

Group Hypo #2
Political Controversies
Fall 2019

2nd Group-Hypothetical Assignment [30 points]

Below I describe a “hypothetical” law that is being constitutionally challenged. One group will work together to argue the government’s authority to adopt the law, while another group will challenge the government’s authority, and another group will serve as the justices of the Supreme Court.

Hypothetical:

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court in a 7-2 decision ruled in favor of a Colorado baker who had refused to create a wedding cake for a gay couple. The Court’s decision was on the basis that the “Civil Rights Commission’s treatment of [Jack Phillips displayed] ...elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.” Thus, the Court’s decision was narrow, and it left open the larger question of whether a business can discriminate on the basis of sexual orientation based on religious liberties protected by the First Amendment in the absence of such hostility.

In 2021, an Oregon Cakeshop owner, John Gregory, refused to bake a cake for a wedding for a same-sex couple. Gregory said he would sell the couple a pre-made cake off the shelf, but he would not bake a cake for the couple. The couple and the owner both agree that the cake the couple requested did not contain any messages or statements related to marriage, weddings, or homosexuality: the only “content” on the cake would be decorative flowers. After being refused a custom cake, Jason and Tim went to the Oregon Civil Rights Division, where they accused John Gregory of discriminating against them based on their sexual orientation.

Oregon’s 2016 Anti-discrimination in Public Accommodations Act states “It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome,

objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.”

Based on the text of this law, the Oregon Civil Rights Commission initiated proceedings against Gregory, who responded that he had turned down the couple not because of their sexual orientation, but because “he could not in good conscience create a wedding cake that celebrates their marriage.” The agency, however, dismissed that explanation as “a distinction without a difference,” and it ruled both that Gregory’s refusal to provide the custom cake violated Oregon’s anti-discrimination laws and that Gregory had “no free speech right” and no “free exercise right” to turn down Jason and Tim’s request so long as he choose to engage in a business that serves the public. The Oregon Civil Rights Commission upheld that ruling and told Gregory – among other things – that if he decided to create cakes for opposite-sex weddings, Oregon law required that he would also have to create them for same-sex weddings. An Oregon court affirmed, and Gregory asked the Supreme Court to take his case, and it agreed.

Gregory argues two points (which will be flushed out in more detail by his Group of Attorney’s):

- (1) The law violates everyone’s First Amendment freedom of speech, and therefore the anti-discrimination law is unconstitutional as written.
- (2) If the law is found to be constitutional, he should be granted a religious based exemption to the law otherwise Oregon violates his First Amendment right to freely exercise his religion.

The state of Oregon counters with 3 points which will be flushed out in more detail that

- (1) Oregon like all states, possesses police powers which grant it the authority to outlaw discrimination in all public accommodations (whether that discrimination is based on race, sex, religion, or sexual orientation);
- (2) the First Amendment does not grant free speech protections against public accommodation laws so that people running a business serving the public can freely discriminate; and
- (3) religious based exemptions do not grant people exemptions from neutral laws that are generally applicable.

Directions:

Group D: State of Oregon

Group A: Baker (John Gregory)

Group C: The Supreme Court

Argument Due date: For Groups A & D is Wednesday, Oct 29th (7 pm) via Blackboard. I will create a Turnitin.com assignment for you to submit your final argument. While there are penalties for being late, please do not be late; it will impair the ability of the Court to come up with its answers. Late Posts will be docked 1/3 grade per day (ie. a “B” would turn into a B- if it is turned in at 7:05 PM Oct. 29th, and it becomes a “C+” at 7:05 PM Oct. 30th).

Supreme Court Decision Due date: For Group C is Monday, Nov. 3rd (11:59 pm) via Blackboard. Late Posts will be docked 1/3 grade per day (ie. a “B” would turn into a B- if it is turned in at 12:05 AM Nov. 4th, and it becomes a “C+” at 12:05 AM Nov. 5th).

College-level writing is expected. Everyone in the group will receive the same grade. Please look over the document “Group Work (Explanation, Expectations & Tips).”

The two groups arguing before the Court will use the concepts from the recent readings and court cases to devise convincing arguments. You should use these cases not as precedent, but for their reasoning. Therefore, do not argue: “*Lemon v. Kurtzman* determined that any law that excessively entangles elected officials in religion violates the Establishment Clause therefore this law is invalid as it excessively entangles.” Instead you should argue: “the Establishment Clause is best understood as requiring an avoidance of excessively entangling elected officials in religion because.” The difference is that we want an appeal to reasoning and logic not an appeal to the authority of precedent. Therefore, avoid arguments that begin and end with the Court ruled “x” in *Brown v. Board* therefore we win. If you do go to precedent, use the precedent from this class, not from outside research. The intent of the assignment is to see how creative an argument you can make that works within the confines of the law; we are less interested in seeing if you can google someone else’s arguments. Thus, the assignment does not require (in fact it shuns) outside research; it is asking to see how well you can use the course materials to come up with creative and novel arguments, and how well can you interpret the Constitution and make a reasoned argument based on it.

These arguments should be 2 to 3 pages (double-spaced). These arguments will be developed in a discussion forum that only your group members can view. As a group, you may choose to create a google doc or have an online video chat to help craft your argument.

The Supreme Court will weigh the arguments from the both groups (one group supporting the law and one challenging it) and the justices will also use their own knowledge of course readings to issue a verdict which includes a 2-3 page opinion in support of its ruling. If the Court is unanimous, then only one majority opinion needs to be submitted. If the decision is split, then there should be one majority opinion and dissenting opinions as needed.