

When the First Amendment Compels an Offensive Result: Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

James Hart

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When the First Amendment Compels an Offensive Result: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*

*James Hart**

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INTRODUCTION

Freedom of thought and speech are the essence of the American experiment. That the First Amendment protects both offensive thought and speech is the price of democracy.¹ This Article addresses *Masterpiece*

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* The author would like to dedicate this Article to his Constitutional Law students; *docendo discimus*.

1. See generally *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

Cakeshop, Ltd. v. Colorado Civil Rights Commission, a case decided by the United States Supreme Court in June of 2018.²

Part I provides the facts and procedural history of the case. Part II provides background to bring *Masterpiece Cakeshop* into historical perspective. Part III summarizes the opinions of the Administrative Law Judge (“ALJ”), the Colorado Civil Rights Commission (the “Commission”), the Colorado Court of Appeals, and the United States Supreme Court. Part IV argues that ordering Masterpiece Cakeshop and its owner, Jack Phillips, to create a wedding cake to celebrate a same-sex marriage violates the First Amendment by forcing a person to carry a compelled message and engaging in viewpoint restriction. This legal conclusion does not indicate any sympathy whatsoever for the behavior or views of Mr. Phillips but quite the opposite. *Dura lex, sed lex*: the law is hard, but it is the law. Part V concludes that, per Justices Holmes and Brandeis, the best way to kill an offensive idea is not to make it illegal but to expose it and crush it under the weight of its own ignorance.

I. FACTS OF *MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION*

Although the parties dispute the facts, this Article assumes the facts as set out in the Colorado Court of Appeals opinion and will therefore directly quote to avoid any confusion:

In July 2012, Craig and Mullins visited Masterpiece, a bakery in Lakewood, Colorado, and requested that Phillips design and create a cake to celebrate their same-sex wedding. Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising Craig and Mullins that he would be happy to make and sell them any other baked goods. Craig and Mullins promptly left Masterpiece without discussing with Phillips any details of their wedding cake. The following day, Craig’s mother, Deborah Munn, called Phillips, who advised her that Masterpiece did not make wedding cakes for same-sex weddings because of his religious beliefs and because Colorado did not recognize same-sex marriages.³

2. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

3. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276–77 (Colo. App. 2015), *cert. denied*, 2016 WL 1645027 (Colo. 2016), *cert. granted sub nom.*

This account is consistent with the facts that Justice Alito established in oral argument before the U.S. Supreme Court, in the following exchange with Frederick Yarger, the Solicitor General for the State of Colorado:

MR. YARGER: Well, Your Honor, again, it—it—the decision by this bakery was it wouldn't sell any product—

JUSTICE ALITO: No, that's not right, Mr. Yarger. It is a disturbing feature of your brief because this case was decided on summary judgment, and, therefore, you have to view the facts in the light most favorable to Mr. Phillips. And the only thing he admitted and what was said in the undisputed—the list of undisputed facts was he would not create—he was very careful to use the word “create.” Is that wrong?

MR. YARGER: That's not incorrect, Your Honor.⁴

After the above described events, Craig and Mullins filed charges of discrimination with the Colorado Civil Rights Division (the “Division”), alleging discrimination based on sexual orientation under the Colorado Anti-Discrimination Act (“CADA”), §§ 24-34-301–804, C.R.S. 2014.⁵ The Division found probable cause to credit the allegations of discrimination.⁶ Craig and Mullins then filed a formal complaint with the Office of Administrative Courts, alleging that Masterpiece discriminated against them in a place of public accommodation because of their sexual orientation in violation of C.R.S. § 24-34-601(2), which 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

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (mem.) (2017).

4. Transcript of Oral Argument at 66–67, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017) (No. 16-111).

5. *Craig*, 370 P.3d at 277.

6. *Id.*

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.⁷

The ALJ granted summary judgment for the plaintiffs, which the Commission affirmed.⁸ Upon review, the Colorado Court of Appeals affirmed the ALJ and Commission decisions.⁹ On June 4, 2018, the U.S. Supreme Court reversed, holding that Mr. Phillips's right to free exercise of religion had been violated.¹⁰

II. BACKGROUND

The United States Supreme Court has consistently held that the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all. . . . [These rights are] complementary components of the broader concept of 'individual freedom of mind.'"¹¹ If, at the time of its founding, there was a single organizing principal on which the new country, its Declaration of Independence, and its Constitution relied, it was this concept of the individual freedom of the mind. It is worth examining, in Justice Harlan's famous phrase, "the traditions from which [America] developed as well as the traditions from which it broke."¹² The profound lack of freedom of the mind in Europe in the centuries prior to adopting the Constitution was a primary tradition from which this country broke, and that break is imperative to contemplate when addressing First Amendment questions. Addressing this lack of freedom of the mind, the author has previously written:

In England, James I and Charles I carried on the persecution of Catholics that had started the moment Henry VIII withdrew from the church.¹³ The Test Act provided that no Catholic could hold

7. COLO. REV. STAT. § 24-34-601(2)(a) (2018).

8. *Craig*, 370 P.3d at 277.

9. *Id.* at 295.

10. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

11. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

12. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

13. 2 WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH SPEAKING PEOPLES* 151–52 (Dodd, Mead & Co. 1956).

office.¹⁴ James I had Unitarians burned alive for doubting the divinity of Christ.¹⁵ William Prynne had his ears cut off for publishing *Histriomatrix*, a series of blasphemous plays.¹⁶ Jews had not been allowed in the country since the time of Edward I.¹⁷ After the ascension of Oliver Cromwell in 1642, the control of the Puritans substituted itself for the control of the Church of England.¹⁸ Gambling and betting were outlawed, and adultery was punishable by death.¹⁹ Drinking, swearing, walking on the Sabbath, and athletic sports were also banned.²⁰

If things improved under William and the Glorious Revolution of 1688, it was not as much as is popularly believed.²¹ The Toleration Act was passed in 1689, but tolerance did not extend to Catholics, Unitarians, Jews, and Pagans.²² Dissenters were not allowed to attend university and could not seek elective office.²³ In 1697, the strengthened legislature passed a law against blasphemy mandating prison for criticism of the church.²⁴ In 1699, laws were passed imposing life imprisonment for saying mass, and rewards were waiting for those who turned in violators.²⁵ A person not taking a loyalty oath to the Church of England lost the right to purchase or devise land.²⁶ Even Locke's *Epistola de Tolerantia*, urging tolerance as a principle, excluded atheists, Moslems, Catholics and Unitarians.²⁷

The sacred world was no more forgiving than the secular. The philosopher Spinoza's parents, expelled from Spain and Portugal, found

14. WILL & ARIEL DURANT, *THE AGE OF LOUIS XIV* 291 (Simon & Schuster 1963) [hereinafter DURANT I].

15. WILL & ARIEL DURANT, *THE AGE OF REASON BEGINS* 140 (Simon & Schuster 1961) [hereinafter DURANT II].

16. *Id.* at 193.

17. *See* CHURCHILL, *supra* note 13, at 315.

18. *Id.* at 311.

19. *Id.* at 311–12.

20. *Id.*

21. DURANT I, *supra* note 14, at 301–02.

22. *Id.* at 301, 589.

23. *Id.* at 301–02.

24. *Id.* at 302.

25. *Id.*

26. *Id.*

27. *Id.* at 589–90.

refuge in Holland.²⁸ There, Spinoza's beliefs were tolerated by the Dutch government—but not by the church, which excommunicated Spinoza.²⁹ Similarly, on February 26, 1616, Galileo was forced to appear before Urban VIII to recant his Copernican theories published in *De Revolutionibus Orbium Coelestium*.³⁰ On pain of death, he spoke: “With a sincere heart and unfeigned faith I abjure, curse, and detest the said errors and heresies”³¹

The situation in 1791 was essentially the same; George the III was King of England, Leopold II was the Emperor of the Holy Roman Empire, Frederick Wilhelm II was King of Prussia, and Louis XVI was—for a short while more—King of France.³² Freedom of thought and speech for their subjects were not priorities.³³ As Voltaire said, “Eloquence is writing something and not ending up in the Bastille”—which Voltaire did.³⁴

Voltaire and his fellow *philosophes* were to aid in supplying the traditions from which America developed. The Founding Fathers heavily relied on the influence of the French Enlightenment, with its emphasis on freedom of the mind, to challenge ancient dogmas. The historians Will and Ariel Durant wrote:

[I]t was noted that Washington, Franklin, and Jefferson had been molded to free thought by the *philosophes*. Through those American sons of the French Enlightenment, republican theories graduated into a government victorious in arms, recognized by a French King, and proceeding to establish a constitution indebted in some measure to Montesquieu.³⁵

This concept of individual freedom of the mind manifested in several ways: Jefferson's Statute of Religious Freedom; the Declaration of

28. WILL DURANT, *THE STORY OF PHILOSOPHY* 167 (Simon & Schuster 1926) [hereinafter DURANT III].

29. *Id.*

30. DURANT II, *supra* note 15, at 607–08.

31. *Id.* at 610.

32. *See generally* WILL AND ARIEL DURANT, *THE AGE OF VOLTAIRE* (Simon & Schuster 1965).

33. *Id.*

34. *Chateau de Cirey, Residence of Voltaire*, VISIT VOLTAIRE, http://www.visitvoltaire.com/voltaire_bio.htm [<https://perma.cc/ERY7-Q6UH>] (last updated Mar. 19, 2015).

35. WILL & ARIEL DURANT, *ROUSSEAU AND REVOLUTION* 899 (Simon & Schuster 1967).

Independence; and the Bill of Rights to the United States Constitution.³⁶ As the U.S. Supreme Court noted, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”³⁷ Individual freedom of the mind has thus been, with its complimentary components of the “right to speak freely and the right to refrain from speaking at all,”³⁸ a cornerstone in the foundation of this nation’s legal beginning. With this foundation in mind, one may now turn to *Masterpiece*.

III. *CRAIG V. MASTERPIECE CAKESHOP, INC.*

After Mr. Phillips declined to create a wedding cake for Mr. Craig and Mr. Mullins, Craig and Mullins began legal proceedings. The ALJ granted summary judgment in their favor,³⁹ and the Commission subsequently entered a:

final cease and desist order required that Masterpiece (1) take remedial measures, including comprehensive staff training and alteration to the company’s policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.⁴⁰

Masterpiece and Phillips appealed to the Colorado Court of Appeals. The parties stipulated that Masterpiece Cake, Ltd. is a place of public accommodation and that the plaintiffs were a protected class per C.R.S. § 24-34-601—although the Court of Appeals had to address the issue that the plaintiffs initially cited the wrong section, the court dismissed that argument.⁴¹ The essence of the arguments, and the Court of Appeals’ holding, was whether Masterpiece refused to bake a wedding cake because of the plaintiffs’ identities, both sides stipulating that would violate CADA, or because of the message that the cake would convey:

36. See generally Virginia Statute of Religious Freedom of 1786, in GARRY WILLS, UNDER GOD 362 (1990); Declaration of Independence (July 4, 1776); U.S. CONST. amends. I–X (Bill of Rights).

37. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

38. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

39. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 277 (Colo. App. 2015).

40. *Id.*

41. See generally *id.*

Masterpiece asserts that it did not decline to make Craig's and Mullins' wedding cake "because of" their sexual orientation. It argues that it does not object to or refuse to serve patrons because of their sexual orientation, and that it assured Craig and Mullins that it would design and create any other bakery product for them, just not a wedding cake. Masterpiece asserts that its decision was solely "because of" Craig's and Mullins' intended conduct—entering into marriage with a same-sex partner—and the celebratory message about same-sex marriage that baking a wedding cake would convey. Therefore, because its refusal to serve Craig and Mullins was not "because of" their sexual orientation, Masterpiece contends that it did not violate CADA. We disagree.⁴²

The Court of Appeals, using the facts assumed in the opinion, further held that the willingness of Mr. Phillips to sell other products to the couple was irrelevant as to whether refusing to bake a wedding cake violated CADA:

We reject Masterpiece's related argument that its willingness to sell birthday cakes, cookies, and other non-wedding cake products to gay and lesbian customers establishes that it did not violate CADA. Masterpiece's potential compliance with CADA in this respect does not permit it to refuse services to Craig and Mullins that it otherwise offers to the general public.⁴³

Finally, the Court of Appeals held that the Commission's order did not constitute a compelled message:

Masterpiece contends that the Commission's cease and desist order compels speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings. Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs. We disagree. We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections.⁴⁴

42. *Id.* at 280.

43. *Id.* at 282.

44. *Id.* at 283.

In June of 2018, the U.S. Supreme Court reversed, holding that the lower courts violated Mr. Phillips’s right of free exercise of religion.⁴⁵ It was an opinion that caused significant controversy, as it was seen in many quarters as a setback for progress in this country’s continuing expansion of its obligation to provide equal protection under the law to groups previously excluded.⁴⁶ Specifically, numerous people wondered how Justice Kennedy, who had penned the soaring rhetoric granting the right to same-sex marriage in *Obergefell v. Hodges*, could come down on the opposite side in *Masterpiece*.⁴⁷ Yet, the legal question was entirely different; the Court decided *Obergefell* under a Fourteenth Amendment analysis and *Masterpiece* under a First Amendment analysis. The question is, which clause of the First Amendment? As noted, the Court decided the case primarily under the Free Exercise Clause.⁴⁸ This Article argues that the Freedom of Speech Clause is what lies at the heart of *Masterpiece*.

IV. FREEDOM OF SPEECH CLAUSE ANALYSIS

A Freedom of Speech Clause analysis yields a three-part inquiry: (1) is a wedding cake “speech”; (2) if so, was Mr. Phillips compelled to be associated with speech constituting a message not of his choosing; and (3) did the Division neutrally apply the law? This analysis suggests that a wedding cake is speech, that Mr. Phillips was forced to carry a message he did not want, and that the Division was not neutral in its application. This violates the First Amendment of the United States Constitution.

A. A Celebratory Wedding Cake is Speech

Baking a wedding cake is a message, even if the parties had not yet discussed the specific words and decorations. Although there is no universal norm for what makes something look like a wedding cake, a general societal consensus exists; otherwise the couple would have asked for a cake, not a wedding cake. A baker of wedding cakes has not done his job if a cake is not recognizable as a wedding cake. As the Court of Appeals noted, the request was for a wedding cake that would “celebrate” their marriage—in other words, requesting a message.⁴⁹

45. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

46. *See generally id.*

47. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

48. *See Masterpiece*, 138 S. Ct. at 1724.

49. *Masterpiece*, 370 P.3d at 276–77.

The cases on which the Court of Appeals relied to show that conduct and identity are inseparable miss the crucial point of the plaintiffs' requested celebratory wedding cake.⁵⁰ In these cases, the laws or policies did not relate to creating a message, but to homosexual conduct. Being in a relationship is not speech or a message. By words or decorations, however, a wedding cake communicates a message and therefore is speech.

At oral argument, a significant amount of time was devoted to the issue of whether the same words necessarily conveyed the same message. Consider the following exchange, admittedly a trap, between Justice Alito and Solicitor General Yarger:

JUSTICE ALITO: And we have a history of—in the questioning by—of Petitioner's counsel, we explored the line between speech and non-speech, but as I understand your position, it would be the same if what was involved here were words. Am I wrong? If he would put a particular form of words on a wedding cake, on a cake for one customer, he has to put the same form of words, the same exact words on a wedding cake for any other customer, regardless of the context?

MR. YARGER: That's right, just as he would have to sell a Happy Birthday cake to a member of the Jewish faith or an African-

50. The Court of Appeals based its disagreement on several U.S. Supreme Court cases:

However, the United States Supreme Court has recognized that such distinctions are generally inappropriate. See *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) (“[The Christian Legal Society] contends that it does not exclude individuals because of sexual orientation, but rather ‘on the basis of a conjunction of conduct and the belief that the conduct is not wrong.’ . . . Our decisions have declined to distinguish between status and conduct in this context.”); *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration *281 in and of itself is an invitation to subject homosexual persons to discrimination.”); *id.* at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in the judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is . . . directed toward gay persons as a class.”).

Id. at 280–81.

American couple.⁵¹

JUSTICE ALITO: So if someone came in and said: I want a cake for—to celebrate our wedding anniversary, and I want it to say November 9, the best day in history, okay, sells them a cake. Somebody else comes in, wants exactly the same words on the cake, he says: Oh, is this your anniversary? He says: No, we're going to have a party to celebrate Kristallnacht. He would have to do that?

MR. YARGER: Your Honor, that wouldn't be—

JUSTICE ALITO: It is the same words.⁵²

Although the words are the same, it is not the same message. Speech is not just the words that one speaks or writes. The words themselves are only the starting point. The intent and context change words into the speech contemplated by the First Amendment. This point is perhaps most ably stated by Oliver Wendell Holmes in his comments on the famous case of *Raffles v. Wichelhaus*,⁵³ wherein two individuals formed a contract for a shipment of cotton between Bombay and Liverpool on a ship called the Peerless; yet, unknown to both parties, there were two ships of the same name:

It is commonly said that such a contract is void, because of mutual mistake as to the subject-matter, and because therefore the parties did not consent to the same thing. But this way of putting it seems to me misleading. The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct. If there had been but one "Peerless," and the defendant had said "Peerless" by mistake, meaning "Peri," he would have been bound. *The true ground of the decision was not that each party meant a different thing from the other, as is implied by the explanation which has been mentioned, but that each said a different thing.*⁵⁴

51. Transcript of Oral Argument at 67–68, *Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111).

52. *Id.* at 68.

53. *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

54. OLIVER WENDELL HOLMES, *THE COMMON LAW* 242 (Howe ed., 1963) (emphasis added).

Justices Holmes and Alito, and Mr. Yarger, rather reluctantly, agreed across the decades that the same words do not necessarily convey the same messages. A wedding cake, especially when customers ask for it to be celebratory, is a message. The meaning of the message changes with the context.

B. Mr. Phillips Was Forced to Carry a Compelled Message Against His Wishes

If one acknowledges that creating a wedding cake is in fact a message, the next question is whether a person can be forced to be associated with a message against his wishes. The Supreme Court has unequivocally answered that question “no.”⁵⁵ Mr. Phillips did not wish to be associated with a message celebrating a same-sex wedding. Regardless of what one thinks of Mr. Phillips’s wish, the Supreme Court has held on numerous occasions that an individual does in fact have the right to decline an unwanted association.⁵⁶ The following three cases, spanning more than half a century, indicate the consistency with which the Court has answered this in the negative.

First, in *West Virginia State Board of Education v. Barnette*, the Supreme Court addressed the issue of whether a school could force a student to stand and pledge allegiance to the flag.⁵⁷ The eloquent and learned Justice Jackson, who would soon be the Chief American Prosecutor at the Nuremberg Trials, wrote for the Court holding that such forced behavior violated the First Amendment:

[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . [T]he power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. *To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not on his mind. . . .*

The very purpose of the Bill of Rights was to withdraw certain

55. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995).

56. *See supra* note 55.

57. *See Barnette*, 319 U.S. 624.

subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of thought achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment was designed to avoid these ends by avoiding these beginnings.⁵⁸

In 1977, the issue of compelled association of a message was once again before the Court, and once again, the Court held it unconstitutional.⁵⁹ In *Wooley v. Maynard*, a citizen of New Hampshire did not wish to have the state motto "Live Free or Die" on his license plate.⁶⁰ The Court held that forcing the plaintiff to carry this message "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."⁶¹

Similarly, in 1995, the Supreme Court decided the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.⁶² *Hurley* involved a group of gay, lesbian, and bisexual people wishing to carry a banner of its own in a privately organized St. Patrick's Day parade.⁶³ The state courts ruled in favor of the plaintiffs, but the United States Supreme Court reversed, holding: "The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the

58. *Id.* at 633–64, 638, 640–41 (emphasis added).

59. *See Wooley*, 430 U.S. 705.

60. *Id.* at 706–07, 717.

61. *Id.* at 715 (quoting *Barnette*, 319 U.S. at 642) (internal quotation marks omitted).

62. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 566 (1995).

63. *Id.*

marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.”⁶⁴ The facts of *Hurley* had a great deal in common with the facts of *Masterpiece*. In both cases there was a state law forbidding discrimination on the basis of sexual orientation of a person in a place of public accommodation. In *Hurley*, the parade was found a place of public accommodation, as was the bakery in *Masterpiece*. In *Hurley*, the plaintiffs wished to carry a banner with a message relating to same-sex couples; in *Masterpiece*, the plaintiffs wanted the defendant to create a cake with a message celebrating same-sex marriage. In *Hurley*, the plaintiffs could have joined the parade, just not imposed their message; in *Masterpiece*—assuming the facts as adopted by the Colorado Supreme Court—the defendant would have served the plaintiffs, just not created a special message. Arguably in both cases, the actions of the defendants were based on ignorance and prejudice. Yet the Court in *Hurley* held: “But this use of the State’s power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”⁶⁵

Justice Brandeis defined “the right to be let alone” as “the most comprehensive of rights, and the right most valued by civilized men.”⁶⁶ This is why “[t]he freedom of speech protected by the First Amendment includes the ‘right to refrain from speaking’ and prohibits the government from telling people what they must say.”⁶⁷

C. The Division Engaged in Viewpoint Restriction in its Application of CADA

Viewpoint restriction occurs when the government takes sides in a question of free speech. To the extent that CADA, as the Division applies it, allows business owners to not create a message they deem offensive, it is redundant; the First Amendment of the United States Constitution already guarantees that. To the extent that the Commission forces a business to create a message with which the owner of the business does not agree, but the Commission does not find offensive, the Commission is violating the First Amendment at its core; it is having the government choose sides in the content of a message and committing viewpoint restrictions.

64. *Id.* at 559.

65. *Id.* at 572–73.

66. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

67. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 283 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

In three cases, each case with the same plaintiff, Mr. Jack, making the same request of three different bakeries, the Commission carved out exceptions to CADA and allowed the baker in question to refuse to make a product with a specific message, because the Division implicitly agreed that the message was offensive.

The first case, *Jack v. Le Bakery Sensual, Inc.*,⁶⁸ is in a sense the mirror opposite of *Masterpiece*. In 2014, Mr. Jack visited Le Bakery Sensual, and asked the owner, Mr. Spotz, for an estimate on two different cakes, each bearing an anti-homosexual message. The first was two groomsmen with a red X over them; the second was a quote from Leviticus 18:2, stating, “Homosexuality is a detestable sin.” Mr. Spotz declined to make the cakes because he considered them hateful.

Mr. Jack filed a complaint with the Division, claiming, like Craig and Mullins, a violation of C.R.S. § 24-34-601. The Commission held that Mr. Jack was in fact a member of a protected class based on his creed, Christianity.⁶⁹ The Commission, however, held that the respondent did not have to make the requested messages, holding that the respondent’s feeling that that requested Biblical verses were “hateful” was a sufficient basis to refuse to create the cakes conveying the messages in question.⁷⁰

In the second case, *Jack v. Azucar Bakery*,⁷¹ the same plaintiff was denied the same cake. The Division held that this refusal was acceptable: “Instead, the Respondent’s denial was based on the explicit message that the Charging Party wished to include on the cakes, which the Respondent deemed as discriminatory.”⁷² Again, the Division was allowing refusal of making a cake because the baker felt that the message was discriminatory. By using the word “message,” the Division undercut its own rationale in *Masterpiece* that the issue was not about a message—it was.

The third case with the same plaintiff had similar facts and holdings. In *Jack v. Gateaux, Ltd.*,⁷³ the Division once again held that the baker had the right to refuse to make the cake requested with the same messages, based on the offensive nature of the message.⁷⁴ The Division noted that Gateaux, Ltd. previously refused to bake cakes with other offensive

68. Colo. Dept. of Reg. Agencies, Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015).

69. *Id.* at 4.

70. *Id.*

71. *Jack v. Azucar Bakery*, Charge No. P20140069X (Colo. Civil Rights Div. Mar. 24, 2015).

72. *Id.* at 4.

73. *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015).

74. *Id.* at 1.

messages, including “eat me,” “ya old bitch,” and what Gateaux referred to as “naughty images,” on the basis that the imagery and messages were not what the Respondent wished to represent in its products.⁷⁵ The pattern that emerges is that the Division allowed the various bakers to refuse to include messages that the owners feel are offensive.

Yet, that is not how the Division ruled in *Masterpiece*. Mr. Phillips refused to create a cake that would in some way convey, by its very existence, a message that he found offensive. The Division, the ALJ, the Commission, and the Court of Appeals, however, held in *Masterpiece* that such a refusal violated CADA. Thus, it issued an order requiring that Masterpiece complete the following:

- (1) take remedial measures, including comprehensive staff training and alteration to the company’s policies to ensure compliance with CADA; and
- (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.⁷⁶

Implicitly, the Division, the ALJ, the Commission, and the Court of Appeals took the stance that if they agreed that the message was offensive, the baker need not carry it, but if they did not agree, the baker must.

The Division and the Court of Appeals engaged in viewpoint restriction in holding whether the cake was a message. The Court of Appeals held: “The Division found that the bakeries did not refuse the patron’s request because of his creed, but rather because of the offensive nature of the requested message.”⁷⁷ Yet the Court of Appeals in the same case held that Mr. Phillips’s cake would not contain a message:

Masterpiece contends that the Commission’s cease and desist order compels speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings. Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission’s order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.

75. *Id.* at 3.

76. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 277 (Colo. App. 2015).

77. *Id.* at 282 n.8.

We disagree. We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections.⁷⁸

The Court of Appeals held, in other words, that the three bakers in the cases of Mr. Jack would be delivering a message constituting speech, but in *Masterpiece*, a wedding cake with the opposite message was "not sufficiently expressive" to receive First Amendment protection. Whether Mr. Jack and Mr. Phillips were acting on bigoted motives is irrelevant.

The Division and the Colorado Court of Appeals engaged in further viewpoint restriction in holding that no one would confuse the message of the cake as being a message from Mr. Phillips himself:

By selling a wedding cake to a same-sex couple, Masterpiece does not necessarily lead an observer to conclude that the bakery supports its customer's conduct. The public has no way of knowing the reasons supporting Masterpiece's decision to serve or decline to serve a same-sex couple. Someone observing that a commercial bakery created a wedding cake for a straight couple or that it did not create one for a gay couple would have no way of deciphering whether the bakery's conduct took place because of its views on same-sex marriage or for some other reason.⁷⁹

This point is not well taken. The Division held that three bakeries that refused to sell to Mr. Jack were not required to do so because the message was offensive. If there were no chance that the message might have been perceived as coming from the respective bakers, then any intellectual and legal foundation for the holding in those three cases instantly fails.

Finally, and most crucially, the Division and the Colorado Court of Appeals engaged in viewpoint restriction in their application of the law by allowing three bakers to refuse to make cakes with a message they found to be offensive, but not the fourth, Mr. Phillips. Justice Alito pointed this out at oral argument:

JUSTICE ALITO: One thing that's disturbing about the record here, in addition to the statement made, the statement that Justice Kennedy read, which was not disavowed at the time by any other member of the Commission, is what appears to be a practice of

78. *Id.* at 283.

79. *Id.* at 287.

discriminatory treatment based on viewpoint. The—the Commission had before it the example of three complaints filed by an individual whose creed includes the traditional Judeo-Christian opposition to same-sex marriage, and he requested cakes that expressed that point of view, and those—there were bakers who said no, we won't do that because it is offensive. And the Commission said: That's okay. It's okay for a baker who supports same-sex marriage to refuse to create a cake with a message that is opposed to same-sex marriage. But when the tables are turned and you have the baker who opposes same-sex marriage, that baker may be compelled to create a cake that expresses approval of same-sex marriage.⁸⁰

A government actor taking sides, or viewpoint restrictions, is precisely what the First Amendment forbids. Indeed, “[t]he Court generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment.”⁸¹ This treatment is true even when those sides are at opposite ends of the moral spectrum. Justice Scalia noted this prohibition on viewpoint restriction in *R.A.V. v. City of St. Paul*:

The First Amendment generally prevents government from proscribing [or compelling] speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid [I]n its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.⁸²

In *Collin v. Smith*, Judge Pell, on behalf of the U.S. Court of Appeals for the Seventh Circuit wrote, “Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁸³

80. Transcript of Oral Argument at 58–59, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16-111).

81. KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* 1166 (Found. Press, 19th ed. 2016).

82. *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 391–92 (1992).

83. *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir. 1978).

V. THE MARKETPLACE OF IDEAS

This is not the end of story, but the beginning. As Justice Brandeis famously wrote, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁸⁴ Oliver Wendell Holmes, Jr., sounded a similar note in his dissent in *Abrams v. United States*:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.⁸⁵

Brandeis wrote to Holmes, “I join you heartily—and gratefully.”⁸⁶ These two Justices experienced a journey after the more repressive holdings like *Schenk* during this critical time in modern First Amendment jurisprudence. Mr. Urofsky wrote:

Holmes met Learned Hand on a train, and the two men began a correspondence debating the meaning of the First Amendment. Hand had earlier delivered a far more speech-protective decision in the *Masses* case that libertarians had applauded Harold Laski arranged a meeting between Holmes and Chaffee, and the

84. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (Harper’s Weekly 1914).

85. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

86. MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE 553 (Pantheon Books 2009).

justice, who had been stung by the unexpected criticism of the *Schenk* decision, listened carefully.

Brandeis also learned about the suppression of speech through dozens of letters he received from correspondents. Felix Frankfurter wrote to him from Bisbee, Arizona, to describe how mine owners violated the civil rights of striking workers under the guise of patriotism. Amos Pinchot wanted Brandeis to intervene with the Justice Department to stop the prosecution of the editors of the *Masses* Since [Holmes] was not about to admit that he had been wrong only a few months earlier, Holmes went out of his way to explain that the clear-and-present-danger test meant “immediate danger” or a “clear and imminent danger,” and he began to pay more attention to the ideas implicit in the First Amendment. He undoubtedly consulted with Brandeis, who alone of all the members of the Court joined his dissent. In the remaining two speech cases of the term, Brandeis wrote the opinions, joined by Holmes, and in doing so moved well beyond his colleagues in terms of speech protectiveness.⁸⁷

The notions that “sunlight is the best disinfectant,” Holmes’ “free trade of ideas,” and the competition of the marketplace thus emerged, or rather, re-emerged. The First Amendment has come under attack before, most notably in the Alien and Sedition Acts signed into law by President John Adams. It has come under attack since then; it will again. But the theory that the way to kill a bad idea is not to make it illegal, but to expose it, is both the modern law and most consistent with the original notions of the First Amendment.

CONCLUSION

Such exposure is the answer in *Masterpiece*. Rather than requiring Mr. Phillips to carry a forced message, it is better to broadcast his discriminatory behavior. It is not a perfect answer; public opinion is not always right. But as Martin Luther King, Jr. said, “The arc of the moral universe is long, but it bends towards justice.”⁸⁸ Courts should allow Mr. Phillips and his business to be crushed by the weight of his own ignorance as the arc bends. Such allowance is the only answer that the American

87. *Id.* at 553–54.

88. *Theodore Parker and the ‘Moral Universe’*, NPR (Sept. 2, 2010), <https://www.npr.org/templates/story/story.php?storyId=129609461> [<https://perma.cc/G2KP-VQ3R>].

experience, and the Constitution, permit. Historical attempts of governments compelling messages have been disastrous. Decades after the Sistine ceiling, when the Vatican—with pressure from no lesser mortals than Clement VII and Paul III and after a lifetime of struggles against Julius II—forced Michelangelo, who greatly preferred his native Florence to Rome, to paint the Last Judgment of Christ, Michelangelo painted the entrance to Hell directly at eye level of the priest, who in the Renaissance would deliver the sermon with his back to the congregation thus facing the fresco.⁸⁹ Centuries later, Joseph Stalin insisted that the composer Dimitri Shostakovich write symphonies that would deliver a triumphant message.⁹⁰ The end of the fifth symphony is but one example of how Shostakovich tricked Stalin, sounding triumphant to lesser ears, but in agony to people of subtler artistic sensibilities than Stalin's. People will find a way to express who they are. The only question is whether a government allows or forbids it. The Constitution of the United States not only allows it, but forbids popular opinion from removing that right. The Founding Fathers placed the First Amendment first with good reason: it is the cornerstone of the American experience. Although, as in this case, it protects offensive and bigoted behavior, protect that behavior it must. For if it does not, it has no meaning at all.

89. See WILL DURANT, *THE RENAISSANCE* 714–16 (Simon & Schuster 1953).

90. See generally Dmitri Shostakovich, *Facing Off Stalin*, *ECONOMIST* (Mar. 11, 2004), <https://www.economist.com/books-and-arts/2004/03/11/facing-off-stalin> in [<https://perma.cc/W29L-FAWY>].