RIGHTS OF FIRST REFUSAL

Kenji Yoshino[*]

In *303 Creative LLC v. Elenis*,[1] the Court held that a Christian web designer who declined to make wedding sites for same-sex couples could escape the reach of Colorado's antidiscrimination law based on the Free Speech Clause of the First Amendment.[2] The Court broke new ground even before it handed down the decision by framing it as one about speech. In the previous five years, the Court had grappled with whether to grant religious objectors constitutional exemptions from civil rights protections in a pair of high-profile cases — *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[3] and *Fulton v. City of Philadelphia*.[4] The Court decided both in favor of the religious objectors solely on free exercise grounds.[5] Yet in granting certiorari in *303 Creative*, the Court did not take up the free exercise claim and confined its review to the free speech claim.[6]

In this Comment, I describe such free speech and free exercise exemptions as "rights of first refusal" — rights grounded in the First Amendment to refuse compliance with civil rights laws. While both free speech and free exercise claims now allow individuals to evade antidiscrimination laws, these exemptions have different contours. The Court's turn from one to the other in *303 Creative* makes civil rights laws vulnerable in novel, distinctive, and alarming ways.

In Part I, I describe *303 Creative* as a new approach by the Court to exemptions from civil rights laws. Instead of looking at conscience-based objections through the lens of religion, the Court viewed them through the lens of speech.[7] Under the speech rubric, the Court has protected individuals from "compelled affirmations" — that is, being forced to speak words the government puts in their mouths.[8] Prior to *303 Creative*, such compelled affirmation rulings had never exempted a business holding itself open to the public from a nondiscrimination law.[9] In the wake of *303 Creative*, any business engaged in sufficiently expressive conduct will be able to assert such an exemption.

---

[*] Chief Justice Earl Warren Professor of Constitutional Law and Faculty Director, Meltzer Center for Diversity, Inclusion, and Belonging, New York University School of Law. I thank Kathleen Agno, David Glasgow, Janet Kearney, Alisa Lazear, Rick Pildes, Robert Post, Daniel Putnam, and David Richards for their colleagueship and assistance.

[1] 143 S. Ct. 2298 (2023).

[2] *Id.* at 2322.

[3] 138 S. Ct. 1719 (2018).

[4] 141 S. Ct. 1868 (2021).

[5] *Id.* at 1882; *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

[6] 303 Creative LLC v. Elenis, 142 S. Ct. 1106, 1106 (2022) (mem.).

[7] *See 303 Creative*, 143 S. Ct. at 2318.

[8] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943).

[9] *See infra* section III.B, pp. 265–69.

In Part II, I argue that the *303 Creative* Court pivoted to free speech because the Court had reached an impasse in its free exercise jurisprudence. The Court has been struggling for some years now over whether to overrule the main impediment to free exercise exemptions — the 1990 case of *Employment Division v. Smith*.[10] In that case, the Court significantly curtailed the rights of people of faith by holding that a neutral law of general applicability would draw only rational basis review even if it substantially burdened free exercise.[11] In *Masterpiece Cakeshop* and *Fulton*, the Court had suitable vehicles for overruling *Smith*. Yet the Court left *Smith* standing, even as it ruled in favor of religious objectors in both cases.[12] Moreover, both rulings relied on strained readings of the relevant facts or law, suggesting the Court's reluctance to jettison *Smith*.[13] In *303 Creative*, the Court arguably turned to the free speech claims out of frustration with this free exercise logjam.

While only time will reveal how this jurisprudence will evolve, this Comment describes how free speech exemptions differ from free exercise exemptions in three ways that are, on net, deeply concerning for civil rights law. In Part III, I observe that free speech exemptions differ from free exercise exemptions because they apply against any group. Since the Second Reconstruction, the Court has rejected religious exemptions from civil rights measures designed to advance racial equality.[14] Those precedents erected a firewall protecting race-based civil rights laws. Analogs of such barriers exist in the free speech and association context.[15] Yet *303 Creative* demolishes the free speech version of that firewall with regard to acts of discrimination it considers "pure speech."[16] As *303 Creative* noted, the free speech jurisprudence does not allow the Court to distinguish among forms of speech based on the offense they cause.[17] For this reason, the free speech exemptions cannot be cabined to any particular civil rights contexts. Web designers would also be protected should they refuse to make websites for interracial couples.[18]

---

[10] 494 U.S. 872 (1990).

[11] *See id.* at 879, 885.

[12] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77 (2021); *see* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1726–27, 1731 (2018).

[13] *See infra* pp. 257–61.

[14] *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam) (quoting Newman v. Piggie Park Enters., Inc., 377 F.2d 433, 437–38 (4th Cir. 1967) (Winter, J., concurring specially), *aff'd per curiam*, 390 U.S. 400)); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (citing United States v. Lee, 455 U.S. 252, 259–60 (1982); Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981)).

[15] *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 176 (1976) (quoting Norwood v. Harrison, 413 U.S. 455, 469–70 (1973)); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (quoting *Norwood*, 413 U.S. at 470); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

[16] *See 303 Creative*, 143 S. Ct. at 2316.

[17] *Id.* at 2312 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995); Snyder v. Phelps, 562 U.S. 443, 456 (2011)).

[18] *Id.* at 2342 (Sotomayor, J., dissenting).

In Part IV, I turn to a second distinction between free exercise and free speech claims — free speech claims can be asserted not only *against* anyone but also *by* anyone. Free exercise claims can be asserted only by individuals exercising a religion. In contrast, a person can assert a conscience-based objection under the free speech jurisprudence without regard to religious affiliation. The universal availability of free speech exemptions may make them seem more equitable. The *303 Creative* majority emphasized that the free speech exemption it recognized could be asserted not only by Christian web designers turning away same-sex couples but also by gay web designers turning away groups opposing same-sex marriage.[19] Yet that universality may create the war of all against all that the Court sought to forestall in the free exercise context. In addition, such deregulatory uses of the Free Speech Clause will favor the more powerful in society because they restore the status hierarchies that antidiscrimination laws seek to combat.

In Part V, I turn to a final distinction between free speech and free exercise exemptions. Unlike the free exercise doctrine, the free speech doctrine limits its protections to expressive conduct. On this dimension, free speech exemptions are more restricted than free exercise exemptions, as free exercise exemptions would also apply to nonexpressive conduct (so long as that conduct is religious). Yet the real boundaries of what constitutes "expressive conduct" remain profoundly uncertain, such that this principle may not provide the limitation it appears to provide. In addition, determinations about what conduct is "expressive" enough to secure protection will lead the Court into a quagmire of semiotic assessments.

In Part VI, I contend that the different contours of the Free Speech Clause make it a dangerous weapon in the hands of individuals who seek to flout civil rights statutes. Moreover, far from offering a substitute for free exercise exemptions, *303 Creative* may offer a complement to such exemptions, enabling the Court to overrule *Smith*. I argue that the *303 Creative* dissent made a powerful case for why exemptions from public accommodations laws should not exist regardless of what constitutional claim is asserted against them. The dissent noted that public accommodations benefit from the ability to serve the public and therefore, in return, must do so on equal terms.[20] In rejecting this argument, the Court corroded the promise of civil rights laws in potentially dramatic and devastating ways.

---

[19] *See id.* at 2320 (majority opinion) (citing 303 Creative LLC v. Elenis, 6 F.4th 1160, 1199 (10th Cir. 2021) (Tymkovich, C.J., dissenting)).

[20] *Id.* at 2325 (Sotomayor, J., dissenting).

I. FREE SPEECH REFUSALS

The *303 Creative* case concerned a Colorado web designer, Lorie Smith, who owns a website and graphic design business.[21] Smith wished to extend that business to wedding websites but worried this expansion would bring her afoul of the law.[22] Her concern arose from her planned refusal to offer such wedding websites to same-sex couples based on her religious beliefs.[23] Smith regards same-sex marriages to be "false," as she believes they contravene "God's true story of marriage."[24]

The Colorado Anti-Discrimination Act[25] (CADA) prohibits any "place of public accommodation" from denying the "full and equal enjoyment" of its goods and services to anyone based on sexual orientation, among other classifications.[26] It defines such a "place of public accommodation" broadly to encompass any business engaged in sales "to the public."[27] As evidence that she risked liability under CADA, Smith pointed to *Masterpiece Cakeshop*,[28] in which a Christian baker in Colorado had been sued for refusing to bake cakes for same-sex couples.[29]

Smith filed suit seeking an injunction that would prevent the State from forcing her to create websites for same-sex couples under CADA, citing both free exercise and free speech grounds.[30] The district court ruled against Smith,[31] noting among other points that she lacked standing to bring portions of her case.[32] On appeal, the Tenth Circuit reached the merits of Smith's claim but also denied her relief.[33] The Tenth Circuit found that Smith's case involved "pure speech"[34] and that CADA would coerce her to speak against her own beliefs.[35] For this reason, it applied strict scrutiny, demanding that CADA be narrowly tailored to a compelling governmental interest.[36] Nevertheless, the Tenth Circuit found that CADA satisfied strict scrutiny because Colorado has a "compelling interest" in preventing discrimination in

---

[21] *Id.* at 2308 (majority opinion).
[22] *Id.*
[23] *Id.* at 2308–09; *id.* at 2334 (Sotomayor, J., dissenting).
[24] *Id.* at 2333 (Sotomayor, J., dissenting).
[25] COLO. REV. STAT. § 24-34-601 (2023).
[26] *Id.* § 24-34-601(2)(a).
[27] *Id.* § 24-34-601(1).
[28] *303 Creative*, 143 S. Ct. at 2309 (citing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1725 (2018)).
[29] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.
[30] 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147, 1152 (D. Colo. 2019).
[31] *See id.* at 1164 (denying plaintiffs' motions for summary judgment and preliminary injunction); 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907, 912 (D. Colo. 2019) (granting summary judgment to defendants).
[32] *See 303 Creative*, 385 F. Supp. 3d at 1153 n.5; *303 Creative*, 405 F. Supp. 3d at 911.
[33] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1190 (10th Cir. 2021).
[34] *Id.* at 1176.
[35] *See id.* at 1178.
[36] *Id.*

public accommodations.[37] It further found that CADA was narrowly tailored to that compelling interest because Smith's speech was customized and therefore unique, meaning that potential clients could not get the same service elsewhere.[38] The Supreme Court granted certiorari.[39]

Justice Gorsuch wrote for a six-member majority of the Court,[40] while Justice Sotomayor wrote a dissent for three Justices.[41] The Court began its legal analysis by noting that the Free Speech Clause of the First Amendment protected the "freedom to think as you will and to speak as you think."[42] More specifically, it described a line of jurisprudence that prohibited "compelled speech," focusing on three cases.[43]

The first was the canonical 1943 case of *West Virginia State Board of Education v. Barnette*.[44] In *Barnette*, West Virginia required schoolchildren to salute the flag and recite the Pledge of Allegiance.[45] Some parents challenged this requirement as a form of compelled affirmation that violated their beliefs as Jehovah's Witnesses.[46] The *Barnette* Court struck down the policy on free speech grounds.[47]

The *303 Creative* Court observed that "[a] similar story unfolded"[48] in the 1995 case of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc*.[49] In *Hurley*, a group of veterans excluded the Gay, Lesbian, and Bisexual Group of Boston (GLIB) from marching as a unit in a St. Patrick's Day parade the veterans were organizing in Boston.[50] GLIB asserted that this exclusion violated a Massachusetts public accommodations law that barred discrimination on the basis of sexual orientation.[51] The state courts ruled in GLIB's favor,[52] but the Supreme Court reversed.[53] The Court explained that the veterans had a right to control their speech by excluding those who would alter their message.[54]

---

[37] *See id.*

[38] *Id.* at 1179–80.

[39] 303 Creative LLC v. Elenis, 142 S. Ct. 1106, 1106 (2022) (mem.).

[40] *303 Creative*, 143 S. Ct. at 2307.

[41] *Id.* at 2322 (Sotomayor, J., dissenting).

[42] *Id.* at 2310 (majority opinion) (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000)).

[43] *Id.* at 2311.

[44] 319 U.S. 624 (1943).

[45] *Id.* at 628–29.

[46] *Id.* at 629.

[47] *Id.* at 642.

[48] *303 Creative*, 143 S. Ct. at 2311.

[49] 515 U.S. 557 (1995).

[50] *Id.* at 560–61.

[51] *Id.* at 561.

[52] *Id.* at 562–65 (citing Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Boston, 636 N.E.2d 1293, 1295–98, 1299–301 (Mass.), *rev'd sub nom. Hurley*, 515 U.S. 557 (1994)).

[53] *Id.* at 566.

[54] *Id.* at 581.

Third, the *303 Creative* Court discussed *Boy Scouts of America v. Dale*.[55] There, the Boy Scouts revoked James Dale's membership after learning he was gay.[56] Dale sued under a New Jersey public accommodations law that prohibited discrimination on the basis of sexual orientation.[57] The state supreme court sided with Dale, but the Supreme Court again reversed.[58] While Dale's exclusion was not pure speech, the Court held that the Boy Scouts was an "expressive association" entitled to First Amendment protection.[59]

After setting forth the rule against compelled affirmation, the *303 Creative* Court applied the law to the facts.[60] It observed that much of its analysis aligned with the Tenth Circuit's reasoning.[61] Like the Tenth Circuit, the Court found that CADA regulated "pure speech."[62] In reaching that conclusion, it relied on the facts stipulated by Smith and Colorado below.[63] The Court observed that the parties had agreed that Smith's websites promised to contain "images, words, symbols, and other modes of expression," and that "every website will be her 'original, customized' creation."[64] The Court also agreed with the Tenth Circuit that Colorado sought to compel Smith's speech through CADA, noting that "the Tenth Circuit recognized that the coercive '[e]liminati[on]' of dissenting 'ideas' about marriage constitutes Colorado's 'very purpose' in seeking to apply its law to Ms. Smith."[65] Because it burdened pure speech, the Court found that core speech concerns were implicated.[66] It parted company with the Tenth Circuit only in finding that, applying that standard to the facts, CADA was unconstitutional.[67]

The Court then rejected an alternative theory for affirmance advanced by Colorado on appeal.[68] Departing from the analysis of the Tenth Circuit, Colorado argued before the Court that CADA did not seek to regulate pure speech.[69] Instead, it sought to govern conduct, with effects on speech that were merely "incidental."[70] As such, Colorado believed the law fell under the more lenient standard of the landmark

---

[55] 530 U.S. 640 (2000).
[56] *Id.* at 644.
[57] *Id.* at 645.
[58] *Id.* at 644.
[59] *Id.* at 656.
[60] *303 Creative*, 143 S. Ct. at 2312.
[61] *Id.*
[62] *Id.* (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176 (10th Cir. 2021)).
[63] *Id.*
[64] *Id.*
[65] *Id.* at 2313 (alterations in original) (quoting *303 Creative*, 6 F.4th at 1178).
[66] *Id.* at 2312–13.
[67] *Id.* at 2313.
[68] *Id.* at 2316.
[69] *Id.*
[70] *Id.*

case of *United States v. O'Brien*.[71] In that case, the Court pointed to previous holdings that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[72] The majority rejected Colorado's alternative theory by relying again on the stipulated facts relating to expression and customization.[73] Those stipulations, the Court argued, suggested that "Colorado seeks to compel just the sort of speech that it tacitly concedes lies beyond the reach of its powers."[74]

Finally, the majority opinion addressed the dissent.[75] It began by observing that "[i]t is difficult to read the dissent and conclude we are looking at the same case."[76] It charged the dissent with spending much of its opinion on matters irrelevant to the case, such as "the evolution of public accommodations laws and the strides gay Americans have made towards securing equal justice under law."[77] It then criticized the dissent for "reimagin[ing] the facts of this case from top to bottom."[78] It further remarked that "[t]he dissent's treatment of precedent parallels its handling of the facts."[79]

I will discuss most of Justice Sotomayor's dissent later in this Comment rather than summarizing it here. Yet one aspect of the dissent bears discussion at the outset because it might explain why the majority and dissent saw this case so differently. Justice Sotomayor's dissent stated that "the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."[80] Many media outlets quoted this claim.[81] However, the majority opinion contested its veracity: "Never mind that we do no such thing and Colorado *itself* has stipulated Ms. Smith will (as CADA

---

[71] 391 U.S. 367 (1968); *see* Transcript of Oral Argument at 58, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-476_n7io.pdf [https://perma.cc/36KX-4R2N].

[72] *O'Brien*, 391 U.S. at 376.

[73] *303 Creative*, 143 S. Ct. at 2316.

[74] *Id.*

[75] *Id.* at 2318.

[76] *Id.*

[77] *Id.* (citations omitted). The Court observed that the dissent dodged the core question of the case and only "gets around to that question" when it was "more than halfway into its opinion." *Id.*

[78] *Id.*

[79] *Id.* at 2319.

[80] *Id.* at 2322 (Sotomayor, J., dissenting).

[81] *See, e.g.*, Linda Greenhouse, *Look at What John Roberts and His Court Have Wrought over 18 Years*, N.Y. TIMES (July 9, 2023), https://www.nytimes.com/2023/07/09/opinion/supreme-court-conservative-agenda.html [https://perma.cc/CQM7-9WSA]; Jessica Gresko, *The Supreme Court Rules for a Designer Who Doesn't Want to Make Wedding Websites for Gay Couples*, AP NEWS (June 30, 2023, 10:04 AM), https://apnews.com/article/supreme-court-gay-rights-website-designer-aa529361bc939c837ec2ece216b296d5 [https://perma.cc/9SVP-F9C8].

requires) 'work with all people regardless of . . . sexual orientation.'"[82] It is worth sorting out this conflict.

The crux of this dispute is how to regard the refusal to make websites for same-sex weddings. Both the majority and the dissent agreed that Smith offers other websites to individuals without regard to sexual orientation.[83] And both agreed that she refuses to make websites for same-sex weddings while she will make websites for opposite-sex weddings.[84] The question is whether that refusal constitutes status-based discrimination.

For the majority, this refusal is not status-based discrimination as Smith does not change the terms associated with the goods she offers based on the identity of the buyer.[85] All websites that do not violate Smith's conscience are available to all.[86] All websites that violate her conscience are unavailable to all.[87]

For the dissent, it was just as clearly status-based discrimination because the only individuals seeking same-sex wedding sites would be members of the LGBTQ+ community.[88] In the dissent's view, it was irrelevant that straight people would also be denied those wedding sites, as straight people would not wish to buy them.[89] Conversely, it found that Smith's willingness to sell other websites on equal terms to same-sex couples was irrelevant.[90] It compared Smith to a restaurateur in a canonical civil rights case who "would serve Black people take-out but not table service," explaining that in both cases, the vendors discriminated by offering minorities "a limited menu."[91]

The LGBTQ+ community has encountered this distinction between status and conduct before. In the "Don't Ask, Don't Tell" context, the military defended itself against charges that it was engaged in status-based discrimination by noting that it punished only conduct (same-sex

---

[82] *303 Creative*, 143 S. Ct. at 2318.

[83] *Compare id.* at 2308 (noting that "Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation"), *with id.* at 2339 n.13 (Sotomayor, J., dissenting) (noting that LGBTQ+ individuals "can access a 'separate but equal' subset of the services made available to everyone else").

[84] *Compare id.* at 2308 (majority opinion) (noting that Smith "worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman"), *with id.* at 2334 (Sotomayor, J., dissenting) ("Smith would like her company to sell wedding websites 'to the public,' but not to same-sex couples." (citations omitted) (quoting Petition for a Writ of Certiorari app. at 189a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476); COLO. REV. STAT. § 24-34-601(1) (2023))).

[85] *Id.* at 2317 (majority opinion).

[86] *Id.*

[87] *Id.*

[88] *See id.* at 2339 (Sotomayor, J., dissenting).

[89] *See id.*

[90] *See id.*

[91] *Id.*

sexual intimacy) not status (gay identity).[92] Over time, this distinction has been rejected as untenable. In *Lawrence v. Texas*,[93] the Court struck down a law criminalizing same-sex sexual conduct under the Due Process Clause, noting that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[94] In *Obergefell v. Hodges*,[95] the Court hearkened back to *Lawrence* to observe that "[a]lthough *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State."[96] The *Obergefell* Court then underscored that "[t]his dynamic also applies to same-sex marriage," because laws banning same-sex marriage not only "burden the liberty of same-sex couples," but also "abridge central precepts of equality."[97] The Court has recognized a similar connection in the race context, where it has stated that while "a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination."[98]

In *303 Creative*, the conduct (same-sex marriage) and the status (gay identity) were similarly linked. The Deputy Solicitor General, who intervened in favor of Colorado's position, observed during the oral argument that "[t]here are certain rare contexts where status and conduct are inextricably intertwined, and I think the Court has rightly recognized that same-sex marriage is one of them."[99] He observed the Court had earlier recognized that "a tax on yarmulkes is a tax on Jews."[100] Justice Sotomayor picked up on the instability of the status/conduct distinction in her dissent, pointing out that the "contrivance" here is "plain to see, for all who do not look the other way."[101]

---

[92] *See, e.g.*, Cook v. Gates, 528 F.3d 42, 68 (1st Cir. 2008) (Saris, J., concurring and dissenting) ("Here, the government insists that the purpose of the Act is to target conduct, not status . . . ."); Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) ("The government argues that the Act in this case proscribes homosexual conduct and that, since any governmental differentiation is based on conduct, not status, no heightened scrutiny is required."); Holmes v. Cal. Army Nat'l Guard, 920 F. Supp. 1510, 1527 (N.D. Cal. 1996) ("The Federal defendants assert that the new policy addresses homosexual *conduct*, not homosexual *status* or *orientation*."), *rev'd*, 124 F.3d 1126 (9th Cir. 1997).

[93] 539 U.S. 558 (2003).

[94] *Id.* at 575.

[95] 576 U.S. 644 (2015).

[96] *Id.* at 675 (citing *Lawrence*, 539 U.S. at 575).

[97] *Id.*

[98] Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983) (citing Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973)).

[99] Transcript of Oral Argument, *supra* note 71, at 126.

[100] *Id.* at 125–26 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)).

[101] *303 Creative*, 143 S. Ct. at 2339 & n.13 (Sotomayor, J., dissenting).

The specious nature of this "status/conduct" distinction may also explain why Justice Sotomayor's dissent did not defer to the stipulated facts. Justice Gorsuch's majority opinion underscored that the parties had stipulated the fact that Smith did not discriminate on the basis of sexual orientation.[102] Yet Smith had also stipulated that she would not make wedding sites celebrating same-sex couples.[103] If one believes that discrimination against same-sex couples is discrimination on the basis of sexual orientation, these two stipulated facts contradict each other.

Part of the dissent's ire concerned how much the Court had shifted ground on its sensitivity to equality issues under the First Amendment. The dissent began by referencing the 2018 case of *Masterpiece Cakeshop*.[104] "Five years ago," it stated, "this Court recognized the 'general rule' that religious and philosophical objections to gay marriage 'do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.'"[105] The dissent underscored that the *Masterpiece Cakeshop* decision "also recognized the 'serious stigma' that would result if 'purveyors of goods and services who object to gay marriages for moral and religious reasons' were 'allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages."'"[106] "What a difference five years makes," the dissent lamented.[107]

The statement that the passage of time had dramatically changed the outcome of the Court's jurisprudence could be construed as a jab. It implied that nothing had really changed in those years except for the composition of the Court.[108] And of course the solidification of a conservative supermajority on the Court has wrought seismic changes in many different areas of law.[109] Yet the allusion to *Masterpiece Cakeshop* invites a more specific exploration of the First Amendment exemption jurisprudence. *Masterpiece Cakeshop* turned on the Free Exercise Clause rather than the Free Speech Clause.[110] What has changed since *Masterpiece Cakeshop*, then, is also the doctrinal rubric under which the

---

[102] *Id.* at 2309, 2318 (majority opinion).

[103] *Id.* at 2309.

[104] *Id.* at 2322 (Sotomayor, J., dissenting) (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

[105] *Id.* (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727).

[106] *Id.* (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1728–29).

[107] *Id.* (quoting Carson v. Makin, 142 S. Ct. 1987, 2014 (2022) (Sotomayor, J., dissenting)).

[108] *Cf.* Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) (maintaining that "[n]either the law nor the facts . . . underwent any change in the last four years" since the precedent being overruled by the majority and that "[o]nly the personnel of this Court did").

[109] *See generally* MICHAEL WALDMAN, THE SUPERMAJORITY: HOW THE SUPREME COURT DIVIDED AMERICA (2023) (discussing how in 2022 alone, the conservative supermajority on the Court transformed the areas of reproductive rights, gun rights, and the powers of administrative agencies).

[110] *See Masterpiece Cakeshop*, 138 S. Ct. at 1724.

Court considers exemption claims. To understand the nature and import of that change, we must move across to the free exercise jurisprudence and the impasse the Court encountered there.

II. Free Exercise Refusals

It might seem counterintuitive that the *303 Creative* decision concerned a speech claim rather than a religious one. Smith's objection to CADA, after all, was religious in nature. She observed that creating a website would violate her "religious belief that same-sex marriages are 'false.'"[111] On its face, her objection mirrors those raised — and approved — in prior cases, such as those asserted by Jack Phillips in *Masterpiece Cakeshop*[112] and Catholic Social Services in *Fulton v. City of Philadelphia*.[113] To understand why the Court took up her case as a free speech challenge rather than a free exercise challenge, we must apprehend the momentous 1990 case of *Employment Division v. Smith* and the thus far unsuccessful campaign to overrule it.

If we turn the clock back to the mid-twentieth century, Smith would have had a stronger free exercise case. Consider the 1963 case of *Sherbert v. Verner*.[114] In that case, a private employer had fired Seventh-day Adventist Adell Sherbert from her job because she refused to work on Saturday, which was her Sabbath.[115] South Carolina rejected her request for unemployment benefits because she had turned down paid work.[116] The Court observed that South Carolina had burdened her right of free exercise and therefore had to show it had a compelling interest.[117] It then found that South Carolina's interest in preventing fraud by "unscrupulous claimants feigning religious objections to Saturday work"[118] had not been established in the case and ruled in Sherbert's favor.[119] Importantly, no one in *Sherbert* alleged that the South Carolina law arose from animus toward Seventh-day Adventists. *Sherbert* stands for the principle that even a facially neutral law of general applicability will draw heightened scrutiny if it burdens the free exercise of religion.[120]

The Court reinforced its holding in *Sherbert* in the 1972 case of *Wisconsin v. Yoder*.[121] *Yoder* concerned a state statute that required

---

[111] *303 Creative*, 143 S. Ct. at 2322 (Sotomayor, J., dissenting).
[112] 138 S. Ct. at 1724.
[113] 141 S. Ct. 1868, 1875 (2021).
[114] 374 U.S. 398 (1963).
[115] *Id.* at 399.
[116] *Id.* at 401.
[117] *Id.* at 406.
[118] *Id.* at 407.
[119] *Id.* at 407, 410.
[120] *See id.* at 406.
[121] 406 U.S. 205 (1972).

students to attend school until the age of sixteen.[122] Amish parents objected to this requirement, maintaining that their faith required them to remove their students from the public school system before high school.[123] Again, Wisconsin's requirement did not specifically target religion. Again, however, the Court created an exemption for the Amish.[124]

In 1990, however, the Court turned sharply away from the *Sherbert/Yoder* rule that laws burdening free exercise automatically drew heightened scrutiny. The landmark case of *Employment Division v. Smith* concerned two members of the Native American Church who smoked peyote for sacramental purposes.[125] Alfred Smith and Galen Black were fired from their jobs because of their use of peyote, which violated Oregon law at the time.[126] When they applied for unemployment compensation, Oregon denied their claims because they had been fired for workplace-related misconduct.[127] They sued, alleging that the denial violated their free exercise rights.[128]

In ruling against Smith and Black, the Court created a sea change. Justice Scalia's majority opinion contrasted two kinds of state regulations of religious conduct. In the first, the state restricted conduct solely because the actors engaged in the conduct for religious reasons.[129] The Court deemed such regulations unconstitutional.[130] In the second, the state burdened free exercise of religion without targeting it on religious grounds.[131] The law in the *Smith* case fell into this category, given that the law was "not specifically directed at [Smith and Black's] religious practice," and was "concededly constitutional as applied to those who use the drug for other reasons."[132] The Court found that such "neutral, generally applicable"[133] laws should be presumptively constitutional even if they burdened an individual's free exercise of religion.[134]

The majority justified its new rule in part on consequentialist grounds. It asserted that allowing free exercise exemptions from neutral laws of general applicability would allow every person "to become a law unto himself."[135] It elaborated that "[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its

---

[122] *Id.* at 207.
[123] *Id.* at 209.
[124] *Id.* at 234.
[125] Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).
[126] *Id.*
[127] *Id.*
[128] *See id.*
[129] *Id.* at 877.
[130] *Id.* at 877–78.
[131] *Id.* at 878.
[132] *Id.*
[133] *Id.* at 881.
[134] *Id.* at 878–79.
[135] *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

determination to coerce or suppress none of them."[136] Noting that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference,"[137] the Court underscored that it could not "afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[138]

The Court noted that allowing religious exemptions from laws of general applicability would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[139] It offered the examples of "compulsory military service," "the payment of taxes," "health and safety regulation," "compulsory vaccination laws," "drug laws," and, presciently, "laws providing for equality of opportunity for the races."[140]

Smith's rule that facially neutral laws substantially burdening free exercise will draw only rational basis review has three exceptions. For starters, as the majority noted at the outset of its opinion, facially neutral statutes animated by discriminatory intent against a religion will draw strict scrutiny.[141] The Court made good on this promise three years after *Smith* in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[142] The City of Hialeah had enacted a set of ordinances forbidding the ritual sacrifice of animals.[143] On their faces, the prohibitions were neutral. However, when the Court probed more deeply, it discovered that the city had enacted these measures with animus toward the Santeria faith.[144] After discerning the animus that underlaid the ordinances, the Court applied strict scrutiny and struck them down.[145]

The *Smith* rule has a second exception that flows from the Court's refusal to overrule *Sherbert*. The Court asserted that the law in *Sherbert* was limited to the unemployment context, which "lent itself to individualized governmental assessment of the reasons for the relevant conduct."[146] The Court observed that this meant the South Carolina statute was not "generally applicable."[147] It elaborated that if a state scheme allowed for exemptions based on individual circumstances, it could "not

---

[136] *Id.* at 888.

[137] *Id.* (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

[138] *Id.*

[139] *Id.*

[140] *Id.* at 889 (citing Gillette v. United States, 401 U.S. 437 (1971); United States v. Lee, 455 U.S. 252 (1982); Funkhouser v. State, 763 P.2d 695 (Okla. Crim. App. 1988); Cude v. State, 377 S.W.2d 816 (Ark. 1964); Olsen v. Drug Enf't Admin., 878 F.2d 1458 (D.C. Cir. 1989); Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983)).

[141] *See id.* at 886 n.3 (citing McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961)).

[142] 508 U.S. 520 (1993).

[143] *Id.* at 527.

[144] *Id.* at 534–35.

[145] *Id.* at 546–47.

[146] *Smith*, 494 U.S. at 884.

[147] *Id.*

refuse to extend that system to cases of 'religious hardship' without compelling reason."[148]

The final exception to *Smith* similarly arises from a reluctance to overrule prior precedents, including *Yoder*. The *Smith* Court observed that *Yoder* was a "hybrid situation,"[149] which involved "the Free Exercise Clause in conjunction with other constitutional protections."[150] In *Yoder*, the "other constitutional protection[]" was the right of parents to "direct the education of their children."[151] Like the individualized-determination carveout, this exception seems to exist only to avoid overruling precedent. Yet unlike the individualized-determination exception, the "'hybrid rights' exception" has been relentlessly excoriated as unworkable.[152]

Despite these exceptions, *Smith* has been far-reaching in its effects. As Justice Alito wrote in *Fulton*, the ruling can have "startling consequences," permitting the state to refuse exemptions for a wide range of religious activity.[153] He observed that under *Smith*, an individual could not successfully assert a free exercise exemption to use sacramental wine during Prohibition, circumcise a child in the face of a ban on the practice, or wear religious paraphernalia in violation of a dress code.[154] Justice Alito and many of his colleagues on the bench have called for *Smith* to be reconsidered or outright overruled.[155] Yet in two recent cases that afforded the Court the chance to do just that, the Court blinked. Rather than overrule *Smith*, the Court slotted these cases into exceptions contemplated by *Smith* itself.

The first of these cases was the 2018 *Masterpiece Cakeshop* case. The case involved a Christian baker — Jack Phillips — who declined to bake a wedding cake for a same-sex couple — Charlie Craig and Dave Mullins.[156] Colorado's Civil Rights Division found probable cause to believe that Phillips had violated CADA,[157] the same public accommodations statute at issue in *303 Creative*.[158] It referred the case to

---

[148] *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[149] *Id.* at 882.

[150] *Id.* at 881 (citing, inter alia, Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[151] *Id.* (citing *Yoder*, 406 U.S. 205).

[152] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1918 (2021) (Alito, J., concurring in the judgment) (noting that the "hybrid rights" carveout, "which was essential to distinguish *Yoder*, has baffled the lower courts," even causing some of them to simply ignore it (citing Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 244–47 (3d Cir. 2008))).

[153] *Id.* at 1883.

[154] *Id.* at 1884.

[155] *See* Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 268 (2021) ("Altogether, five Justices criticized the core *Smith* rule . . . .").

[156] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

[157] *Id.* at 1726.

[158] *303 Creative*, 143 S. Ct. at 2308.

the Civil Rights Commission.[159] In defending himself before the Commission, Phillips challenged this finding on free exercise grounds.[160]

The Court ruled in favor of Phillips but declined to overrule *Smith*.[161] Instead, it found the case fit into the discriminatory-intent exception to *Smith*.[162] Writing for the Court, Justice Kennedy found that the Colorado Civil Rights Commission showed "clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips's] objection."[163]

In doing so, Justice Kennedy relied on two pieces of evidence — statements made by the commissioners and what he perceived as the disparate treatment of Phillips relative to bakers in other cases.[164] With regard to the statements made by commissioners, Justice Kennedy relied primarily on a statement by Commissioner Diann Rice: "[W]e can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use . . . ."[165] Justice Kennedy found that this statement evinced hostility to Phillips's religion "by describing it as despicable, and also by characterizing it as merely rhetorical — something insubstantial and even insincere."[166] The Court also maintained that Colorado treated Phillips less favorably than other bakers who had refused to sell cakes.[167] The Colorado Civil Rights Division had rejected claims brought by William Jack, who had asked three different Colorado bakers to make cakes "disapproving same-sex marriage on religious grounds."[168] When the bakers declined, Jack filed complaints with the Division.[169] The Division found that these bakers did not violate the Act.[170] Justice Kennedy believed that this disparity showed that the Division disfavored religion: "A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness."[171]

Evaluating Justice Kennedy's analysis in these pages, Professors Leslie Kendrick and Micah Schwartzman challenge the Court's interpretation of the facts.[172] They observe that Commissioner Rice did not

---

[159] *Masterpiece Cakeshop*, 138 S. Ct. at 1726.
[160] *Id.*
[161] *See id.* at 1732.
[162] *See id.* at 1729.
[163] *Id.*
[164] *Id.* at 1729–30.
[165] *Id.* at 1729.
[166] *Id.*
[167] *Id.* at 1730.
[168] *Id.* at 1735 (Gorsuch, J., concurring).
[169] *Id.*
[170] *Id.*
[171] *Id.* at 1731 (majority opinion).
[172] *See* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 141–42 (2018).

call Phillips's religion "despicable," but applied that epithet only to the appeal to religion to justify discrimination.[173] Kendrick and Schwartzman elaborate that Rice never contested the sincerity of Phillips's religious beliefs in her comment, and accepted the sincerity of his beliefs in the proceedings as a whole.[174] They further point out that it is simply historical fact that religion has been used to justify discrimination of various kinds.[175] Similarly, Kendrick and Schwartzman note that Colorado did not deem Jack's message offensive.[176] Rather, the State found that the *bakers* rejected Jack's message because they believed it was offensive, not because it was religious.[177]

My aim here is not to relitigate *Masterpiece Cakeshop*. Rather, it is to suggest that the Court implausibly shoehorned the facts into an exception in *Smith* to avoid confronting *Smith* itself. For all the steady criticism of *Smith*, the Court seems unwilling to take the final step of overruling it altogether. Justice Kennedy's opinion suggested a reason for that reluctance. The majority expressed concern that if broad exemptions were granted, "a long list of persons who provide goods and services . . . might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[178]

As Justice Sotomayor developed in her *303 Creative* dissent, Justice Kennedy's insight was that public accommodations raise different concerns because they hold themselves open to the public.[179] When religious organizations deal with internal matters, courts have long granted them exemptions from civil rights laws[180] (or the civil rights laws themselves have exempted them,[181] as CADA does[182]). Yet when people of faith open their businesses to the general community, they enter an

---

[173] *Id.* at 141.

[174] *Id.*

[175] *Id.* at 141–42.

[176] *Id.* at 144.

[177] *Id.*

[178] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

[179] *See 303 Creative*, 143 S. Ct. at 2325–29 (Sotomayor, J., dissenting).

[180] *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (holding that the First Amendment prevents employment discrimination laws from being applied to a Catholic school); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (holding that antidiscrimination laws cannot regulate a religious organization's choice of its own leaders).

[181] *See, e.g.*, 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity]."); *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 329 (1987) (acknowledging that Title VII exempts religious organizations from its prohibitions on employment discrimination).

[182] COLO. REV. STAT. § 24-34-601(1) (2023) (noting that the accommodation clause does not apply to any "church, synagogue, mosque, or other place that is principally used for religious purposes").

implicit contract with that community — in claiming to serve and sell to the public, they cannot evade antidiscrimination laws that seek to protect that public. Justice Kennedy's expressed qualm about a far-reaching set of exemptions from public accommodations laws might suggest the nature of one reservation about overruling *Smith*.

Three years later, the Court showed a similar diffidence in *Fulton v. City of Philadelphia*. At issue in *Fulton* was Philadelphia's refusal to enter into foster-care contracts with Catholic Social Services (CSS), which places children with foster families.[183] Because of its religious view that marriage is only between a man and a woman, CSS would not place children with married same-sex couples.[184] Philadelphia informed CSS that this restriction violated a nondiscrimination provision in the agency's contract with the city, as well as the city's Fair Practices Ordinance.[185] It told CSS that it would terminate its foster-care contract unless it agreed to certify same-sex couples.[186] CSS challenged this refusal under the Free Exercise and Free Speech Clauses.[187]

The Court ruled unanimously in favor of CSS on the free exercise ground.[188] Chief Justice Roberts wrote for a six-member majority of the Court that this case fell outside the ambit of *Smith*.[189] The majority found that *Smith* applied only to neutral laws of general applicability.[190] In this case, the Court deemed the city's contract with CSS to fail the requirements of general applicability.[191] It noted that section 3.21 of the contract required the agency to provide services to prospective foster parents without regard to their sexual orientation.[192] It further observed, however, that this provision allowed exceptions to be made to this requirement at the "sole discretion" of the Commissioner.[193] This provision meant that the city had a "system of individual exemptions."[194] As such, it fell within the *Sherbert* exception to *Smith*.[195] The Court applied strict scrutiny and invalidated Philadelphia's rejection of CSS's services.[196]

The unanimity of the Court with regard to this result masked two deep rifts among the Justices. First, the Justices disagreed about what standard should replace *Smith*'s rule if it were to be overruled. Justice

---

[183] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021).
[184] *Id.*
[185] *Id.*
[186] *Id.* at 1875–76.
[187] *Id.* at 1876.
[188] *See id.* at 1882; *id.* at 1926 (Alito, J., concurring in the judgment).
[189] *Id.* at 1877 (majority opinion).
[190] *Id.*
[191] *Id.* at 1878.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *See id.*
[196] *Id.*

Alito, joined by Justices Thomas and Gorsuch, wrote a concurrence several times the length of Chief Justice Roberts's majority opinion.[197] That concurrence outlined a comprehensive case for overruling *Smith*[198] and expressed an intuition that the Court should return to the strict scrutiny applied in the cases that predated it.[199] Yet Justice Barrett, joined by Justice Kavanaugh and in part by Justice Breyer, answered the question of "what should replace *Smith*?"[200] differently. Her concurrence expressed concerns "about swapping *Smith*'s categorical anti-discrimination approach for an equally categorical strict scrutiny regime."[201] This disagreement over the proper standard may have prevented the Court from overturning the precedent.

In addition, the Justices vehemently disagreed over the wisdom of dodging the question of *Smith*'s continued vitality. In his concurrence, Justice Gorsuch, joined by Justices Thomas and Alito, acerbically observed: "Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about *Smith*'s fate that it is willing to say pretty much anything about municipal law and the parties' briefs."[202] He concluded: "*Smith* committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today."[203]

Justice Gorsuch was certainly correct that exemption cases would "keep coming" to the Court. When *303 Creative* arrived, however, the Justices took a different tack. Rather than belaboring the question of whether *Smith* should be overruled, the Justices explicitly took that question off the table in their grant of certiorari.[204] Instead, the Justices looked at another ground for conscientious exemption: the right of free speech.

In the 1992 case of *Lee v. Weisman*,[205] the Court observed that "[t]he Free Exercise Clause embraces a freedom of conscience and

---

[197] *See id.* at 1883–926 (Alito, J., concurring in the judgment).

[198] *See id.*

[199] *See id.* at 1924 ("If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.").

[200] *Id.* at 1882 (Barrett, J., concurring).

[201] *Id.* at 1883.

[202] *Id.* at 1929 (Gorsuch, J., concurring in the judgment).

[203] *Id.* at 1931.

[204] In Smith's petition for certiorari, she raised two questions presented, with the second being: "Whether a public-accommodation law that authorizes secular but not religious exemptions is generally applicable under *Smith*, and if so, whether this Court should overrule *Smith*." Petition for a Writ of Certiorari, *supra* note 84, at i. The Court limited its grant of certiorari to the first question on free speech, thus explicitly denying review of *Smith*. 303 Creative LLC v. Elenis, 142 S. Ct. 1106, 1106 (2022) (mem.).

[205] 505 U.S. 577 (1992).

worship that has close parallels in the speech provisions of the First Amendment."[206] As I have written elsewhere, when constitutional commitments get shut down in one area of doctrine, the effect is like squeezing a balloon.[207] The commitments often do not get squeezed out, but rather squeezed over to a collateral area of doctrine.[208] It seems fair to infer from *Masterpiece Cakeshop* and *Fulton* that many of the Justices have accepted that *Smith* will be hard to overrule. Instead of giving up on conscience-based exemptions, these Justices have shunted the issue over to the free speech jurisprudence.

In doing so, they may have succeeded beyond their wildest dreams with regard to protecting conscience-based exemptions. Free speech exemptions differ from free exercise exemptions in at least three ways, which on net tend to expand the reach of such exemptions. I now turn to those differences.

III. SPEECH EXEMPTIONS CAN BE ASSERTED AGAINST ANYONE

Unlike the free exercise exemptions the Court has addressed before, the free speech exemption articulated in *303 Creative* can be asserted against anyone based on any classification, including race. This quality makes the free speech exemption potentially much more damaging to civil rights.

That danger surfaced in a fraught exchange during the *303 Creative* oral arguments between some of the Justices and Kristen Waggoner, the attorney for 303 Creative. In an eyebrow-raising moment, Justice Jackson asked Waggoner if a photographer seeking to shoot a nostalgic "Scenes with Santa" series could exclude children of color because they were inconsistent with the message the photographer sought to convey.[209] Waggoner responded that the relevant message was not as clearly embedded in the photograph, but that it would be an "edge case."[210] Justice Kagan asked, with apparent incredulity: "It may be an edge case meaning it could fall on either side, you're not sure?"[211] Waggoner responded, "I am sure in that the message isn't in the product. It's not in the photograph. But even if this Court were to find that it was, the Court would still have to protect the speech . . . ."[212]

Justice Alito jumped in, asking whether the Court in *Obergefell v. Hodges* had said "that religious objections to same-sex marriage are

---

[206] *Id.* at 591.
[207] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).
[208] *Id.*
[209] Transcript of Oral Argument, *supra* note 71, at 26–28.
[210] *Id.* at 28–29.
[211] *Id.* at 29.
[212] *Id.*

the same thing as religious or other objections to people of color."[213] Waggoner took the lifeline he offered her to distinguish LGBTQ+ rights from racial civil rights: "No. In fact, it said that decent and honorable people hold beliefs about . . . gender-differentiated marriage and that that's based on reasonable religious and philosophical premises."[214]

This distinction is critical. Many of the "right of first refusal" cases that have come before the Court and lower courts deal with LGBTQ+ individuals.[215] In this relatively nascent civil rights context, it may be easier to believe that religious objectors should be accommodated. It is much harder to imagine the Court reaching the result it did in *303 Creative* had Lorie Smith refused to make websites for interracial couples.

In the end, however, that is exactly what the majority opinion in *303 Creative* allowed Smith to do. While Justice Alito's distinction may still hold true in the free exercise context, it does not hold true going forward in the free speech context. As I will show, religious exemptions need not extend to race-based discrimination, while speech exemptions *must* now do so.

A. Religious Exemptions Need Not Extend to Race-Based Discrimination

As Commissioner Rice stated in *Masterpiece Cakeshop*, religious belief has often been used as a ground on which to resist civil rights laws.[216] At least since the Second Reconstruction, however, the Supreme Court has decisively rejected such arguments. In the 1966 case of *Newman v. Piggie Park Enterprises, Inc.*,[217] Ann Newman, the wife of the NAACP executive director, sued Piggie Park restaurants.[218] Run by white supremacist Maurice Bessinger, the chain permitted Black patrons to purchase barbecue only for takeout and did not allow them to be served inside its restaurants.[219] Newman argued that racial segregation at Piggie Park violated Title II of the Civil Rights Act of 1964,[220] which barred race discrimination in public accommodations.[221]

---

[213] *Id.*

[214] *Id.* at 29–30.

[215] *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019); State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019).

[216] *Masterpiece Cakeshop*, 138 S. Ct. at 1729; *see also* Kendrick & Schwartzman, *supra* note 172, at 140–41.

[217] 390 U.S. 400 (1968) (per curiam).

[218] JAMES L. FELDER, CIVIL RIGHTS IN SOUTH CAROLINA: FROM PEACEFUL PROTESTS TO GROUNDBREAKING RULINGS 55 (2012).

[219] *Id.*

[220] 42 U.S.C. §§ 2000a to 2000a-6.

[221] *See* Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 943–44 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400.

Bessinger responded that Title II unconstitutionally violated his free exercise of religion.[222] He testified at trial that he regarded the Bible as the "infallible word of god," and that "in the Old Testament God commanded the Hebrews not to mix with other people and races."[223] The district court flatly rejected Bessinger's argument, noting that the Free Exercise Clause did not provide Bessinger "the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens."[224]

On appeal to the Supreme Court, the main issue was whether attorneys' fees could be assessed for Bessinger's violations.[225] As such, the Court's decision did not squarely address his free exercise defense. However, the per curiam opinion asserted that the attorneys' fees were warranted in part because of the baselessness of the defenses raised: "Indeed, this is not even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable."[226] As an example of such a "patently frivolous" claim, the Court cited "defendants' contention that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'"[227]

The Court rejected the "religious right to discriminate" more directly in the 1983 case of *Bob Jones University v. United States*.[228] That case concerned the tax-exempt status of two universities — Bob Jones University and Goldsboro Christian Schools — that discriminated on the basis of race.[229] In 1971, the IRS issued a revenue ruling stating that a school that engaged in race discrimination against its students could not be deemed "charitable," and therefore would not be entitled to a tax exemption.[230] The schools challenged the policy on several grounds, including the ground that it violated their free exercise of religion.[231]

As *Bob Jones* arose before *Smith*, the Court applied the *Sherbert* test, noting that any burden on free exercise would need to be "essential to accomplish an overriding governmental interest."[232] The Court

---

[222] *See id.* at 944.

[223] Petition for a Writ of Certiorari app. at 126A, *Newman*, 390 U.S. 400 (No. 339).

[224] *Newman*, 256 F. Supp. at 945.

[225] *See Newman*, 390 U.S. at 401.

[226] *Id.* at 402 n.5.

[227] *Id.* (quoting Newman v. Piggie Park Enters., Inc., 377 F.2d 433, 437–38 (4th Cir. 1967) (Winter, J., concurring specially), *aff'd*, 390 U.S. 400).

[228] 461 U.S. 574 (1983).

[229] *See id.* at 577.

[230] *Id.* at 579 (citing Rev. Rul. 71-447, 1971-2 C.B. 230–31).

[231] *See id.* at 582, 584.

[232] *Id.* at 603 (quoting United States v. Lee, 455 U.S. 252, 257–58 (1982)) (citing McDaniel v. Paty, 435 U.S. 618, 628 & n.8 (1978); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Gillette v. United States, 401 U.S. 437 (1971)).

determined that "the Government ha[d] a fundamental, overriding interest in eradicating racial discrimination in education — discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."[233] The Court found that this interest "outweigh[ed] whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[234] Moreover, the Court concluded that no "less restrictive means" could achieve that interest.[235]

For at least the past half-century, then, it has been clear that there is no religious right to engage in race discrimination. As Justice Sotomayor mused in her *303 Creative* dissent, "How quickly we forget that opposition to interracial marriage was often because 'Almighty God . . . did not intend for the races to mix.'"[236] She was quoting the 1967 case of *Loving v. Virginia*,[237] in which the state trial court had upheld the criminal convictions for interracial marriage on this basis.[238] Yet one reason we forget — if we do forget — is that the Court has consistently rejected such arguments.

B. Speech Exemptions Must Extend to Race-Based Discrimination

To be clear, the free speech jurisprudence also contains cases that reject expression as a constitutional ground on which to circumvent antidiscrimination laws. The difference is that *303 Creative* has now cast doubt on at least some aspects of their holdings. Justice Sotomayor canvassed these cases at length in her dissent.[239]

In the 1976 case of *Runyon v. McCrary*,[240] "commercially operated" private schools sought an exemption from a federal law prohibiting race discrimination in contracting.[241] The schools asserted a defense based on freedom of association.[242] The Court rejected this defense, stating that "the Constitution . . . places no value on discrimination."[243] Moreover, it found no evidence that the federal law's prohibition on the exclusionary admission policy would restrict the school's ability to maintain its discriminatory speech in the classroom.[244] The school retained its capacity to speak out against racial integration.[245]

---

[233] *Id.* at 604 (footnote omitted).
[234] *Id.*
[235] *Id.* (quoting Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981)).
[236] *303 Creative*, 143 S. Ct. at 2342 (Sotomayor, J., dissenting) (omission in original) (quoting Loving v. Virginia, 388 U.S. 1, 3 (1967)).
[237] 388 U.S. 1.
[238] *See id.* at 3.
[239] *See 303 Creative*, 143 S. Ct. at 2331–33 (Sotomayor, J., dissenting).
[240] 427 U.S. 160 (1976).
[241] *See id.* at 168.
[242] *Id.* at 175.
[243] *Id.* at 176 (omission in original) (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)).
[244] *See id.*
[245] *See id.*

Justice Sotomayor's dissent also discussed a pair of cases decided in 1984 that applied similar reasoning in the context of gender.[246] In *Hishon v. King & Spalding*,[247] a law firm defended itself against a Title VII sex discrimination claim by observing that the statute violated its First Amendment "rights of expression or association."[248] The Court rejected this defense on the ground that "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections."[249] Similarly, in *Roberts v. United States Jaycees*,[250] a civic organization sought an exemption from a Minnesota law that prohibited discrimination on the basis of sex, asserting its "constitutional rights of free speech and association."[251] Yet again, the Court rejected this defense on the ground that the law did "not aim at the suppression of speech,"[252] but rather aimed at "eliminating discrimination and assuring [the state's] citizens equal access to publicly available goods and services."[253]

At least with regard to vendors engaged in "pure speech," however, that status quo is now different. In *303 Creative*, the Court construed activity that some might view as conduct with incidental effects on speech to be "pure speech."[254] And when commercial practice is construed in this way, no limit exists on the groups against which free speech exemptions can be asserted.

This is because in the pure speech context, the Court has taken great pride in protecting hate speech. As the Court stated in the 2017 case of *Matal v. Tam*[255]: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[256] The *303 Creative* Court did not quote *Tam*, but it swore fealty to this principle. Justice Gorsuch's majority opinion noted that "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or

---

[246] *303 Creative*, 143 S. Ct. at 2333–34 (Sotomayor, J., dissenting).

[247] 467 U.S. 69 (1984).

[248] *Id.* at 78.

[249] *Id.* (alteration in original) (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)).

[250] 468 U.S. 609 (1984).

[251] *Id.* at 615.

[252] *Id.* at 623.

[253] *Id.* at 624 (citing U.S. Jaycees v. McClure, 305 N.W.2d 764, 766–68 (Minn. 1981)); *see also* Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (holding that law prohibiting "immoral or scandalous" trademarks violated First Amendment because it "aim[ed] at the suppression of [speech]" (quoting Matal v. Tam, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment))).

[254] *See 303 Creative*, 143 S. Ct. at 2316 (finding that designer's refusal to develop wedding websites for same-sex customers was "pure speech").

[255] 137 S. Ct. 1744.

[256] *Id.* at 1764 (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

deeply 'misguided,' and likely to cause 'anguish' or 'incalculable grief.'"[257]

In writing of "anguish" and "incalculable grief," the Court was quoting *Snyder v. Phelps*,[258] where the Court considered a free speech defense asserted by the notoriously anti-gay Westboro Baptist Church.[259] The Church had picketed the funeral of a veteran.[260] The veteran's father filed suit, alleging, among other tort claims, intentional infliction of emotional distress.[261] In ruling for the Church, the Court observed: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and — as it did here — inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker."[262] The Court observed: "As a Nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[263]

Justice Gorsuch had already endorsed this view in *Masterpiece Cakeshop* when he joined a concurrence penned by Justice Thomas.[264] Justice Thomas maintained that Jack Phillips should have prevailed on free speech grounds (as well as on the free exercise grounds on which he won his case).[265] Justice Thomas observed that because CADA regulated expressive conduct, it would be subjected to strict scrutiny.[266] While he declined to opine on whether CADA met that standard, Justice Thomas underscored one justification that would *not* constitute a compelling governmental interest.[267] That justification was the asserted governmental rationale that "Colorado can compel Phillips' speech to prevent him from 'denigrat[ing] the dignity' of same-sex couples, 'assert[ing] [their] inferiority,' and subjecting them to 'humiliation, frustration, and embarrassment.'"[268] Justice Thomas stressed that state actors "cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified."[269] To the contrary, he observed that it was a "bedrock principle underlying the First Amendment" that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

---

[257] *303 Creative*, 143 S. Ct. at 2312 (citation omitted) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995); Snyder v. Phelps, 562 U.S. 443, 456 (2011)).

[258] 562 U.S. 443.

[259] *See id.* at 448, 450.

[260] *Id.* at 447.

[261] *Id.* at 448, 450.

[262] *Id.* at 460–61.

[263] *Id.* at 461.

[264] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring in part and concurring in the judgment).

[265] *Id.*

[266] *Id.* at 1745–46.

[267] *See id.* at 1746.

[268] *Id.* (alterations in original) (citations omitted) (quoting Brief for Respondents Charlie Craig & David Mullins at 39, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)).

[269] *Id.*

disagreeable."[270] Justice Thomas acidly noted that such "[c]oncerns about 'dignity' and 'stigma' did not carry the day" on occasions when the Court protected the speech of racists, such as when it "affirmed the right of white supremacists to burn a 25-foot cross."[271]

The "protecting the thought that we hate" rationale has no ready analog in the free exercise context. For this reason, the free speech exemption will be much more wide-ranging. It would not permit distinctions between anti-gay expressive conduct on the one hand and sexist or racist expressive conduct on the other.

Moreover, if commercial practice can now be characterized as pure speech, earlier cases may need to be revisited. At oral argument, Justice Kagan asked the Deputy Solicitor General about the "killer[]" hypotheticals the Court should worry about if the case were decided in 303 Creative's favor.[272] His answer was *Runyon*: "[I]f Petitioners are right, that case comes out differently as long as the school can come in and say, when we teach, we are expressing messages and those messages change when we express them to students of different races."[273] Picking up on that theme, the *303 Creative* dissent observed that the majority "studiously avoid[ed]" any discussion of *Runyon*.[274] Justice Sotomayor elaborated: "The potential implications of the Court's logic are deeply troubling. Would *Runyon* have come out differently if the schools had argued that accepting Black children would have required them to create original speech, like lessons, report cards, or diplomas, that they deeply objected to?"[275]

If that seems like an overly apprehensive prediction, recall the three cases that the majority cited to set forth the legal framework of the prohibition on "compelled affirmation": *Barnette*, *Hurley*, and *Dale*.[276] This list is striking both in what it omits and what it adds. *Barnette* is often paired with *Wooley v. Maynard*,[277] in which the Court held that New Hampshire could not force Jehovah's Witnesses to carry the motto "Live Free or Die" on their license plates.[278] The majority cited this case, but not as part of its doctrinal framework.[279] This might have

---

[270] *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[271] *Id.* at 1747 (citing Virginia v. Black, 538 U.S. 343 (2003)). Had he gone back in time, he could have also cited *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which is perhaps the fountainhead for the idea that speech trumps equality in the context of hate speech. In that case, the Court invalidated a city ordinance that prohibited race-based hate speech as it applied to a cross burning. *See id.* at 380, 396. The Court stated that the city could not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392.

[272] Transcript of Oral Argument, *supra* note 71, at 137.

[273] *Id.* at 138.

[274] *303 Creative*, 143 S. Ct. at 2332 (Sotomayor, J., dissenting).

[275] *Id.* at 2342 n.16.

[276] *See id.* at 2311 (majority opinion).

[277] 430 U.S. 705 (1977); *see, e.g.*, Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 62 (2006); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87–88 (1980).

[278] *Wooley*, 430 U.S. at 707, 713.

[279] *See 303 Creative*, 143 S. Ct. at 2312.

been in part because *Wooley*, like *Barnette*, concerned speech that the government itself composed.[280] As such, *Wooley* offered more fuel to the dissent's claim that "[a] content-neutral equal-access policy is 'a far cry' from a mandate to 'endorse' a pledge chosen by the Government."[281]

Just as notable, however, is the majority's addition of *Dale*. *Dale* might seem like an intuitive case to invoke because — like *Hurley* and *303 Creative* — it involved a public accommodations law barring discrimination on the basis of sexual orientation.[282] Unlike *Barnette* or *Hurley*, *Dale* did not involve speech per se, but expressive association.[283] This shows the potential breadth of the exemption for public accommodations laws involving commerce. In the wake of *303 Creative*, *Dale* squarely raises the question of whether *Runyon* — which was also an expressive association case[284] — would be decided differently today.

IV. Speech Exemptions Can Be Asserted by Anyone

A second critical way in which free speech claims would sweep more broadly than free exercise claims rests on who can claim them. Free exercise exemptions can be asserted only by those seeking to exercise religion.[285] Free speech exemptions can be asserted by anyone.[286]

A. Religious Exemptions Do Not Extend to Nonreligious Expression

To briefly state the obvious, the religion clauses protect individuals only on the basis of their religion.[287] The *Yoder* Court observed that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[288] The Court went on to helpfully contrast religious and secular withdrawals from the world: "[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis."[289] The Court concluded: "Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."[290]

---

[280] *See Wooley*, 430 U.S. at 713 (discussing the relevant speech as a state motto).
[281] *303 Creative*, 143 S. Ct. at 2340 (Sotomayor, J., dissenting) (quoting *Rumsfeld*, 547 U.S. at 62).
[282] Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).
[283] *Id.*
[284] *See* Runyon v. McCrary, 427 U.S. 160, 175 (1976).
[285] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
[286] *See, e.g.*, *303 Creative*, 143 S. Ct. at 2312.
[287] *Yoder*, 406 U.S. at 215.
[288] *Id.*
[289] *Id.* at 216.
[290] *Id.*

The idea that free exercise exemptions must be asserted on religious grounds may, in fairness, not be as stringent as it may seem. For understandable reasons, the Court has hesitated to judge the sincerity or nature of a party's religious belief.[291] It may be that an individual could — as South Carolina feared in *Sherbert* — opportunistically assert a particular belief for the purposes of bringing their claim within the ambit of the religion clauses.[292] As a practical matter, though, there seems to be little evidence of such opportunistic embraces of religion. And more deeply, the principle that the exemptions must be religious remains.[293]

The limitation on asserting religious objections to civil rights laws has significant consequences for how these conflicts are framed — both to the Court and to the broader public. The conflict between people of faith and LGBTQ+ individuals, for instance, has sometimes been described as "God vs. gay."[294] The Court has an interest in avoiding this inflammatory way of casting the conflict as one between a majority religion and a sexual minority. That may explain why the Court has stayed its hand in overruling *Smith*, as doing so might suggest it is definitively siding with one group over the other.[295]

The religious-objector-versus-sexual-minority debate is particularly combustible because both groups are vying for visibility.[296] Members of religious groups and LGBTQ+ individuals both generally have the capacity to be forced to "pass," that is, to be driven into the closet.[297] For this reason, the fight between these two constituencies is about who gets to live openly in the public sphere.[298] In *Romer v. Evans*,[299] Justice Scalia referred to the struggle over gay rights as a "Kulturkampf,"[300] or culture war, but one might equally say it was a "Closetkampf." For

---

[291] *Id.* at 215; *see also* Sherbert v. Verner, 374 U.S. 398, 407–08 (1963) (citing United States v. Ballard, 322 U.S. 78 (1944); Shelton v. Tucker, 364 U.S. 479, 487–90 (1960); Talley v. California, 362 U.S. 60, 64 (1960); Schneider v. New Jersey, 308 U.S. 147, 161 (1939); Martin v. City of Struthers, 319 U.S. 141, 144–49 (1943)).

[292] *See Sherbert*, 374 U.S. at 407.

[293] *See, e.g.*, *Yoder*, 406 U.S. at 215.

[294] *See generally* JAY MICHAELSON, GOD VS. GAY?: THE RELIGIOUS CASE FOR EQUALITY *passim* (2011) (coining the "God vs. gay" conflict in "our national 'conversation'" as one that pits LGBTQ+ rights against the claimed beliefs of people of faith, *id.* at xvi).

[295] *See supra* Part II, pp. 254–62.

[296] *See* Obergefell v. Hodges, 576 U.S. 644, 661, 669 (2015) (detailing LGBTQ+ couples' increasing efforts at attaining public recognition, including via marriage).

[297] *See, e.g.*, YingFei Héliot et al., *Religious Identity in the Workplace: A Systematic Review, Research Agenda, and Practical Implications*, 59 HUM. RES. MGMT. 153, 162 (2020). *See generally* Margaret Rosario, *Development of Lesbian/Gay, Bisexual, and Other Sexual Minority Individuals: The Closet and Disclosure as a Window into the Issue*, 52 ARCHIVES SEXUAL BEHAV. 1923 (2023) (describing "the closet" as the state of "absolute concealment" of one's sexual minority status, *id.* at 1923).

[298] *See Obergefell*, 576 U.S. at 661, 669.

[299] 517 U.S. 620 (1996).

[300] *Id.* at 636 (Scalia, J., dissenting).

centuries — or, in the words of Chief Justice Burger, "millennia"[301] — religious views were used to keep gay people in closets.[302] As the tide has turned in favor of LGBTQ+ equality, some feel that people of faith are pushed into their closets as gay people come out of theirs.[303] In *Obergefell v. Hodges*, Justice Alito queried whether the "rights of conscience" of opponents of same-sex marriage "will be protected."[304] He elaborated: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[305] Justice Alito returned to this idea in his concurrence in *Fulton v. City of Philadelphia*, maintaining that "[s]uppressing speech — or religious practice — simply because it expresses an idea that some find hurtful is a zero-sum game."[306] "While [Catholic Social Service's] ideas about marriage are likely to be objectionable to same-sex couples," he continued, "lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs."[307]

Professor Andrew Lewis observes that if the conflict over exemptions is framed in these terms, the winner is clear.[308] He describes surveys showing that "75 percent of Americans think small businesses should not use their religious beliefs to deny services to gay men and lesbians."[309] Lewis, however, goes on to point out that this opposition is curiously malleable.[310] He notes that when respondents are asked whether *minority* religious groups in the United States, like Muslims, should have the right to refuse service, support for the exemptions rises.[311] The lesson from his research is clear — when seeking exemptions, it is good strategy for objectors to create as broad a coalition as possible.

Yet the broadest coalition, of course, would move beyond religion altogether. The persuasive virtue of the free speech exemption lies precisely in its universal availability.

---

[301] Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).
[302] *Id.* at 196.
[303] *Obergefell*, 576 U.S. at 742 (Alito, J., dissenting).
[304] *Id.* at 741.
[305] *Id.*
[306] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1925 (2021) (Alito, J., concurring in the judgment).
[307] *Id.*
[308] Andrew R. Lewis, *The Supreme Court Handed Conservatives a Narrow Religious Freedom Victory in* Fulton v. City of Philadelphia, WASH. POST (June 18, 2021, 6:00 AM), https://www.washingtonpost.com/politics/2021/06/18/supreme-court-handed-conservatives-narrow-religious-freedom-victory-fulton-v-city-philadelphia [https://perma.cc/V4XF-ECLK].
[309] *Id.*
[310] *Id.*
[311] *Id.*

B. Speech Exemptions Extend to Nonreligious Expression

The key difference between free exercise and free speech exemptions is that anyone can assert a free speech exemption.[312] The *303 Creative* majority opinion was at pains to point out that in the absence of such a protection, the state could force "'an unwilling Muslim movie director to make a film with a Zionist message' or 'an atheist muralist to accept a commission celebrating Evangelical zeal.'"[313] Bringing it still closer to home, the Court observed: "Equally, the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage."[314]

As that last hypothetical suggested, many in the LGBTQ+ community are more likely to struggle with their opposition to free speech exemptions than with their opposition to free exercise exemptions. In his careful history, Professor Carlos Ball has shown that the Speech Clause has been an enormous boon to the LGBTQ+ rights movement.[315] It has protected the community from state action ranging from obscenity laws to attempts to quash expressive association.[316] By showing that LGBTQ+ individuals are just as protected as religious individuals, the Court highlighted the universality of speech rights.

There are at least two reasons, however, to be concerned about the universal applicability of this exemption. The first goes back to Justice Scalia's concern in *Smith* that allowing religious exemptions from laws of general applicability would allow each individual "to become a law unto himself."[317] He observed that in a nation as religiously diverse as ours, the Court could not afford such exemptions.[318] Moving from free exercise to free speech means that those exemptions will be even more broadly available. Anyone engaged in an expressive profession can now claim a speech exemption from public accommodations laws.[319] But that could open a war of all against all. One can easily imagine a scenario in which religious vendors discriminate against LGBTQ+ individuals and then, in retaliation, LGBTQ+ vendors (or their allies)

---

[312] *See, e.g.*, *303 Creative*, 143 S. Ct. at 2312.

[313] *Id.* at 2314 (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1199 (10th Cir. 2021) (Tymkovich, C.J., dissenting)).

[314] *Id.*

[315] *See generally* CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY (2017).

[316] *See, e.g.*, *id.* at 16, 51.

[317] Emp. Div. v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

[318] *Id.* at 888 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

[319] *See 303 Creative*, 143 S. Ct. at 2334 (Sotomayor, J., dissenting).

discriminate against people of faith.[320] That tit-for-tat dynamic would make a Swiss cheese of antidiscrimination law.

The second concern is an egalitarian one. *303 Creative* creates exemptions in the context of antidiscrimination laws.[321] As a raft of recent scholarship has noted, courts are using the right of free speech as a weapon for deregulation in a broad array of contexts.[322] One has gone so far as to call free speech claims "the new *Lochner*,"[323] comparing the free speech cases to the deployment of substantive due process in the 1890s to the 1930s to strike down a wide array of social welfare legislation.[324]

Regardless of what one thinks of that argument in general, it seems incontrovertibly true in the context of antidiscrimination laws. Those laws seek to overcome systemic inequality in American society. Creating speech exemptions to blunt their force will only reinstate the status hierarchies such laws sought to disestablish.

V. SPEECH EXEMPTIONS ARE LIMITED TO EXPRESSIVE ACTIVITY

The *303 Creative* Court took particular umbrage at the dissent's claim that its decision would open the door to historically rejected forms of discrimination. The Court stated: "The dissent even suggests that our decision today is akin to endorsing a 'separate but equal' regime that would allow law firms to refuse women admission into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a 'White Applicants Only' sign."[325] It then dismissed the parade of horribles with three percussive words: "Pure fiction all."[326] Yet if this is fiction, it bears explaining why. As we have established, anyone can exert a speech exemption against anyone.[327] So the ground on which the majority dismissed these concerns must be that these instances do not involve "speech."

---

[320] While writing in jest, actor Michael Imperioli revealed this "tit-for-tat" impulse. In the immediate wake of the *303 Creative* decision, he wrote: "I've decided to forbid bigots and homophobes from watching *The Sopranos*, *The White Lotus*, *Goodfellas* or any movie or tv show I've been in." Christy Piña, *Michael Imperioli Says He Has Decided to "Forbid Bigots and Homophobes" from Watching "The White Lotus" and "The Sopranos,"* HOLLYWOOD REP. (July 2, 2023, 11:54 AM), https://www.hollywoodreporter.com/news/general-news/michael-imperioli-forbids-bigots-homophobes-from-watching-the-white-lotus-sopranos-1235528021 [https://perma.cc/V3QY-4YSM].

[321] *See 303 Creative*, 143 S. Ct. at 2322.

[322] *See, e.g.*, Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323, 325 (2016); Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1329 (2020); Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2243 (2018); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 133.

[323] Shanor, *supra* note 322, at 136.

[324] *Id.* at 185–86.

[325] *303 Creative*, 143 S. Ct. at 2319.

[326] *Id.*

[327] *See supra* Parts III–IV, pp. 262–73.

The final way in which speech exemptions differ from free exercise exemptions is that speech exemptions are limited to behaviors that can be categorized as expressive. In fairness to the majority, this could indeed operate as a serious constraint on the Court's jurisprudence. In fairness to the dissent, however, the Court gave scant guidance about what it will deem to be speech in future cases.

A. Religious Exemptions Protect Religious Nonexpressive Activity

As Professor Mark Tushnet has pointed out, the protections of the Free Exercise Clause heavily overlap with those of the Free Speech Clause.[328] Yet Tushnet acknowledges that there are some forms of free exercise that would be difficult to categorize as expressive.[329] He offers the example of "cases involving the application of local zoning ordinances or historic preservation rules to church structures."[330] In such situations, the Free Exercise Clause — possibly unshackled from *Smith* — would do work that the Free Speech Clause could not.

B. Speech Exemptions Protect Expressive Nonreligious Activity

Free speech exemptions are the mirror image of free exercise exemptions in this regard. While religious exemptions extend to religious nonexpressive activity,[331] speech exemptions extend to expressive nonreligious activity.[332] Much will depend, then, on what the court deems to be expression.

During oral argument in *303 Creative*, Justice Sotomayor asked Waggoner how the requirement of expression would limit the exemption. She observed that "you're saying a print shop, a web designer, . . . a cake maker, . . . a photographer, a jewelry maker, they can refuse to serve anyone they want to refuse because they have a deeply felt belief . . . ?"[333] Waggoner responded: "I'm not saying that at all. What I'm saying is that in every free speech case the Court looks first is there speech. In many of the situations you've raised, there would not be speech."[334] Justice Sotomayor shot back: "But why not?"[335]

In her dissent, Justice Sotomayor pressed this theme. She observed that if the exemption were broad, it could allow for discrimination against individuals from cradle to grave. She noted that "[a] stationer could refuse to sell a birth announcement for a disabled couple because

---

[328] Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 72–73 (2001).
[329] *See id.* at 76.
[330] *Id.* at 77.
[331] *See id.* at 76–77.
[332] Dale Carpenter, *How to Read* 303 Creative v. Elenis, REASON: VOLOKH CONSPIRACY (July 3, 2023, 2:11 PM), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/FP2B-KPHF].
[333] Transcript of Oral Argument, *supra* note 71, at 30–31.
[334] *Id.* at 31.
[335] *Id.*

she opposes their having a child."[336] Other "website designer[s] could equally refuse to create a wedding website for an interracial couple."[337] A department store "could reserve its family portrait services for 'traditional' families."[338] Cemeteries could refuse to include a reference to a same-sex partner on a gravestone (as the dissent showed using an actual instance).[339] As the dissent put it: "Wedding websites, birth announcements, family portraits, epitaphs. These are not just words and images. They are the most profound moments in a human's life."[340]

The majority opinion bristled at this litany of examples, observing that "the dissent spends much of its time adrift on a sea of hypotheticals about photographers, stationers, and others, asking if they too provide expressive services covered by the First Amendment."[341] It responded: "But those cases are not *this* case. Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complications of that kind."[342] *303 Creative* achieved this simplicity because the parties had stipulated that the activity was expressive in nature.[343] By resting on the parties' stipulations, the Court avoided articulating any guidance for lower courts or future cases about what would constitute expressive behavior.

Perhaps strictures on what counts as expression will be the real limitation the Court will place on this case. But even with just *303 Creative* on the books, it is hard to believe that the exemptions could be particularly limited. I earlier argued that connecting free speech exemptions to broad speech principles like "thought that we hate" protections vastly expanded the exemptions.[344] Similarly, the idea that business conduct is protected if expressive expands the exemption by linking it to other comments the Court had made about such expression. For example, as Justice Thomas has observed, the Court has deemed a broad swath of activity to be expressive conduct, "including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag."[345] The *Hurley* Court also observed that a "particularized message" is not required because otherwise, freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock,

---

[336] *303 Creative*, 143 S. Ct. at 2342 (Sotomayor, J., dissenting).
[337] *Id.*
[338] *Id.*
[339] *Id.*
[340] *Id.*
[341] *Id.* at 2319 (majority opinion).
[342] *Id.*
[343] *Id.* at 2309.
[344] *See supra* section III.B, pp. 265–69.
[345] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1741–42 (2018) (Thomas, J., concurring in part and concurring in the judgment).

music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[346] Finally, Professor Paul Smith has observed that "[t]he freedom of association is a separate First Amendment right [litigants] might try to utilize to expand this beachhead that they've established."[347] "What you're going to start to see eventually," he predicted, "is people saying, 'I run my little inn in this little town somewhere, and I don't want to have same-sex couples sleeping in one of my bedrooms.'"[348] As noted above, the majority planted the seed for this expansion into expressive association claims with its invocation of the *Boy Scouts of America v. Dale* case.[349] Confronted with statements like these, one's head begins to spin.

Adding to the confusion, the Court has not clearly embraced a level of scrutiny for expressive conduct. In the 1971 case of *Cohen v. California*,[350] the Court protected the expressive conduct of wearing a jacket that said "Fuck the Draft,"[351] without articulating a level of scrutiny.[352] Eighteen years later, the Court held in *Texas v. Johnson*[353] that the expressive conduct of burning the flag would draw "the most exacting scrutiny," suggesting that strict scrutiny was the appropriate standard.[354] Yet in the 2001 case of *Holder v. Humanitarian Law Project*,[355] the Court employed a more comparative test, characterizing the *Cohen* case as drawing "more rigorous scrutiny," without specifying what the scrutiny would be.[356]

Lest this sound like catastrophizing, let me acknowledge that while the majority provided no explicit guidance, thoughtful commentary has distilled some potential standards from the opinion. Professor Dale Carpenter reads the opinion to hold that a vendor cannot be forced by the state "(1) to create customized *and* expressive products (whether goods or services) that constitute the vendor's own expression; (2) where the vendor's objection is to the *message* contained in the product itself, not to the identity or status of the customer."[357] He elaborates that expressive but noncustomized goods, like off-the-rack cakes or websites, would not qualify.[358] Neither would customized but nonexpressive goods

---

[346] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) (quoting Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam)).

[347] Matt Lavietes & Jo Yurcaba, *What the Supreme Court's Gay Wedding Website Ruling Means for LGBTQ Rights*, NBC NEWS (June 30, 2023, 6:56 PM), https://www.nbcnews.com/nbc-out/out-news/supreme-courts-gay-wedding-website-ruling-means-lgbtq-rights-rcna92022 [https://perma.cc/Y2RD-RDCY].

[348] *Id.*

[349] *See supra* notes 282–83 and accompanying text.

[350] 403 U.S. 15 (1971).

[351] *Id.* at 16.

[352] *See id.* at 18–19, 26.

[353] 491 U.S. 397 (1989).

[354] *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

[355] 561 U.S. 1 (2010).

[356] *Id.* at 28 (citing *Cohen*, 403 U.S. at 18–19, 26).

[357] Carpenter, *supra* note 332 (citations omitted).

[358] *Id.*

(like the Ford 150 or the Whopper).[359] Moreover, the vendor's objection would have to relate to the nature of the message conveyed by the good rather than the nature of the buyer.[360] For that reason too, then, a wedding vendor could not refuse to sell a premade wedding cake to a gay couple.[361] The message in that case has already been created. Even if the vendor believed that an additional message was sent by the sale of the cake, that would not be a protected one.[362] While acknowledging the existence of edge cases, Carpenter maintains that these line-drawing issues already arise in the speech context.[363] *303 Creative* merely brings this task into the domain of commercial products.[364] As he further contends, "almost all the products we buy are neither customized nor expressive,"[365] and thus not within the purview of *303 Creative*.

Yet even if the Court were to embrace this standard, the edge cases would be more common than this analysis might intimate. Applying this standard with regard to the genre of portrait photography, Carpenter observes that he doesn't "think a photographer offering to take standard school photos, corporate headshots, passport photos, or pictures with a mall Santa truly customizes the product or expresses something to a degree that warrants constitutional protection."[366] On the other hand, he finds that "[a] wedding photographer . . . does offer highly customized and expressive services, working closely with each customer to depict the wedding in a certain way."[367]

While Carpenter is correct that only a fraction of the goods we buy are customized and expressive,[368] the sheer number of commercial goods means that even that fraction will be a large number of cases. Even granting that a "picture with a mall Santa" is not expressive, what of Justice Jackson's photographer doing a nostalgic "Scenes with Santa" shoot who doesn't want to take photos of children of color?[369] What about Justice Sotomayor's photographic studio that takes "family portraits," but then only seeks to offer its services to "'traditional' families"?[370] Even if we constrain ourselves to comments made by Justices in this case about a single subindustry, we can effortlessly generate edge cases.

---

[359] *Id.*
[360] *Id.*
[361] *Id.*
[362] *See id.*
[363] *See id.*
[364] *Id.*
[365] *Id.* (emphasis omitted).
[366] *Id.*
[367] *Id.*
[368] *See* Press Release, U.S. Census Bureau, U.S. Retail Sales Top $6,523 Billion (Dec. 15, 2022), https://www.census.gov/newsroom/press-releases/2022/retail-sales.html [https://perma.cc/JL2Y-9E6Q].
[369] Transcript of Oral Argument, *supra* note 71, at 26–28.
[370] *303 Creative*, 143 S. Ct. at 2342 (Sotomayor, J., dissenting).

The Court may also lack the institutional competence to sort through the interpretive morass represented by those edge cases. We need not speculate about what that analysis might look like, thanks to Justice Thomas's concurrence in *Masterpiece Cakeshop*. Justice Thomas, joined by Justice Gorsuch, engaged in an analysis of whether Phillips's wedding cakes were sufficiently expressive to merit free speech protection.[371] In that analysis, he recited the following facts:

- "Phillips considers himself an artist."[372]
- "The logo for Masterpiece Cakeshop is an artist's paint palette with a paintbrush and baker's whisk."[373]
- "Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas."[374]
- "In addition to creating and delivering the cake — a focal point of the wedding celebration — Phillips sometimes stays and interacts with the guests at the wedding."[375]
- "To him, a wedding cake inherently communicates that 'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'"[376]
- "Wedding cakes do, in fact, communicate this message."[377]
- "A tradition from Victorian England that made its way to America after the Civil War, '[w]edding cakes are so packed with symbolism that it is hard to know where to begin.'"[378]
- "The cake is 'so standardised and inevitable a part of getting married that few ever think to question it.'"[379]

For these and other reasons, Justice Thomas concluded that "Phillips' creation of custom wedding cakes is expressive."[380]

This analysis does not bode well for future cases. For each, the Court will have to engage with the history of the particular genre of putative expression, becoming historians of the dessert, the epitaph, the birth announcement, and the family portrait. Even Professor Andrew Koppelman, who is deeply sympathetic to free exercise accommodations, is unsympathetic to free speech accommodations in part because of these issues of scope and administrability. As he notes: "Lots of services that can be the basis of discrimination involve deeply expressive

---

[371] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1742–44 (2018) (Thomas, J., concurring in part and concurring in the judgment).

[372] *Id.* at 1742.

[373] *Id.*

[374] *Id.*

[375] *Id.* at 1743.

[376] *Id.*

[377] *Id.*

[378] *Id.* (alteration in original) (quoting MICHAEL KRONDL, SWEET INVENTION: A HISTORY OF DESSERT 321 (2011)).

[379] *Id.* (quoting Simon Charsley, *Interpretation and Custom: The Case of the Wedding Cake*, 22 MAN 93, 95 (1987)).

[380] *Id.*

events: funerals, theaters, concerts, private schools, pregnancy and childbirth."[381] The Court will also have to assess the intentions and talents of the individual working in each genre, ascertaining, for instance, whether Subway "Sandwich Artists"[382] are truly making art in addition to making footlongs.

These inquiries will be further freighted with what might be called the "highbrow/lowbrow" problem. Many may be inclined to call the novelist an artist but balk at the idea that a writer of epitaphs is one. Even internal to a single profession, many may be more disposed to call the *cordon bleu* chef an artist than to call the cook at a diner an artist. Yet such determinations might seem to side — as Justice Scalia once wrote — with the "knights rather than the villeins."[383] As members of the legal profession, judges are inherently part of the white-collar class. As such, they could fairly worry about making distinctions that track their own socioeconomic privilege.

Those inquiries will be still further complicated by strategic behavior. Individuals who seek to violate civil rights laws will have every incentive to highlight "artistic" or "expressive" aspects of their work. It will be left to the Court to sort through how to distinguish genuine artistry from opportunistic obstructionism.

These qualms will exert the kind of hydraulic pressure we have seen in the free exercise context about the "sincerity" of religious belief. As noted earlier, the Court has been understandably loath to wade into the deep waters of whether an individual authentically adheres to a particular religion.[384] An analogous concern about the insult delivered when the courts opine on whether someone is *really* engaged in artistic expression may lead to similar deference in the speech context. "Jack Phillips considers himself an artist" may be an effectively dispositive factor in the determination that his speech is expressive.

Again, the other aspects of free exercise exemptions are limitless — such exemptions can be asserted against anyone by anyone. So whether the exemption is conscribed will depend entirely on what constitutes protected expression. *303 Creative* gives almost no indication of where the Court will go on this issue.

VI. REFUSING REFUSALS

The future of free speech exemptions presents a potentially grim prospect for antidiscrimination laws. Free speech exemptions have served as a kind of Trojan horse for what the conservative Justices on

---

[381] ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT 73 (2020).

[382] *Sandwich Artist*, SUBWAY TEAM, https://subwayteam.com/home/sandwich-artist [https://perma.cc/5HDL-UQC7].

[383] Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

[384] *See supra* notes 290–92 and accompanying text.

the Court have not been able to achieve with the free exercise jurisprudence to date. I say "to date" because free speech exemptions may serve as complements to, rather than as substitutes for, free exercise exemptions. Free speech exemptions could normalize conscience-based objections to civil rights law to such a degree that they could pave the way for a future overruling of *Smith*.

I now offer a normative case for why neither "right of first refusal" should be permitted in the context of public accommodations law. That case was powerfully set forth in the dissent in *303 Creative*. It was, however, largely ignored by the majority opinion. By returning to the dissent, I hope to underscore what was lost this Term.

Justice Gorsuch's majority opinion derided Justice Sotomayor's dissent on many grounds, but the first was that the dissent included too much irrelevant material. The majority observed: "Much of [the dissent] focuses on the evolution of public accommodations laws, and the strides gay Americans have made towards securing equal justice under law. And, no doubt, there is much to applaud here."[385] It then landed the barb: "But none of this answers the question we face today: Can a State force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?"[386]

Yet the dissent's history of public accommodations laws and its discussion of gay rights did in fact constitute a good faith answer to this question. The question required the Court to discern what level of scrutiny to apply, and then to apply it. Assume for the sake of argument that Justice Thomas was correct in *Masterpiece Cakeshop* and that strict scrutiny would apply in a circumstance like that or this one.[387] That standard would require the law to serve a compelling governmental interest and to be narrowly tailored to that end.[388] The dissent's history of public accommodations law described the compelling nature of the interest and showed why no more narrowly tailored option existed.[389] And its history of gay rights brought vividly home both parts of that means/ends inquiry even though the peculiarities of this case rendered gay individuals and their interests largely invisible.

To be clear, Justice Gorsuch did not view strict scrutiny to be the apt approach to this case.[390] Like the *Barnette* Court, he adhered to a categorical approach, finding that if the conduct is speech, government

---

[385] *303 Creative*, 143 S. Ct. at 2318 (citations omitted).

[386] *Id.*

[387] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1745–46 (2018) (Thomas, J., concurring in part and concurring in the judgment).

[388] *Id.* at 1734 (Gorsuch, J., concurring) ("[T]he government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored." (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))).

[389] *303 Creative*, 143 S. Ct. at 2322–25 (Sotomayor, J., dissenting).

[390] *See id.* at 2318 (majority opinion).

compulsion is absolutely forbidden.[391] Yet other jurists — like Justice Thomas in *Masterpiece Cakeshop* and the judges in the Tenth Circuit majority in *303 Creative* — adopted a strict scrutiny analysis.[392] This uncertainty about even the basic applicable standards is typical of First Amendment law. As Professor Robert Post has aptly said: "[F]irst [A]mendment doctrine is neither clear nor logical. It is a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections."[393] While Justice Sotomayor herself eschewed a formal strict scrutiny analysis, her opinion tacitly followed the structure of such an inquiry, providing a discussion of means and ends that illuminated the import of public accommodations laws.

To begin with the nature of public accommodations, the dissent asserted that public accommodations laws rest on a "simple, but powerful, social contract: A business that chooses to sell to the public assumes a duty to serve the public without unjust discrimination."[394] An individual need not choose to do business, they need not sell any particular good or service, and they need not sell to the public.[395] However, "if a business chooses to profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination."[396] In doing so, the state may specifically focus on ensuring "that groups historically marked for second-class status are not denied goods or services on equal terms."[397]

This is the compelling governmental interest served by public accommodations laws. The dissent drilled further into that interest in observing that such laws have "two core purposes."[398] First, they secure "*equal access* to publicly available goods and services."[399] "For social groups that face discrimination," the dissent observed, "such access is vital," and all the more critical "if the group is small in number or if discrimination against the group is widespread."[400] Second, public accommodations laws secure "*equal dignity* in the common market."[401] This is in fact their "'fundamental object': 'to vindicate "the deprivation

---

[391] *See id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63–64 (2006)); *Barnette*, 319 U.S. at 639, 641.

[392] *Masterpiece Cakeshop*, 138 S. Ct. at 1745–46 (Thomas, J., concurring in part and concurring in the judgment); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021).

[393] Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991).

[394] *303 Creative*, 143 S. Ct at 2325 (Sotomayor, J., dissenting).

[395] *Id.*

[396] *Id.*

[397] *Id.*

[398] *Id.* at 2323.

[399] *Id.* at 2324 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984)).

[400] *Id.*

[401] *Id.*

of personal dignity that surely accompanies denials of equal access to public establishments.'"'"[402]

The importance of distinguishing these two interests is that a choice between them can alter the outcome of the tailoring inquiry. If the Court were to consider only "equal access," then it might be relevant that the consumer could find the good or service elsewhere. Even then, a public accommodations law might be narrowly tailored to its compelling interest if there was evidence that the group was so small or discrimination against it was so virulent that it would be largely or altogether shut out of the market.

Yet as the dissent showed, securing those alternative venues for second-class citizens is not the "fundamental object" of public accommodations laws.[403] Equal access is not the central concern of public accommodations laws — equal dignity is. As the dissent observed: "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]."[404]

To understand the interest as one in equal dignity is to understand how public accommodations laws like CADA could not be drawn any more narrowly to secure that end. The dignitary harm cannot be evaded by the existence of other vendors because it occurs at the moment service is refused. Drawing on the confirmation hearings for Justice Ginsburg, the dissent noted: "When a young Jewish girl and her parents come across a business with a sign out front that says, 'No dogs or Jews allowed,'[405] the fact that another business might serve her family does not redress that 'stigmatizing injury.'"[406] Similarly, the dissent found that "'the hardship Jackie Robinson suffered when on the road' with his baseball team 'was not an inability to find *some hotel* that would have him; it was the indignity of not being allowed to stay in the *same hotel* as his white teammates.'"[407]

In short, the dissent did not discuss the history of public accommodations laws to dodge the question the majority posed. Quite the contrary. It delved into that history to discern the compelling governmental interest of securing equal dignity and to show that CADA was narrowly tailored to that interest.

---

[402] *Id.* (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)).

[403] *Id.*

[404] *Id.* (alteration in original) (quoting *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring)).

[405] *Id.* (quoting *Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 139 (1993) (statement of then-Judge Ruth Bader Ginsburg)).

[406] *Id.* (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984)).

[407] *Id.* (quoting James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 138 (2015)).

The majority was not insensible to these dignitary claims. It acknowledged that public accommodations laws redress "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[408] Indeed, it asserted that the state has a "'compelling interest' in eliminating discrimination in places of public accommodation."[409] Yet the majority did not fully face the implications of that statement for a strict scrutiny analysis. If the state had a "compelling interest" in eliminating discrimination in public accommodations, then the state should have been able to enact even a direct regulation of speech, so long as its law was "narrowly tailored" to that end. Again, it may be that the majority did not believe strict scrutiny was the correct standard. But it did not explicitly articulate the test it was applying, nor did it discuss why the strict scrutiny standard applied below[410] was inapposite.

Albeit obliquely, the majority addressed the tailoring issue by noting the "alternative vendor" argument in two ways. First, in the stipulated facts, the majority observed: "To the extent Ms. Smith may not be able to provide certain services to a potential customer, '[t]here are numerous companies in the State of Colorado and across the nation that offer custom website design services.'"[411] Second, in discussing the history of public accommodations law, the majority speculated that public accommodations laws sought to regulate enterprises that often "exercised something like monopoly power."[412] While this was a more subtle point, it too suggested that no harm would occur if an alternative vendor would provide the good or service. It hypothesized that public accommodations laws were particularly concerned with instances where the existence of a monopoly meant no such alternative existed.

Yet neither of these points about tailoring is persuasive. As the dissent observed, if we understand the core purpose of public accommodations laws to be about equal dignity rather than equal access, the fact that service can be afforded at the shop down the street is irrelevant. In addition, the majority's contention about the concern public accommodations laws had for monopolies is unconvincing. As the dissent responded, "nowhere in the relevant case law 'is monopoly suggested as the distinguishing characteristic.'"[413] This bolstered the dissent's

---

[408] *Id.* at 2314 (majority opinion) (quoting *Heart of Atlanta Motel*, 379 U.S. at 250).

[409] *Id.* (quoting *Roberts*, 468 U.S. at 628).

[410] 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021).

[411] *303 Creative*, 143 S. Ct. at 2310 (alteration in original) (quoting Petition for a Writ of Certiorari, *supra* note 84, app. at 190a).

[412] *Id.* at 2314 (citing Liverpool & Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 437 (1889); Primrose v. W. Union Tel. Co., 154 U.S. 1, 14 (1894)).

[413] *Id.* at 2326 (Sotomayor, J., dissenting) (quoting Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 156 (1914)).

contention that the "fundamental object" of such laws was in fact the interest in equal dignity.[414] The majority did not respond to this critique.

Under a strict scrutiny analysis, it was the majority, not the dissent, that dodged the question of whether a state can "force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead."[415] After acknowledging the importance of public accommodations law, the majority observed that "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail."[416] Yet that aphoristic invocation of the Supremacy Clause obscured the reality that the law will not "collide" with the Constitution if it can meet strict scrutiny.[417] In the analysis the majority deemed redundant, the dissent showed that CADA could meet that test.

In the end, one must wonder why the majority focused so much on the dignitary issues of the speaker rather than on the dignitary issues of the same-sex couples she refused to serve. Three reasons might explain this emphasis. The first is the status/conduct distinction discussed above. The majority relied on the stipulated fact that Smith does not discriminate on the basis of sexual orientation.[418] It did not acknowledge the potential conflict between that stipulated fact and the other stipulated fact that Smith discriminates against same-sex marriage,[419] which, as the dissent said, is tantamount to discrimination on the basis of sexual orientation.[420] This might explain why the dignitary claims of gay people fell away for the majority, while they took center stage for the dissent.

Second, the *303 Creative* Court's inattention to the dignitary interests of LGBTQ+ individuals might also be explained by the retirement of Justice Kennedy. It is hard to read Justice Sotomayor's comment about the difference "five years makes" without thinking of that 2018 retirement.[421] On that occasion, Chief Justice Roberts praised Justice Kennedy's jurisprudence for demonstrating "an abiding commitment to liberty and the personal dignity of every person."[422] Justice Kennedy's most notable rulings underscored the dignitary aspects of the Due

---

[414] *Id.* at 2324 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)).
[415] *Id.* at 2318 (majority opinion).
[416] *Id.* at 2315.
[417] *Id.* (discussing the Supremacy Clause).
[418] *See id.* at 2309.
[419] *See id.*
[420] *See id.* at 2322 (Sotomayor, J., dissenting).
[421] *Id.* (quoting Carson v. Makin, 142 S. Ct. 1987, 2014 (2022) (Sotomayor, J., dissenting)).
[422] Press Release, U.S. Supreme Court, Statements from the Supreme Court Regarding Justice Anthony Kennedy's Retirement (June 27, 2018), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_06-27-18_2 [https://perma.cc/PP6H-SQWK].

Process Clause,[423] the Equal Protection Clause,[424] and the Eighth Amendment,[425] particularly with regard to the LGBTQ+ community.[426] In the wake of his departure, the Court may be retreating from his insistence on keeping the dignitary claims of that community steadily visible.

Finally, the *303 Creative* litigation seemed designed to render gay individuals who would be harmed by the exemption invisible.[427] Because it was a preenforcement suit for an injunction, no gay couple had ever been turned away. Smith offered only one example of an individual who had allegedly asked her for a same-sex wedding site.[428] When tracked down by a reporter, however, that person turned out to be an already-married heterosexual individual whose information had been pulled to fill out Smith's intake form, and thus had not actually asked for a site himself.[429] Consider the contrast with *Masterpiece Cakeshop*, where Craig and Mullins were turned away for a wedding cake and their outraged mother asked why Phillips would not serve them.[430] In *303 Creative*, there were no actual human beings who could bring to light the dignitary interests on the other side.

The dissent's analysis of gay rights also brought home these dignitary harms. It is puzzling that the majority opinion characterized this portion of the dissent as concerning "the evolution of public accommodations laws" and "the strides gay Americans have made."[431] The dissent's discussion in the span of pages cited by the majority was both broader and narrower than that characterization. The dissent's discussion was broader in that it canvassed not just the rights of LGBTQ+

---

[423] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("[A]dults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

[424] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 656 (2015) ("The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life.").

[425] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958))).

[426] Justice Kennedy authored the four major gay-rights decisions issued by the Court. *See Obergefell*, 576 U.S. at 651–81; United States v. Windsor, 570 U.S. 744, 749–74 (2013); *Lawrence*, 539 U.S. at 562–79; Romer v. Evans, 517 U.S. 620, 623–36 (1996).

[427] *See, e.g.*, Mark Joseph Stern, *The Real Story of* 303 Creative v. Elenis, SLATE (June 1, 2023, 5:52 AM), https://slate.com/news-and-politics/2023/06/real-story-behind-gay-marriage-case.html [https://perma.cc/X6DM-MPPX].

[428] Appellants' Opening Brief at 22, 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021) (No. 17-1344) ("On September 21, 2016, Lorie received an inquiry through her webpage asking her to create custom graphics and a website for a same-sex wedding.").

[429] Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, The Real Straight Man, and the Supreme Court*, NEW REPUBLIC (June 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court [https://perma.cc/HV9E-5GR7].

[430] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

[431] *303 Creative*, 143 S. Ct. at 2318.

individuals,[432] but also the rights of racial minorities,[433] the rights of women,[434] and the rights of individuals with disabilities.[435] The dissent's discussion was also narrower in that it did not examine the history of gay rights (or other rights) in generic terms, but specifically in the context of public accommodations law.[436] The point of this portion of the dissent was to show how compelling the interest in public accommodations was to secure the equal participation of these groups in American life.

Yet the majority may have been onto something in highlighting the dissent's discussion of gay rights. Justice Sotomayor's opinion presented the most vivid representation of the struggle for LGBTQ+ equality that has ever entered the *United States Reports*, ranging from the Stonewall riots, to the murder of Matthew Shepard, to the Pulse Nightclub shooting, to the current spate of anti-LGBTQ+ legislation.[437] The point of telling this history was to focus on how it led to the "expansion of state and local laws to secure gender and sexual minorities' full and equal enjoyment of publicly available goods and services."[438] What emerges gradually from that history is the insistent and more vocal desire of the LGBTQ+ community to occupy public space on the same terms as others. The dissent ended its rendition of this history by quoting the landmark gay-rights case of *Romer v. Evans*, which was the first case to bring lesbian, gay, and bisexual individuals within the ambit of the Equal Protection Clause: "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[439] One wonders how it could possibly strike a reader as irrelevant to discuss the infinite everyday dignitary harms experienced by a community in public accommodations in a case that could dramatically increase such harms.

If the lawsuit in *303 Creative* seemed designed to render its potential gay victims invisible, the dissent seemed equally committed to bringing them back into view. Justice Sotomayor not only told a story about the movement, but also told stories about particular individuals. Early in the opinion, the dissent introduced the reader to "Bob" and "Jack," a loving couple of fifty-two years.[440] When Bob passed away, a funeral

---

[432] *Id.* at 2329–30 (Sotomayor, J., dissenting).
[433] *Id.* at 2326–28.
[434] *Id.* at 2328.
[435] *Id.*
[436] *See id.* at 2330.
[437] *Id.* at 2329–30.
[438] *Id.* at 2329.
[439] *Id.* at 2330 (quoting Romer v. Evans, 517 U.S. 620, 631 (1996)).
[440] *Id.* at 2324 n.4.

home in Mississippi agreed to transport and cremate his remains.[441] After it learned that his surviving spouse was also a man, the funeral home denied service to the family.[442] "Grief stricken, and now isolated and humiliated, the family desperately searche[d] for another funeral home that w[ould] take the body,"[443] the dissent wrote. "This ostracism, this otherness, is among the most distressing feelings that can be felt by our social species."[444]

Near the end of the opinion, the dissent observed: "You already heard the story of Bob and Jack, the elderly gay couple forced to find a funeral home more than an hour away. Now hear the story of Cynthia and Sherry, a lesbian couple of 13 years until Cynthia died from cancer at age 35."[445] Cynthia's will authorized Sherry to make burial arrangements, and asked her to include an inscription on her headstone, listing her important relationships.[446] The cemetery was willing to include words such as "daughter, granddaughter, sister, and aunt" but not the words that described Cynthia's relationship to Sherry: "beloved life partner."[447]

What is remarkable about these stories is their deep informality. The dissent made a direct, plain-throated address to the reader: "You already heard the story of Bob and Jack . . . Now hear the story of Cynthia and Sherry."[448] Uncharacteristically for a legal opinion, it described the parties by their first names rather than their surnames. This was true even of Matthew Shepard, who surfaced as part of the dissent's movement history: "Matthew was targeted by two men, tortured, tied to a buck fence, and left to die for who he was."[449] What might be called the impassioned informality of this opinion recalled Justice Blackmun's famous "Poor Joshua!" dissent in *DeShaney v. Winnebago County Department of Social Services*.[450] Like Justice Blackmun's celebrated opinion, Justice Sotomayor's dissent was both a lament and a call to action: "There are many such stories, too many to tell here. And after today, too many to come."[451]

---

[441] *Id.* at 2324.
[442] *Id.*
[443] *Id.*
[444] *Id.* at 2324–25.
[445] *Id.* at 2342 (citation omitted).
[446] *Id.*
[447] *Id.* (quoting NANCY J. KNAUER, GAY AND LESBIAN ELDERS: HISTORY, LAW, AND IDENTITY POLITICS IN THE UNITED STATES 102 (2011)).
[448] *Id.* (citation omitted).
[449] *Id.* at 2329.
[450] 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).
[451] *303 Creative*, 143 S. Ct. at 2342 (Sotomayor, J., dissenting).

CONCLUSION

The Court broke new ground in *303 Creative v. Elenis* in allowing businesses open to the public to evade civil rights laws when they offer expressive goods and services. This decision can only be understood as the explosion of the pent-up frustration among some of the Justices at the Court's futile attempt to secure such broad exemptions in the free exercise realm. Yet the free speech exemption fashioned in *303 Creative* is ultimately much broader than the free exercise exemption in two ways — it can be asserted not only against any group, but also by any group. The only real constraint on these free speech exemptions will lie in how the Court interprets the requirement of "expression." While only future cases will show the nature of that constraint, it will at a minimum require brutally difficult line-drawing exercises. More broadly, the emerging jurisprudence of these "rights of first refusal" could end the promise of full equality for many of the most vulnerable individuals in the nation.