

## Taking (up) The Cake (case)

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

On Tuesday, December 5, the Supreme Court will hear oral argument in one of the most high-profile cases of its Term.

*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* is sure to trigger substantial news coverage and strong opinions. This podcast instead focuses on the case as a textbook example of three important realities about constitutional litigation. First, *Masterpiece Cakeshop* illustrates how the legal system often narrows the framing of a social, political and moral controversy in surprising ways. Second, the challenge classically illustrates that high-stakes constitutional decision-making is not just about who wins in Court; it matters as much (and sometimes more) *on what basis* the Court decides. Third, *Masterpiece Cakeshop* underlines that Supreme Court opinions are important for the reverberations they trigger or tamp down in lower courts, the halls of government, and among the media and public.

Most people hearing the facts of *Masterpiece Cakeshop* would conclude that it pits religiously motivated business practices against civil rights. In 2012 a cake baker refused to design a cake for the wedding reception of a Colorado same-sex couple. The baker claims that he had a longstanding practice of not selling custom cakes to customers for occasions or involving messages inconsistent with his deeply held religious beliefs. Colorado civil-rights-enforcement officials and an intermediate state court concluded that the baker’s refusal to do business based on his disapproval of same-sex marriage was sexual-orientation discrimination in violation of Colorado civil-rights laws.

Is this the classic broad tradeoff between religious freedom and equality? As the song goes, “it ain’t necessarily so.” The parties in *Masterpiece Cakeshop* don’t focus their legal arguments centrally on the baker’s right to Free Exercise of Religion. Key here is that Colorado’s civil-rights law seems to be a generally applicable law not discriminating on the basis of religion; such laws are usually valid.

Therefore, counsel have chosen to focus on the *free-speech* rights of the baker as a self-proclaimed “cake artist.” Claiming that Colorado laws violate First Amendment prohibitions on governmentally “compelled speech,” the baker argues that Colorado penalized him for declining to use his creative talents to advocate a message he finds religiously objectionable -- or which at least would be interpreted as such by others. If accepted, this would trigger “strict scrutiny”, the judicial test requiring government to narrowly pursue a “compelling interest.” Government often fails strict scrutiny.

Because of its free-speech focus, then, *Masterpiece Cakeshop* does not *necessarily* involve across-the-board the rights of employees and business entities to claim religious

exceptions from civil-rights or consumer-protection laws. A florist or graphic designer might legitimately claim significant “artistry” in their creations. But it would seriously distort the “compelled speech” doctrine to include a limousine-rental service or the gas station selling it fuel. (Significantly, the cake baker offered to sell a standard “off the rack” cake to the same-sex couple.)

Just as *Masterpiece Cakeshop* dramatically shows how social, political, and moral issues can become skewed when the legal system gets involved, the challenge also points to the importance of how the justices explain the rationale behind their decisions. For example, if the Court were to rule in favor of the baker, it would become crucial whether the majority narrowly and clearly bases its decision on special free-speech rights and closes the door to unjustified expansive claims by others.

Which brings up the last point: beyond the Court’s specific explanation of the *reasoning* behind a particular decision, it usually sends *signals* enhancing or reducing the expectations of future potential litigants, public officials (who, for example, might be more or less likely to pass “freedom of conscience” legislation), the media and members of the public.

The bottom line: There is often less – and much more – than meets the eye in high-stakes constitutional litigation.