas*, Perryman Group (May 27, 2020), <https://www.perrymangroup.com/publications/report/the-potential-impact-of-a-comprehensive-non-discrimination-act-of-business-activity-in-texas/>.
- Issues, Tex. Values, <https://txvalues.org/issues/> (last visited June 3, 2020). Texas Values is concerned about attempts to pass LGBT nondiscrimination ordinances at the local level. James Wsolek, *San Marcos Sneaks in LGBT Policy During COVID-19*, Tex. Values (May 14, 2020), <https://txvalues.org/2020/05/14/san-marcos-sneaks-in-lgbt-policy-during-covid-19/>.
- Religious Liberty*, Baptist Gen. Convention of Tex., <https://texasbaptists.org/ministries/clc/public-policy/issues/religious-liberty> (last visited on June 3, 2020). Religious traditionalists are also expected to push back specifically on a range of transgender issues, including participation in school sports. *Webinar: Preview to Texas Legislature—Anti-Trans Bills*, Equality Tex. (April 22, 2020), <https://www.equalitytexas.org/webinar-preview-to-texas-legislature-anti-trans-bills/>.
- Masterpiece Cakeshop*, 138 S. Ct. at 1731.
- Id.* at 1727.
- Id.* This principle applies to employers and landlords, as well as service providers.
- Id.* at 1732.

The author would like to thank his research assistants, Nita Hight and Joe LeCroy, for their excellent work on this article.



DALE CARPENTER

is a professor of law and the Judge William Hawley Atwell Chair of Constitutional Law at SMU Dedman School of Law.