



JUSTICES SPLIT OVER WHO TAKES THE CAKE | BAD NEWS BEARS FOR NATIONAL MONUMENTS | SAME-DAY SILENCE FROM SCOTUS

December 6, 2017

EASY AS PIE? | In what's been widely viewed as one of the biggest cases of the term, the justices yesterday considered a dispute out of Colorado involving gay rights and claims of religious freedom. The case—*Masterpiece Cakeshop v. Colorado Civil Rights Commission* (<https://t.e2ma.net/click/taeln/1sldnm/96pose>)—left justices deeply divided over an outcome that will likely have far-reaching impacts on American culture.

Buzzfeed (), The Economist

(<https://www.economist.com/blogs/democracyinamerica/2017/12/tricky-mix>),

POLITICO ([https://www.politico.com/story/2017/12/05/gay-wedding-cake-supreme-](https://www.politico.com/story/2017/12/05/gay-wedding-cake-supreme-court-280944)

[court-280944](https://www.politico.com/story/2017/12/05/gay-wedding-cake-supreme-court-280944)), USA Today

([https://www.usatoday.com/story/news/politics/2017/12/05/case-cake-supreme-court-](https://www.usatoday.com/story/news/politics/2017/12/05/case-cake-supreme-court-justices-raise-constitutional-culinary-questions/923973001/)

[justices-raise-constitutional-culinary-questions/923973001/](https://www.usatoday.com/story/news/politics/2017/12/05/case-cake-supreme-court-justices-raise-constitutional-culinary-questions/923973001/)), WSJ

<https://www.wsj.com/articles/supreme-court-hears-case-of-baker-refusing-to-make-cake-for-gay-wedding-1512469801>)

RIGHT DOWN THE MIDDLE? RIGHT DOWN THE MIDDLE | Per usual, court watchers are looking to **JUSTICE ANTHONY KENNEDY** as the deciding vote in the big cake case, and it seems that even he is torn as to which way we'll come down on decision day. He voiced during Tuesday's arguments both sympathy for the baker and concern for the broader impact that would come with siding with the baker. Apparently by the end of the 90-minute argument, it seemed Kennedy might be looking for a way to avoid a sweeping ruling that would allow businesses to refuse services for gay people based on religion. Kennedy is one of the court's most prominent defender of gay rights and also its most committed supporter of free speech

AP (https://www.washingtonpost.com/politics/courts_law/kennedy-seems-conflicted-in-supreme-court-wedding-cake-case/2017/12/05/fce320a4-da1e-11e7-a241-0848315642do_story.html?utm_term=.9c3f94d4aa57), CNN (<http://www.cnn.com/2017/12/05/politics/anthony-kennedy-supreme-court-same-sex-marriage-religious-liberty/index.html>), NPR (<https://www.npr.org/2017/12/05/568653522/supreme-court-sharply-divided-over-same-sex-wedding-cake-case>), NY Times (https://www.nytimes.com/2017/12/05/us/politics/supreme-court-same-sex-marriage-cake.html?_r=0)

THE ART OF IT ALL | [Jeffrey Toobin writing for The New Yorker](https://t.e2ma.net/click/taeln/1sldnm/p3xose) (<https://t.e2ma.net/click/taeln/1sldnm/p3xose>) notes that both **JUSTICE ELENA KAGAN** and **JUSTICE RUTH BADER GINSBURG** spent yesterday's arguments honing in on the issue of artistry. Kagan made the point that people across industries do work that involves some level of creativity and expression, and as Toobin explains, "If the Court were to rule that cake bakers had a First Amendment right to discriminate,

what was to stop virtually any retail business with religious owners from exempting itself from anti-discrimination laws?”

SAME-DAY SILENCE | What’s the big deal with same-day audio? And why is it so impossible to get, even from cases as consequential and closely followed as yesterday’s cake case? These are the questions of the hour for Michael McGough who opines in the Los Angeles Times (<https://t.e2ma.net/click/taeln/1sldnm/5vyose>) that the justices would do well to show some good faith and institute a policy of same-day audio for all cases.

ICYMI – BAD NEWS BEARS | This week, **PRESIDENT DONALD TRUMP** announced that he plans to roll back national monument designations, reducing the size of the Bears Ears and Grand Staircase-Escalante national monuments. This is by far the largest unprotecting of public lands and wildlife in our nation’s history, and a president’s ability to un-designate national monuments under the Antiquities Act has never been tested in court. Dino Grandoni in The Washington Post (https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2017/12/06/the-energy-202-legal-battle-over-national-monuments-is-just-beginning/5a27242530fb0469e883fa3d/?utm_term=.66ce8af58672) explains that Trump’s move has already sparked a legal response from environmental and tribal groups. At least two lawsuits challenging the legality of Trump’s action have already been filed — and it’s only the beginning. You can follow along with the Center for Western Priorities (<http://westernpriorities.org/category/blog/>) which will be closely monitoring this issue as it unfolds.

TWO SIDES OF THE SAME COIN | Julie Zauzmer with The Washington Post (<https://t.e2ma.net/click/taeln/1sldnm/h9o0se>) reports that while arguments raged on inside 1 First Street yesterday, outside the Marble Palace were demonstrators on

opposite sides of the cake case. However, the protestors were all fired up about the same thing: losing their freedoms. She reports, “The two parallel rallies outside the court Tuesday morning, each of roughly the same size, expressed the fervent fears that people on both sides of the issue have regarding the outcome of this case. Those supporting Phillips worry they could be compelled to put aside their religious beliefs in the workplace. Those opposing the baker fear undermining civil rights protections not only for gay and lesbian couples but for women, African Americans and many others. Both sides voiced their opinions Tuesday with signs, songs, balloons and Bible verses.”

BEEN THERE, DONE THAT | “A cake maker has as much right to discriminate against gay customers as a BBQ shop has a right to discriminate against black ones: None.” That’s Cristian Farias writing in Slate (<https://t.e2ma.net/click/taeln/1sldnm/x110se>) that the key principle in the blockbuster cake case was already litigated and settled long ago.

A CONCESSION ON CAMERAS |

During yesterday’s arguments, **CHIEF JUSTICE JOHN ROBERTS** made something of a slip, commenting that oral argument is more than just speech. **GABE ROTH** with Fix the Court argues the comment reveals a flaw in the argument for shutting out broadcast media from the high court. Read his statement here. (<https://t.e2ma.net/click/taeln/1sldnm/du20se>)

OTHER NEWS

The Trump Court-Packing Plan Is Based On A Fiction
(http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/the_trump_court_packing_plan_is_based_on_a_lie.html)

Slate | by Jed Handelsman Shugerman

“There is no judicial workload crisis. They have conveniently attempted to manufacture one in 2017, after conservatives acted as if there were too many judges on the bench in the Obama years. Beneath a fiction of a ‘caseload crisis,’ Calabresi and Hirji actually want to deepen an access-to-justice crisis by helping Trump make access to justice even worse for average Americans.”

Windsor Lawyer Weighs In On Same-Sex Wedding Cake Case (https://www.axios.com/windsor-lawyer-weighs-in-on-same-sex-wedding-case-cake-2515165721.html?utm_source=sidebar)

Axios | by Alayna Treene

“Roberta Kaplan, the attorney who represented Edie Windsor in the landmark SCOTUS case that toppled the Defense of Marriage Act, told Axios that she doesn’t think the case currently before the court

(<https://t.e2ma.net/click/taeln/1sldnm/5z5ose>) about a Christian baker refusing service to a same-sex couple will bring a sweeping ruling for either side.”

With Travel Ban, SCOTUS Can Correct For Lower Courts' Anti-Trump Bias (<http://thehill.com/opinion/immigration/363473-with-travel-ban-scotus-can-correct-lower-courts-anti-trump-bias>)

The Hill | by Nolan Rappaport

“If the Supreme Court allows the courts to continue to do this to Trump, they will interfere with any national security decision he makes that impacts a country with a large Muslim population, regardless of the circumstances.”

The Supreme Court Must Protect A Baker's Unpopular Speech (https://www.washingtonpost.com/opinions/the-supreme-court-must-protect-a-bakers-unpopular-speech/2017/12/06/6eb37490-d9e8-11e7-b1a8-62589434a581_story.html?utm_term=.d2bcea91ec9d)

The Washington Post | by Marc. A Thiessen

“Even if you disagree with Phillips, you have an interest in seeing him prevail. The First Amendment protects unpopular speech. Speaking out in favor of same-sex marriage was once unpopular. And views that are popular today may be unpopular in the future. To maintain a free society, we must have the freedom to disagree — and tolerance for

those who disagree with us.”

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com/GregStorr)

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