

WHEN CONSTITUTIONAL RIGHTS CLASH: MASTERPIECE CAKESHOP'S POTENTIAL LEGACY

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In December, the United States Supreme Court heard oral argument in the highly anticipated case *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.¹ Jack Phillips, who has owned and operated Masterpiece Cakeshop in Lakewood, Colorado for over 22 years, declined to create a wedding cake for a same-sex couple based on his Christian belief that same-sex couples should not marry.² The couple filed charges with the Colorado Civil Rights Division for discrimination in a place of public accommodation based on sexual orientation, violating the Colorado Anti-Discrimination Act (CADA). An Administrative Law Judge ruled in favor of the couple, requiring Phillips to bake cakes for couples of all sexual orientations and to ensure his staff is properly trained to comply with CADA.³

The question presented to the Court in *Masterpiece Cakeshop* is whether CADA violates Jack Phillips' rights under the Free Exercise and Free Speech Clauses of the First Amendment of the United States Constitution by compelling him to create a cake for the same-sex couple.⁴ This specific legal issue is undoubtedly one of great national importance, as the case is an appropriate vehicle for the Court to bring some clarity to

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1. Transcript of Oral Argument, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, Dec. 5, 2017 (No. 16-111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf [<https://perma.cc/LN9L-5T9T>].

2. Petition for Writ of Certiorari at 4-6, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, <http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf> [<https://perma.cc/7WJ2-5U2Q>].

3. *Id.* at 6-7.

4. *Id.* at i.

an area of law that affects multiple wedding industries across the United States.⁵

The Court, however, should avoid limiting its decision to this very narrow issue. *Masterpiece Cakeshop* presents an opportunity for the Court to expound upon a broader, more fundamental constitutional issue – what is the optimal legal framework for resolving direct conflicts between constitutional rights? In Part I of this essay, I argue that the Court's current approach to resolving such conflicts is flawed because it establishes a hierarchy of constitutional rights. In Part II, I argue that the optimal legal framework is actually embedded in precedent and the Court should use *Masterpiece Cakeshop* to revive this framework to guide courts in refereeing these conflicts in a fair and balanced manner.

I. THE COURT'S CATEGORICAL APPROACH TO RIGHTS

In *Masterpiece Cakeshop*, the Court finds itself directing traffic at the crossroads of the Free Exercise Clause, the Free Speech Clause, and Colorado's enforcement of the Fourteenth Amendment's Equal Protection Clause through CADA.⁶ There is little disagreement that each of these constitutional rights should be afforded close judicial scrutiny. If each right holds equal value by way of its inclusion in the Constitution, what is the proper method for courts to determine winners and losers when these rights are in a state of conflict with each other?

The Court's line of questioning during oral argument in *Masterpiece Cakeshop* lends some insight into how it might address this legal conundrum. This perceived approach incorporates an examination of government interests and the means required to advance those interests within the traditional levels of scrutiny. During oral argument, the Court's treatment of the Free Exercise Clause, one of the rights in a state of conflict in *Masterpiece Cakeshop*, illustrates this point. Justice Kennedy's questions to Frederick Yarger, who represents the State of Colorado, invoke a potential *Employment Division v. Smith* analysis by the Court.⁷ Specifically, Justice Kennedy states, "in this case . . . Commissioner Hess says freedom of religion used to justify discrimination is a despicable

5. See, e.g., *State of Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (2017) (flower shop owner refused to design floral arrangements for a same-sex wedding); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (2013) (owner of a photography business refused to provide services for a commitment ceremony for a same-sex couple).

6. The Fourteenth Amendment's Equal Protection Clause would be implicated if the State of Colorado were to create a religious exemption to the sexual orientation provision of CADA.

7. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

piece of rhetoric.”⁸ If a majority of the Court finds the Colorado Civil Rights Commission exhibited hostility to religion, the *Smith* precedent triggers a strict scrutiny analysis.⁹ On the other hand, if a majority of the Court does not find any evidence of religious hostility and determines CADA is a neutral law of general applicability in both text and operation, then the Court would conduct a rational basis review.¹⁰

To demonstrate the inherent flaw to this approach, I start with the premise that the Court has historically rejected a hierarchy of constitutional rights. The Court has noted that there should not be a presumption that one constitutional right is superior to another constitutional right. In the 1976 case *Nebraska Press Association v. Stuart*, the Court was presented with the question as to whether the entry of an order restraining several members of the press from publishing or broadcasting accounts of admission by the accused in a criminal case violated the constitutional guarantee of freedom of the press under the First Amendment.¹¹ The Court was deeply concerned that the petitioners wanted the Court to declare the right of a criminal defendant subordinate to their First Amendment right to publish in all circumstances. The Court noted in response, “[t]he authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.”¹² Rejecting the petitioners’ absolute claim of superiority,¹³ the Court proceeded to examine the evidence before the trial judge to determine the nature and extent of pretrial news coverage, whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity, and how effectively a restraining order would operate to prevent the threatened danger.¹⁴ After weighing these factors and balancing the interests of both parties, the Court ruled in favor of the petitioners.¹⁵

8. Oral Argument, *supra* note 1, at 51. https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf [<https://perma.cc/LN9L-5T9T>].

9. Strict scrutiny analysis was later applied in the free exercise context in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 522 (1993). Mr. Yarger raises this case in response to the Justices’ questions on the Free Exercise Clause. See Oral Argument, *supra* note 1, at 56.

10. *Smith*, 494 U.S. at 884-85.

11. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

12. *Id.* at 561.

13. *Id.* The Court further noted: “[I]f the authors of these guarantees, fully aware of the potential conflicts between them were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances.” *Id.*

14. *Id.* at 562.

15. *Id.* at 540.

In the end, the Court avoided establishing a *de facto* hierarchy of constitutional rights by weighing and examining the unique facts presented in the case at hand.¹⁶

The Court's purported fallback to a categorical approach involving levels of scrutiny to resolve cases where constitutional rights collide is flawed in that it creates a hierarchy of constitutional rights. Under this approach, courts can frame controversies in a manner that assign seemingly insurmountable legal burdens on one party, which consequently leads to predetermined results. Under a traditional level of scrutiny analysis, courts examine government interests and the means necessary to achieve those interests for just one of the two constitutional rights in conflict. To further compound this problem, the court typically evaluates broad, macro-level government interests, which are susceptible to rubber stamping. As such, this categorical approach promotes an uneven playing field where one constitutional right has a deliberate advantage over the other constitutional right.

Assume a majority of the Court in *Masterpiece Cakeshop* finds that the statements attributed to the Colorado Civil Rights Commission trigger a rational-basis review under *Smith*. As the Court has previously explained, "action by a legislature is presumed to be valid" when courts apply the rational-basis standard.¹⁷ This notion of judicial restraint, embodied in rational basis review, is especially problematic when constitutional rights clash. As described in *FCC v. Beach Communications, Inc.*, "[o]n rational-basis review, a classification in a statute. . . comes to us bearing a strong presumption of validity . . . and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it."¹⁸ Applying this standard in *Masterpiece Cakeshop*, Jack Phillips would bear the near impossible burden of showing that Colorado does not have a legitimate government interest in providing equal access to public areas for classes of individuals who have been historically denied equal access; or, assuming Jack Phillips concedes that it is a legitimate government interest, CADA itself is not rationally related to achieving that interest. There is no conceivable legal basis to question the rationality of passing

16. The Court rejected a categorical approach to resolving competing constitutional interests by noting in the opinion that "[t]he problems presented in this case have a substantial history outside the reported decisions of the courts, in the efforts of many responsible people to accommodate the competing interests. We cannot resolve all of them, for it is not the function of this Court to write a code. We look instead to this particular case and the legal context in which it arises." *Id.* at 550-51.

17. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

18. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993) (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

an anti-discrimination law to advance equal access in public accommodations. Additionally, at a macro-level, the overarching government interest of CADA is the enforcement of a constitutional right—namely the Equal Protection Clause. It is unlikely that anyone would question the legitimacy of the government’s attempts to secure fundamental constitutional rights cloaked in the notion of equality. Thus, the absolute nature of rational-basis review blocks courts from considering the interests of the party with the impenetrable burden. If the Court were to apply rational basis review in *Masterpiece Cakeshop*, it would effectively prevent Jack Phillips from demonstrating how Colorado’s enforcement of the Equal Protection Clause, through CADA, potentially burdens him at an individual level. Under this analysis, the Free Exercise Clause is automatically subordinated to the Equal Protection Clause.

On the other end of the spectrum is strict scrutiny analysis.¹⁹ Assume now that a majority of the Court in *Masterpiece Cakeshop* finds that the statements attributed to the Colorado Civil Rights Commission trigger a strict scrutiny analysis under *Smith* and *Lukumi*. Strict scrutiny requires that a law be narrowly tailored to meet a compelling government interest.²⁰ Here, the burden shifts from Jack Phillips to the State of Colorado. The first prong is generally not at issue because the government will always have a compelling interest in enforcing a fundamental constitutional right. However, the second prong is particularly problematic. The State of Colorado must demonstrate that enforcement of the Equal Protection Clause through CADA is narrowly tailored to achieve the compelling interest. The second prong is closely intertwined with the least-restrictive-means standard, which the Court has previously described as exceptionally demanding.²¹ The Court in recent years has strongly suggested this standard places an unlimited burden on the government to fund alternative programs to achieve stated government interests.²² In this case, the Court could conceivably, under this principle, force the State of Colorado to open special cake shops or similar venues to serve customers who are denied service on religious grounds. Under

19. This view has been described as “strict in theory, fatal in fact.” (a phrase that originated in Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

20. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978).

21. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) (citing *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

22. *Id.* at 2780-82.

this analysis, there is a presumption that the Free Exercise Clause is superior to the Equal Protection Clause.

II. A PROPOSED FRAMEWORK OF INDIVIDUAL RIGHTS

The primary issue with the categorical approach is that undue emphasis is placed on *broad* government interests and government action *at the macro-level*, both of which are ripe for manipulation, rubber stamping, and predetermined results by the courts. Ultimately, the categorical approach leads to a hierarchy of constitutional rights because it fails to consider the *individual, micro-level* interests at stake under the particular facts and circumstances of each case. How, then, does the Court establish a level playing field in these types of cases? I propose that the optimal legal framework can be extracted from the Court's decisions in *Rowan v. United States Post Office Department*.²³

In *Rowan*, the appellants challenged the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967, under which a person may require a mailer to remove his name from its mailing lists to the householder.²⁴ At specific issue was a section of the law entitled "Prohibition of pandering advertisements in the mails," which provided a procedure for any householder to "insulate himself from advertisements that offer for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative."²⁵ The Court in *Rowan* was essentially required to resolve a direct conflict between the Free Speech Clause of the First Amendment and the penumbra right of privacy emanating from the First, Third, Fourth, and Fifth Amendments.²⁶

The Court in *Rowan* resolved this conflict by weighing the *individual costs and burdens* placed on *each party* to the controversy.²⁷ Under this balancing methodology, the Court's goal is to determine which party

23. *Rowan v. U. S. Post Office Dept't*, 397 U.S. 728 (1970).

24. *Rowan*, 397 U.S. at 729.

25. *Id.* at 729-30.

26. *Id.* at 731. The Court states: "But the right of every person to be let alone must be placed in the scales with the right of others to communicate." *Id.* at 736.

27. This general principle was also invoked six years later in *Nebraska Press Association v. Stuart*. *Nebraska Press Ass'n*, 427 U.S. 539 (1976). In *Stuart*, the Court weighed the costs associated with the competing interests of the Sixth Amendment and First Amendment. For example, in reference to the Sixth Amendment interests, the Court noted: "[i]n the most extreme cases. . . the risk of injustice was avoided when the convictions were reversed. But a reversal means that justice has been delayed for both the defendant and the State; in some cases, because of the lapse of time retrial is impossible or further prosecution is gravely handicapped." *Id.* at 555. In regard to the First Amendment interests, the Court noted: "[a] prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Id.* at 559.

would have to make the greatest sacrifice of its protected liberty under the specific facts and circumstances of the case if the Court ruled against them.²⁸ In *Rowan*, the Court recognized that a substantial burden was placed on a citizen receiving offensive, unsolicited mail: “[t]he citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable. Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped.”²⁹ Additionally, the Court in *Rowan* acknowledged that the costs associated in the removal of names from mailing lists were significant to the mailers.³⁰ In the end, after weighing these costs and burdens, the *Rowan* Court determined the householders would have to make the greatest sacrifice among the competing individual liberties and ultimately ruled in their favor.³¹

This pragmatic approach, with a focus on *individual costs and burdens of each party*, is likely to drive a more balanced analysis by the Court in *Masterpiece Cakeshop* in contrast to an analysis employing the traditional levels of scrutiny. Consider, for example, the costs and burdens facing Jack Phillips. If he fails to make cakes for same-sex weddings, he is subject to tangible harm in the form of fines, additional resources expended on remedial training for his staff, and potentially the loss of his business and livelihood. He is also subject to the intangible harm to his conscience for violating his sincere religious beliefs. For the same-sex couple, they suffered a degree of emotional harm as a result of the incident. While the couple may have arguably had alternative options to receive service at a different cake shop, the unique artistry of the requested good for an important ceremonial occasion may have also created additional obstacles for them to receive service at a different cake shop. As previously discussed, it is not necessary for the Court in *Masterpiece Cakeshop* to consider any of these micro-level factors under a traditional

28. This approach is strikingly similar to the pragmatic balancing advanced by Judge Richard Posner:

There may be no objective method of valuing the competing interests. But analysis can be made more manageable by pragmatically recasting the question as not which of the competing interests is more valuable but what are the consequences for each interest of deciding the case one way rather than the other. If one outcome involves a much smaller sacrifice of one of the competing interests, then unless the two are of very different value that outcome will probably have the better overall consequences.

See RICHARD A. POSNER, HOW JUDGES THINK 242-43 (2008).

29. *Rowan*, 397 U.S. at 738.

30. *Id.* at 740.

31. *Id.*

analysis using the various levels of scrutiny. By evading these factors under that approach, the Court is inclined to make presumptions about the superiority of certain constitutional rights over others. The pragmatic balancing test discussed in this section provides a safe haven from such decisions by forcing Courts to articulate and then weigh the *individual costs and burdens of all parties*.

III. CONCLUSION

Without question, the narrow issue before the Court in *Masterpiece Cakeshop* is of national importance. But it is not the first case of its kind. The effects have been felt beyond the State of Colorado and the wedding industry; small business owners from all over the country are often forced to violate their sincere religious convictions without due consideration of their First Amendment interests.

At the same time, the implications of *Masterpiece Cakeshop* run deeper as a matter of constitutional law. *Masterpiece Cakeshop* presents an opportunity for the Court to revive a fair and balanced legal framework for resolving conflicts between constitutional rights. The Court's current flawed approach shifts focus away from *individual interests* and toward *broad, macro-level government interests*, which promotes the establishment of a presumptive hierarchy of constitutional rights. The Court needs to shift its focus back to a legal model that places individual interests at the forefront of its analysis. If the underlying purpose of constitutional rights is to safeguard *individual* liberty, a balanced approach to resolving conflicts between constitutional rights should necessarily require judges to articulate and weigh the individual costs and burdens associated with enforcing them.

The *Masterpiece Cakeshop* conflict has a potential legacy beyond religion, speech, and various wedding industries. The Court's search for a level playing field is more important than ever as new constitutional conflicts continue to emerge, such as the apparent conflict between the First and Second Amendments.³²

32. See, e.g., David M. Shapiro, *Commentary: Guns, Speech, Charlottesville: The Semiotics of Semiautomatics*, 106 GEO L.J. ONLINE (2017).