

FIRST AMENDMENT EXEMPTIONS FOR SOME

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INTRODUCTION

For the last decade, conservative Supreme Court Justices have repeatedly contended that opponents of marriage rights for same-sex couples are decent and fair-minded people who are not prejudiced against lesbians, gay men, and bisexuals.¹ According to these Justices, the sincere and reasonable beliefs of marriage-equality opponents are distinguishable, in constitutionally relevant ways, from the views of bigots who oppose racial integration and equality.²

The distinctions that conservative Justices have made between the views of opponents of marriage equality and those of opponents of racial equality are crucial to understanding the meaning, scope, and impact of the Court's ruling in *303 Creative LLC v. Elenis*.³ Professor Kenji Yoshino, in his incisive and thoughtful Comment, understandably worries that *303 Creative* will make it possible for any defendant in any antidiscrimination case involving the sale of a good or service with sufficient expressive content to claim a free speech exemption "against anyone based on any classification, including race."⁴ He adds that "[t]his . . . makes the free speech exemption [granted in *303 Creative*] potentially much more damaging to civil rights" than an exemption granted under the Free Exercise Clause.⁵ Professor Yoshino explains that because "the free speech exemptions cannot be cabined to any particular civil rights contexts[, w]eb designers would also be protected should they refuse to make websites for interracial couples."⁶

Professor Yoshino sensibly raises the alarm about how *303 Creative* "corrode[s] the promise of civil rights laws in potentially dramatic and devastating ways."⁷ I argue in this Response, however, that there are reasons to believe that the Court's conservative Justices will find ways of distinguishing exemptions sought by business owners grounded in views that the Justices understand to be sincere and reasonable (such as those of owners who refuse to provide wedding-related goods and services to same-sex couples) from exemptions sought by business owners grounded in bigoted and prejudiced views (such as those of owners who

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¹ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 711 (2015) (Roberts, C.J., dissenting).

² See, e.g., *id.* at 730 n.5 (Thomas, J., dissenting).

³ 143 S. Ct. 2298 (2023).

⁴ Kenji Yoshino, *The Supreme Court, 2022 Term — Comment: Rights of First Refusal*, 137 HARV. L. REV. 244, 262 (2023).

⁵ *Id.*

⁶ *Id.* at 245.

⁷ *Id.* at 246.

refuse to provide goods and services to Black customers or interracial couples).

I offer three sources of support for this claim. The first, explored in Part I, is the ways in which conservative Justices, for the last decade, have repeatedly emphasized the constitutional relevance of the differences between the views of opponents of equal marital rights for LGBTQ people and the views of racial bigots. The second, discussed in Part II, is the ways in which the *303 Creative* Court understood the particular ideological views of the business owner who challenged the Colorado antidiscrimination law at issue in the case to be sincere and nonprejudiced. This understanding was crucial to its conclusion that in refusing to provide wedding-related web-design services to same-sex couples, the business owner did not engage in status-based discrimination. And the third, examined in Part III, is the ways in which the *303 Creative* majority vehemently rejected the dissent's charge that its ruling was inconsistent with the Court's well-established precedents denying First Amendment exemptions to business owners who hold racist and sexist views.

In short, it seems that for the Court's current conservative majority, on the question of First Amendment exemptions, some dissenters from antidiscrimination laws are more equal than others. This means that the impact of *303 Creative* may not be as problematic for those who support the robust enforcement of civil rights laws as Professor Yoshino fears. But it also means, as I explain in Part IV, that *303 Creative* is grounded in precisely the type of governmental distinction on the basis of speakers' viewpoints that the Free Speech Clause prohibits.

I. CONSERVATIVE JUSTICES AND THE OPPOSITION TO MARRIAGE EQUALITY BY “DECENT” AND “FAIRMINDED” PEOPLE

In recent years, conservative Justices have repeatedly emphasized that opponents of marital rights for same-sex couples are neither prejudiced nor bigoted. For example, in dissenting from the Court's striking down of the Defense of Marriage Act⁸ (DOMA) in *United States v. Windsor*,⁹ Chief Justice John Roberts insisted that there was no “sinister motive”¹⁰ behind the statute.¹¹ For the Chief Justice, it was not surprising that Congress had denied federal recognition to same-sex marriages while leaving other marriage-eligibility criteria, such as consanguinity and minimum age, unaddressed given that, as the majority had recognized, “most people [deemed gender to be] essential to the very definition of [marriage] and to its role and function throughout the history of

⁸ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (repealed 2022).

⁹ 570 U.S. 744 (2013).

¹⁰ *Id.* at 775 (Roberts, C.J., dissenting).

¹¹ *Id.* at 776.

civilization.”¹² This meant that there was no validity to the majority’s claim that DOMA evinced animus towards lesbians, gay men, and bisexuals.¹³ It was unfathomable to the Chief Justice that “the 342 Representatives and 85 Senators who voted for it, and the President who signed it,” were motivated by “a bare desire to harm.”¹⁴ He therefore “would not tar the political branches with the brush of bigotry.”¹⁵

In his separate dissent in *Windsor*, Justice Antonin Scalia was confident that the majority’s claim that DOMA had been motivated by animus was “quite untrue.”¹⁶ For Justice Scalia, to defend a traditional understanding of marriage that excluded same-sex couples *was the moral equivalent of defending the Constitution*.¹⁷ As he put it, “to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions.”¹⁸ All that DOMA did, according to the conservative Justice, was to:

codify an aspect of marriage that had been unquestioned in our society for most of its existence — indeed, had been unquestioned in virtually all societies for virtually all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.¹⁹

According to Justice Scalia, in deeming DOMA to have been motivated by animus, the *Windsor* Court had “formally declar[ed that] *anyone* opposed to same-sex marriage [was] an enemy to human decency.”²⁰ He further contended that:

In the majority’s telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one’s political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today’s Court can handle.²¹

For Justice Scalia, the “justifying rationales for this legislation . . . give the lie to the Court’s conclusion that only those with hateful hearts

¹² *Id.* (second alteration in original) (quoting *id.* at 763 (majority opinion)).

¹³ *See id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 797 (Scalia, J., dissenting).

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *Id.* at 798.

²⁰ *Id.* at 800 (emphasis added).

²¹ *Id.* at 802.

could have voted ‘aye’ on this Act.”²² Instead, the issue of same-sex marriage “inspire[d] . . . attendant passion by *good people* on all sides.”²³

According to Justice Samuel Alito’s dissent in *Windsor*, *merely to contend* that same-sex marriage bans should be subject to heightened judicial scrutiny was to claim that all opponents of same-sex marriage were prejudiced or uninformed.²⁴ As Justice Alito forcefully put it:

In asking the Court to determine that § 3 of DOMA is subject to and violates heightened scrutiny, *Windsor* and the United States . . . ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. . . . Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools.²⁵

When the Supreme Court two years after *Windsor* struck down same-sex marriage bans in *Obergefell v. Hodges*,²⁶ it did not claim that the laws were the result of animus against lesbians, gay men, and bisexuals.²⁷ In fact, the Court in *Obergefell* stated that “reasonable and sincere people here and throughout the world” believe in “good faith” that marriage is “by its nature a gender-differentiated union of man and woman.”²⁸ Rather than focus on the issue of animus, *Obergefell* emphasized the harmful, demeaning, and stigmatizing consequences of denying lesbians, gay men, and bisexuals the opportunity to marry the individuals of their choice.²⁹

Of course, it is not unusual for the Court, in assessing the constitutionality of laws, to address their effects on those subject to their regulation.³⁰ But for Chief Justice Roberts, to suggest that same-sex marriage bans stigmatized or demeaned lesbians, gay men, and bisexuals was to claim that those who opposed granting same-sex couples the opportunity to marry were bigots.³¹ According to the Chief Justice’s dissent in *Obergefell*, such a claim was “the most discouraging aspect of today’s decision [because it showed] the extent to which the majority feels compelled to sully those on the other side of the [same-sex marriage]

²² *Id.* at 795; *see also id.* at 796 (“The majority . . . affirmatively conceal[s] from the reader the arguments that exist in justification . . . because it is harder to maintain the illusion of the Act’s supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.”).

²³ *Id.* at 801 (emphasis added).

²⁴ *See id.* at 813 (Alito, J., dissenting).

²⁵ *Id.*

²⁶ 576 U.S. 644 (2015).

²⁷ Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 649–50 (2016) (quoting *Obergefell*, 576 U.S. at 672).

²⁸ *Obergefell*, 576 U.S. at 657.

²⁹ *Id.* at 668, 670 (citing *Windsor*, 570 U.S. at 772).

³⁰ *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 575–76 (2003) (citing *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003)); *N.J. Welfare Rts. Org. v. Cahill*, 411 U.S. 619, 621 (1973).

³¹ *See supra* notes 8–15 and accompanying text.

debate.”³² That other side was made up of “[m]any good and decent people [who] oppose same-sex marriage as a tenet of faith.”³³

Chief Justice Roberts contended that the Court, by claiming the marriage bans demeaned and stigmatized lesbians, gay men, and bisexuals, improperly and unnecessarily insulted those who believe that the institution of marriage should be limited to unions of one man and one woman.³⁴ As he put it, “[t]hese apparent assaults on the character of fairminded people . . . are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s ‘better informed understanding’ as bigoted.”³⁵ The views of same-sex marriage opponents were by definition reasonable given that “a State’s decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational.”³⁶

For Justice Scalia, as for Chief Justice Roberts, the fact that different-sex marriage had existed since time immemorial while same-sex marriage was of recent vintage meant that the views of opponents of marriage equality were entirely reasonable.³⁷ Despite the deeply rooted history of the traditional definition of marriage, Justice Scalia complained in his *Obergefell* dissent, the Justices in the majority “*know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry.”³⁸ Justice Clarence Thomas’s dissent added that “[t]he suggestion of petitioners and their

³² *Obergefell*, 576 U.S. at 712 (Roberts, C.J., dissenting). Chief Justice Roberts returned to this theme during the oral arguments in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), by noting that “when the Court upheld same-sex marriage in *Obergefell*, it went out of its way to talk about the decent and honorable people who may have opposing views.” Transcript of Oral Argument at 75, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). He added that “to immediately lump [opponents of marriage equality] in the same group as people who are opposed to equality in relations with respect to race, I’m not sure that takes full account . . . of that concept in the *Obergefell* decision.” *Id.* at 76.

³³ *Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting).

³⁴ *Id.* at 712 (citing *id.* at 672 (majority opinion)).

³⁵ *Id.* (citation omitted) (quoting *id.* at 671 (majority opinion)) (citing *id.* at 741–42 (Alito, J., dissenting)).

³⁶ *Id.* at 686.

³⁷ See *id.* at 716 (Scalia, J., dissenting) (“We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification.”); see also *id.* at 718 (“The five Justices who compose today’s majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment’s ratification and Massachusetts’ permitting of same-sex marriages in 2003.” (citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003))).

³⁸ *Id.* at 718–19 (footnote omitted).

amici that antimiscegenation laws are akin to laws defining marriage as between one man and one woman is both offensive and inaccurate.”³⁹

For his part, Justice Alito predicted in his dissent that *Obergefell* will be:

used to vilify Americans who are unwilling to assent to the new [marriage] orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.⁴⁰

As he had done in *Windsor*,⁴¹ Justice Alito in *Obergefell* complained that the Court’s ruling tarred opponents of same-sex marriage as bigots.⁴² As he put it, “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.”⁴³ Justice Alito made a similar point six years later in his concurrence in *Fulton v. City of Philadelphia*⁴⁴ when he noted that “[w]hile [Catholic Social Services’s] ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs.”⁴⁵

In short, in assessing the constitutionality of DOMA and of same-sex marriage bans, conservative Justices repeatedly defended both the sincerity and reasonableness of the views held by same-sex marriage opponents. They also contrasted those views to the bigoted beliefs of individuals who defend racial inequality. For these Justices, there is no plausible analogy to be made between opposition to marital rights for lesbians, gay men, and bisexuals, on the one hand, and opposition to racial equality on the other. In fact, from the Justices’ perspective, to merely suggest that opposition to same-sex marriage is in any way

³⁹ *Id.* at 730 n.5 (Thomas, J., dissenting).

⁴⁰ *Id.* at 741 (Alito, J., dissenting) (citation omitted). During oral arguments in *Obergefell*, Justice Alito went all the way back to Ancient Greece to make the point that opposition to same-sex marriage is not grounded in prejudice. Transcript of Oral Argument at 14–15, *Obergefell*, 576 U.S. 644 (No. 14-556) (asking the lawyer representing the same-sex couples whether it was the case that “their limiting marriage to couples of the opposite sex [in Ancient Greece] was not based on prejudice against gay people,” *id.* at 15).

⁴¹ See *supra* notes 24–25 and accompanying text.

⁴² *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting).

⁴³ *Id.*

⁴⁴ 141 S. Ct. 1868 (2021).

⁴⁵ *Id.* at 1925 (Alito, J., concurring). During the oral arguments in *Fulton*, in response to the claim made by the attorney representing the federal government supporting a First Amendment exemption that “race is unique in this country’s constitutional history,” Justice Alito asked the following questions: “Didn’t the Court in *Obergefell* say exactly that? Didn’t the Court say that there are honorable and respectable reasons for continuing to oppose same-sex marriage? Would the Court say the same thing about interracial marriage?” Transcript of Oral Argument at 39, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

analogous to opposition to racial equality is to tarnish all opponents of marriage equality as bigots.

I have elsewhere explored the relationship between bigotry and opposition to marriage equality rights for lesbians, gay men, and bisexuals.⁴⁶ My purpose here is neither to critique nor question how conservative Justices have understood the views of same-sex marriage opponents. Instead, my purpose is simply to point out both that these Justices have consistently deemed those views to be sincere and reasonable and that they have relied on those assessments to deny the validity of constitutional claims brought by LGBTQ individuals.

II. THE SINCERITY AND REASONABLENESS OF MS. SMITH'S VIEWS

The majority in *303 Creative* similarly deemed the challenger's personal beliefs to be sincere and reasonable, an assessment that was crucial to its granting her a free speech exemption from Colorado's antidiscrimination law for refusing to provide wedding-related commercial services to same-sex couples.

During the oral arguments in *303 Creative*, Justice Ketanji Brown Jackson asked the attorney representing business owner Lorie Smith whether the free speech exemption sought by her client would apply to a photographer who refused to take pictures of Black children in selling a nostalgic product called "Scenes with Santa."⁴⁷ In responding to the question, the attorney acknowledged that the hypothetical "may be an edge case."⁴⁸ After Justice Elena Kagan asked for a clarification on the meaning of that phrase, Justice Alito leaped to the rescue by asking whether the Court in *Obergefell* had said "that religious objections to same-sex marriage are the same thing as religious or other objections to people of color."⁴⁹ As Professor Yoshino notes, the attorney "took the lifeline [Justice Alito] offered her to distinguish LGBTQ+ rights from racial civil rights"⁵⁰ by answering as follows: "No. In fact, [*Obergefell*] said that decent and honorable people hold beliefs about . . . gender-differentiated marriage and that that's based on reasonable religious and philosophical premises."⁵¹

Justice Alito returned to this point later in the oral arguments by asking the Colorado Solicitor General, who was defending his state's antidiscrimination law, whether "[i]n light of what Justice Kennedy wrote in *Obergefell* about honorable people who object to same-sex

⁴⁶ Ball, *supra* note 27.

⁴⁷ Transcript of Oral Argument at 26, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) (No. 21-476).

⁴⁸ *Id.* at 29.

⁴⁹ *Id.*

⁵⁰ Yoshino, *supra* note 4, at 263.

⁵¹ Transcript of Oral Argument, *supra* note 47, at 29-30.

marriage, do you think it's fair to equate opposition to same-sex marriage with opposition to interracial marriage?"⁵² After the Solicitor General responded that the problem identified by *Obergefell* was that when "honest and decent disagreement [is] transformed into . . . law and policy, the necessary consequence is to put the imprimatur of the state on [the] exclusion" of same-sex couples,⁵³ Justice Alito responded by directly asking the Solicitor General whether "Justice Kennedy would have said that there are — that it's honorable to oppose — to discriminate on the basis of race?"⁵⁴ Not surprisingly, the attorney answered that particular question in the negative.⁵⁵

Justice Alito's contention during the oral arguments in *303 Creative*, previously elaborated on in his dissents in *Windsor* and *Obergefell*,⁵⁶ that those who oppose same-sex marriage do so on sincere and reasonable grounds is also found throughout Justice Neil Gorsuch's majority opinion in the case. Early in *303 Creative*, for example, Justice Gorsuch noted that the parties stipulated that Ms. Smith's "belief that marriage is a union between one man and one woman is a *sincerely* held religious conviction."⁵⁷

It is not clear why Ms. Smith's sincerity as a speaker "about a matter of major significance," such as the proper definition of marriage, mattered from a free speech perspective.⁵⁸ The question of sincerity would have theoretically been relevant had the Court chosen to decide whether Ms. Smith was entitled to a religious exemption because only sincere religious beliefs are protected by the Free Exercise Clause.⁵⁹ I say "theoretically" because, as Professor Yoshino correctly states, "the Court has been understandably loath to wade into the deep waters of whether an individual authentically adheres to a particular religion."⁶⁰ But the *303 Creative* Court chose to decide the case as a free speech one, and, in that context, there is no analog to even the minimal role that sincerity, at least in theory, can play in free exercise cases.⁶¹ As Professor Ira Lupu puts it, a "critical difference between free speech claims and free exercise claims is that only the latter trigger a test of sincerity."⁶²

⁵² *Id.* at 80–81.

⁵³ *Id.* at 81.

⁵⁴ *Id.* at 82.

⁵⁵ *Id.*

⁵⁶ See *supra* notes 24–25, 40–43 and accompanying text.

⁵⁷ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2309 (2023) (emphasis added) (citing Petition for a Writ of Certiorari app. at 179(a), *303 Creative*, 143 S. Ct. 2298 (No. 21-476)).

⁵⁸ *Id.* at 2321.

⁵⁹ See, e.g., *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (quoting *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981)) (holding that a belief must be sincerely held to garner protection under the Free Exercise Clause).

⁶⁰ Yoshino, *supra* note 4, at 279.

⁶¹ Ira C. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 776 (1986) (claiming that there is "no analogous requirement" to the concept of sincerity in free speech claims).

⁶² *Id.*

For example, if I criticize government policies that promote free markets by defending socialist values, the fact that I may not sincerely believe in those values does not diminish the protection afforded to me by the Free Speech Clause. Similarly, although it is unlikely that the current Court would conclude that racists hold sincere (or honorable) views on questions related to racial equality, as Justice Alito indicated in his questioning of the Colorado Solicitor General,⁶³ the Court has nonetheless repeatedly protected hate speech under the Free Speech Clause.⁶⁴ Furthermore, the Court has held that lies, which are the complete opposite of sincere statements, are sometimes protected by the Free Speech Clause.⁶⁵

From the perspective of free speech doctrine, therefore, the sincerity of Ms. Smith's views about the proper definition of marriage should not have mattered. But it seems that for the 303 *Creative* Court, Ms. Smith's sincerity was relevant to the question of whether she was constitutionally entitled to the free speech exemption from the antidiscrimination law because it helped render her justifications for excluding same-sex couples from her wedding-related business services reasonable and non-prejudiced, and therefore substantively distinguishable from the views of bigoted business owners.

In further exploring Ms. Smith's justifications for denying commercial services to some members of the public, Justice Gorsuch stressed that they were not grounded in biased or prejudiced views. He noted, for example, that "Ms. Smith provides her website and graphic services to customers regardless of their race, creed, sex, or sexual orientation."⁶⁶ Similarly, relying on the parties' stipulations, Justice Gorsuch emphasized that Ms. Smith was willing to "work with all people regardless of . . . sexual orientation."⁶⁷

In addition, the majority highlighted the stipulated fact that she "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites' do not violate her beliefs."⁶⁸ Justice Gorsuch also emphasized that Ms. Smith would refuse to provide her web-design services to "all customers," regardless of

⁶³ See *supra* notes 52–55 and accompanying text.

⁶⁴ See, e.g., *Virginia v. Black*, 538 U.S. 343, 364 (2003) (holding that hate speech lacking an intent to intimidate is constitutionally protected); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); see also *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53 (1988) ("[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.").

⁶⁵ *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion).

⁶⁶ 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023) (citing Petition for a Writ of Certiorari, *supra* note 57, app. at 184(a)).

⁶⁷ *Id.* at 2309 (quoting Petition for a Writ of Certiorari, *supra* note 57, app. at 184(a)).

⁶⁸ *Id.* at 2317 (quoting Petition for a Writ of Certiorari, *supra* note 57, app. at 184(a)).

sexual orientation, who asked to purchase the services for purposes that were inconsistent with her values.⁶⁹

In short, for the Court, nothing in Ms. Smith's statements, values, or beliefs reflected prejudice against lesbians, gay men, and bisexuals. As Justice Gorsuch put it during oral arguments, the relevant "question [for Ms. Smith] isn't who, it's what?"⁷⁰ It seems that for the majority, Ms. Smith's reasons for refusing to provide her services to help celebrate same-sex marriages had everything to do with her sincerely held and reasonable "belief that marriage should be reserved to unions between one man and one woman" and nothing to do with prejudice against lesbians, gay men, and bisexuals.⁷¹

The question of whether Ms. Smith engaged in status-based discrimination by offering wedding-related web-design services to different-sex couples while refusing to do the same for same-sex couples was a crucial point of disagreement between the majority and Justice Sonia Sotomayor's dissent.⁷² Justice Sotomayor challenged the majority's contention that Ms. Smith's willingness to provide other services to lesbians, gay men, and bisexuals meant that her refusal to provide wedding-related services to them did not constitute status-based discrimination.⁷³ In doing so, she noted that the restaurant owner in *Katzenbach v. McClung*⁷⁴ also had been willing to provide some services to Black customers, in particular take-out food; what the business owner in *Katzenbach* could not countenance was serving Black customers in the same dining room with white patrons because that reflected a form of racial equality that was inconsistent with his "personal convictions."⁷⁵ Surely, Justice Sotomayor reasoned, a business owner who provides only a limited set of services to some protected groups, while offering all services to other groups, engages in status-based discrimination.⁷⁶ For Justice Sotomayor, a refusal to provide commercial services to celebrate same-sex marriages, while doing so to celebrate different-sex unions, is

⁶⁹ *Id.* (citing Transcript of Oral Argument, *supra* note 47, at 18–20).

⁷⁰ Transcript of Oral Argument, *supra* note 47, at 43.

⁷¹ *303 Creative*, 143 S. Ct. at 2308 (citing Petition for a Writ of Certiorari, *supra* note 57, app. at 177(a)–190(a)).

⁷² *Compare id.* at 2308–09 (quoting Petition for a Writ of Certiorari, *supra* note 57, app. at 184(a) (reasoning that petitioner did not make distinctions on the basis of sexual orientation), *with id.* at 2338 (Sotomayor, J., dissenting) (citing Transcript of Oral Argument, *supra* note 47, at 37–38) (“[P]etitioners here concede that if a same-sex couple came across an opposite-sex wedding website created by the company and requested an identical website, with only the names and date of the wedding changed, petitioners would refuse. That is status-based discrimination, plain and simple.” (footnote omitted) (citation omitted)).

⁷³ *See id.* at 2339 (Sotomayor, J., dissenting).

⁷⁴ 379 U.S. 294 (1964).

⁷⁵ *303 Creative*, 143 S. Ct. at 2331 (Sotomayor, J., dissenting) (discussing *Katzenbach*).

⁷⁶ As Justice Sotomayor put it, the petitioner in *303 Creative*, “like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu. This is plain to see, for all who do not look the other way.” *Id.* at 2339 (footnote omitted).

discrimination against lesbians, gay men, and bisexuals because they are the only individuals interested in entering into such marriages.⁷⁷

Justice Gorsuch found the dissent's reasoning unpersuasive, rejecting its charge that the majority was "'for the first time in [the Court's] history . . . grant[ing] a business open to the public' a 'right to refuse to serve members of a protected class.'"⁷⁸ In the very next sentence, Justice Gorsuch pointed to the fact that "Ms. Smith will . . . 'work with *all people regardless of . . . sexual orientation*.'"⁷⁹ Ms. Smith's views, in other words, could not be fairly characterized as prejudiced. The implication, therefore, is that while nonbigoted owners like Ms. Smith can avail themselves of the Free Speech Clause to immunize their refusal to provide wedding services to same-sex couples, racist business owners who provide some but not all services to Black customers cannot.

It would seem that while Ms. Smith was entitled to a First Amendment exemption from antidiscrimination laws, a racist web designer who refuses to provide services to interracial couples would not be so entitled. This is precisely the distinction that Justice Alito emphasized during oral arguments with his repeated questions about the differences between racially prejudiced views and Ms. Smith's sincerely held beliefs about same-sex marriage.⁸⁰ The crucial and, after *303 Creative*, seemingly relevant difference is between bigoted beliefs and, as Ms. Smith's lawyer put it in response to one of Justice Alito's questions, "*reasonable* religious and philosophical premises."⁸¹ The fact that the *303 Creative* Court understood Ms. Smith's views to be both sincere and reasonable led it to conclude that she was entitled to a First Amendment exemption.⁸²

A skeptic might point to the fact that even though the Court emphasized the sincere and nonprejudiced nature of Ms. Smith's beliefs, it did not explicitly hold that only business owners who abide by such beliefs are entitled to free speech exemptions.⁸³ Even if that is the case, it is nonetheless highly unlikely that the Court would view a business owner's refusal, for example, to provide expressive wedding services to interracial couples based on the owner's racist views *as anything but a*

⁷⁷ See *id.* ("The majority protests that Smith will gladly sell her goods and services to anyone, including same-sex *couples*. She just will not sell websites for same-sex *weddings*. Apparently, a gay or lesbian couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing." (citation omitted) (citing *id.* at 2308, 2316–17 (majority opinion))); see also *id.* at 2339 n.13 (criticizing the "petitioners' contrivance, embraced by the Court, that a prohibition on status-based discrimination can be avoided by asserting that a group can always buy services on behalf of others, or else that the group can access a 'separate but equal' subset of the services made available to everyone else").

⁷⁸ *Id.* at 2318 (majority opinion) (quoting *id.* at 2322 (Sotomayor, J., dissenting)).

⁷⁹ *Id.* (emphasis added) (quoting Petition for a Writ of Certiorari, *supra* note 57, app. at 184(a)).

⁸⁰ See *supra* notes 49–55 and accompanying text.

⁸¹ Transcript of Oral Argument, *supra* note 47, at 30 (emphasis added).

⁸² See *supra* notes 57–71 and accompanying text.

⁸³ See *303 Creative*, 143 S. Ct. at 2321–22.

status-based distinction. This would be true even if the business owner was willing to provide other services to people of color. And if the Court understands the owner's policy of refusing to provide some services to some individuals as grounded in a status-based distinction, it is likely to conclude that the application of the antidiscrimination law targets that distinction rather than, as in Ms. Smith's case, the business owner's speech.⁸⁴

In arguing that *303 Creative* will have a limited impact on the enforcement of civil rights laws, Professor Dale Carpenter reasons that, despite the ruling, "[b]usinesses can't claim constitutional protection for a categorical rule that they won't sell commissioned products to gays, Jews, Blacks, or women. . . . *303 Creative* reaffirms the cardinal rule that the First Amendment does not shield these acts of status-based discrimination."⁸⁵ But what this reasoning fails to account for is the extent to which the sincerity and perceived reasonableness of Ms. Smith's substantive views on marriage equality led the Court to conclude that there was no status-based discrimination to begin with. It seems highly unlikely that the Court would reach the same conclusion if the substantive views of the business owner seeking an exemption were racist in nature.

It was the Court's assessment that Ms. Smith's views did not evince prejudice against lesbians, gay men, and bisexuals, and that there was, therefore, no status-based discrimination, which led it to conclude that a future application of the Colorado law to her would entail a regulation not of discriminatory conduct but of protected speech.⁸⁶ The sincerity and reasonableness of Ms. Smith's views seemed to have assured the majority that she was not engaging in discrimination; after all, she was willing to provide other services to lesbians, gay men, and bisexuals, and she was willing to turn away any customer, regardless of sexual orientation, who asked her to provide web-design services that contradicted her values. As a result, the only thing left to regulate, according to the majority, was Ms. Smith's speech.⁸⁷

It appears, then, that for the *303 Creative* Court, the substantive content of an exemption claimant's views — namely, its degree of sincerity and reasonableness (as understood by the Court) — plays a crucial role in determining whether the claimant is entitled to free speech immunity from the application of antidiscrimination laws. To further support this claim, I turn now to a closer examination of how *303 Creative* dealt with the Court's well-established precedents denying

⁸⁴ See *id.* at 2317 n.3 ("While [the Free Speech Clause] does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message . . .").

⁸⁵ 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/UGH2-A7PA>].

⁸⁶ See *303 Creative*, 143 S. Ct. at 2318, 2322.

⁸⁷ See *id.* at 2315.

First Amendment exemptions in the context of sex and especially race discrimination.

III. 303 CREATIVE DISTINGUISHES EXEMPTION REQUESTS IN EARLIER CASES

The substantive differences between Ms. Smith's views on same-sex marriage and the views of business owners who unsuccessfully claimed First Amendment exemptions in earlier cases involving racial and gender equality help explain why the 303 *Creative* Court believed that those precedents were irrelevant to the dispute before it. The differences, for example, help account for why 303 *Creative*, as Justice Sotomayor's dissent put it, "studiously avoids"⁸⁸ discussing *Runyon v. McCrary*.⁸⁹ *Runyon* involved consolidated cases brought against two commercially operated schools under 42 U.S.C. § 1981.⁹⁰ "The educational services of [both schools] were advertised and offered to members of the general public."⁹¹ The plaintiffs were Black children who, through their parents, sued the schools after the institutions rejected their admission applications.⁹² The reason given by one school for the "rejection was that [it] was not integrated."⁹³ The other school made it clear that "only members of the Caucasian race were accepted."⁹⁴

In rejecting the schools' contention that the First Amendment barred the antidiscrimination claim, the *Runyon* Court "assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions."⁹⁵ But that did not mean that the private schools had a corresponding First Amendment right to exclude on the basis of race. As *Runyon* put it, in quoting from the Court's earlier case of *Norwood v. Harrison*,⁹⁶ "while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'"⁹⁷

It would seem particularly relevant to the dispute in 303 *Creative* that the Court in *Norwood* had expressly recognized that a private school that discriminates on the basis of race:

manifests, by its own actions, that its educational processes are *based on private belief* that segregation is desirable in education. There is no reason

⁸⁸ *Id.* at 2332 (Sotomayor, J., dissenting).

⁸⁹ 427 U.S. 160 (1976).

⁹⁰ *See id.* at 163.

⁹¹ *Id.* at 172.

⁹² *Id.* at 163–64.

⁹³ *Id.* at 165.

⁹⁴ *Id.*

⁹⁵ *Id.* at 176.

⁹⁶ 413 U.S. 455 (1973).

⁹⁷ *Runyon*, 427 U.S. at 176 (alteration in original) (quoting *Norwood*, 413 U.S. at 470).

to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an *essential part of the educational message to be communicated* to the students who are admitted.⁹⁸

But the fact that business owners might make distinctions among potential customers based on the owners' constitutionally protected viewpoints does not mean, as *Runyon* makes clear, that the First Amendment prohibits the enforcement of antidiscrimination laws against them.⁹⁹ *Runyon* stands for the proposition that even when business owners refuse to make commercial services available to some customers due to *constitutionally protected beliefs and speech*, that protection does not entitle the commercial entities in question to First Amendment exemptions from statutory antidiscrimination obligations.¹⁰⁰

The factual similarities between *303 Creative* and *Runyon* are considerable. Both cases involved the selling of services to the general public.¹⁰¹ In both instances, the owners of the businesses had policies, grounded in their set of personal beliefs, calling for the turning away of some members of the public.¹⁰² In both cases, the claimants provided services with significant expressive content.¹⁰³ And in both instances, the owners claimed a First Amendment exemption from the application of an antidiscrimination law.¹⁰⁴ To Justice Sotomayor, cases like *Runyon* squarely answered the question presented in *303 Creative* because they held that a commercial business, open to the general public, does not have a First Amendment right to discriminate.¹⁰⁵

It may seem perplexing, at first, that *303 Creative* did not cite, much less grapple with, *Runyon* given the considerable similarities between the two cases. But the fact that *303 Creative* ignored *Runyon* altogether becomes less perplexing once we focus on what the majority likely thought was a crucial distinction between the two exemption cases: the exemption claim in *Runyon* was based on bigoted beliefs, while the exemption claim in *303 Creative* was based on sincere and reasonable beliefs. Given (1) the substantive distinctions between the bigoted views of racists and what conservative Justices through the years have repeatedly understood to be the sincere and reasonable views of opponents of

⁹⁸ *Norwood*, 413 U.S. at 469 (emphases added).

⁹⁹ See *Runyon*, 427 U.S. at 176 (quoting *Norwood*, 413 U.S. at 470).

¹⁰⁰ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2331 (2023) (Sotomayor, J., dissenting) (“[T]he refusal to deal with or to serve a class of people is not an expressive interest protected by the First Amendment.”).

¹⁰¹ See *id.* at 2308 (majority opinion) (citing Petition for a Writ of Certiorari, *supra* note 57, app. at 184(a)); *Runyon*, 427 U.S. at 172.

¹⁰² *303 Creative*, 143 S. Ct. at 2308 (citing Petition for a Writ of Certiorari, *supra* note 57, app. at 184(a); Transcript of Oral Argument, *supra* note 47, at 19–20); *Runyon*, 427 U.S. at 164.

¹⁰³ *303 Creative*, 143 S. Ct. at 2312 (citing Petition for a Writ of Certiorari, *supra* note 57, app. at 181(a)–182(a), 186(a)–187(a)); *Runyon*, 427 U.S. at 176.

¹⁰⁴ *303 Creative*, 143 S. Ct. at 2308; *Runyon*, 427 U.S. at 175–76.

¹⁰⁵ *303 Creative*, 143 S. Ct. at 2331–33 (Sotomayor, J., dissenting) (citing, inter alia, *Runyon*, 427 U.S. at 168, 172, 176).

same-sex marriage like Ms. Smith, and (2) that conservative Justices in *Windsor* and *Obergefell* found those differences to be constitutionally relevant, it is less surprising that the conservative majority in *303 Creative* found it unnecessary to address or even cite *Runyon*.

As Justice Sotomayor noted in her dissent, *Runyon* was not the only case in which the Court had previously denied First Amendment exemptions to business owners from the application of antidiscrimination laws. In *Newman v. Piggie Park Enterprises, Inc.*,¹⁰⁶ the Court dismissed as “patently frivolous”¹⁰⁷ a restaurant owner’s claim that applying Title II of the Civil Rights Act of 1964¹⁰⁸ in ways that required him to provide equal services to Black customers violated his religious freedom because it would “contravene[] the will of God.”¹⁰⁹ The same is true of *Hishon v. King & Spalding*,¹¹⁰ in which the Court rejected the claim by a group of male law partners that they had free speech and association rights to refuse to hire a female partner.¹¹¹

But for the *303 Creative* Court, cases like *Newman* and *Hishon* were irrelevant to the dispute before it. The Court rejected as “[p]ure fiction”¹¹² the dissent’s contention “that [its] decision today is akin to endorsing a ‘separate but equal’ regime that would allow law firms to refuse women admissions into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a ‘White Applicants Only’ sign.”¹¹³ Importantly, in all three examples, the business owners rely on *bigoted views*, supporting a “‘separate but equal’ regime,” to justify their differential treatment of protected classes.¹¹⁴ It seems that, as far as *303 Creative* is concerned, these expressly prejudiced views stand in sharp and constitutionally relevant contrast to the sincere and reasonable views expressed by business owners like Ms. Smith when denying marriage-related services to same-sex couples.

The Court’s understanding of Ms. Smith’s views as sincere and reasonable, and therefore as being entirely different from the bigoted views of the business owners in the earlier exemption cases, helps explain why the majority complained that “[i]t is difficult to read the dissent and conclude we are looking at the same case” and that the dissent “reimagines the facts of this case from top to bottom.”¹¹⁵ From the Court’s perspective, the dissent treated the case as if Ms. Smith held prejudiced

¹⁰⁶ 390 U.S. 400 (1968) (per curiam).

¹⁰⁷ *Id.* at 402 n.5.

¹⁰⁸ 42 U.S.C. §§ 2000a to 2000a-6.

¹⁰⁹ *Newman*, 390 U.S. at 403 n.5 (quoting *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring), *aff’d*, 390 U.S. 400).

¹¹⁰ 467 U.S. 69 (1984).

¹¹¹ *Id.* at 78.

¹¹² 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2319 (2023).

¹¹³ *Id.* (citing *id.* at 2322, 2330–33, 2335–38, 2339 & n.13, 2342 (Sotomayor, J., dissenting)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2318.

views against lesbians, gay men, and bisexuals and was therefore prepared to engage in invidious discrimination against them, when the majority firmly believed that that was not the case.¹¹⁶

The Court's understanding of Ms. Smith's views also helps explain why it criticized the dissent for exploring issues that the majority deemed irrelevant in a case where the exemption claimant had not expressed anti-LGBTQ views or refused to provide lesbians, gay men, and bisexuals with web-design services that did not involve same-sex marriages.¹¹⁷ The issues that the majority believed were irrelevant included the history and purposes of public accommodation laws, the struggles of LGBTQ people to attain basic rights enjoyed by others, and the economic, dignitary, and psychological impact on lesbians, gay men, and bisexuals of being discriminated against in the economic marketplace.¹¹⁸ These topics were irrelevant to the Court because, from its perspective, Ms. Smith's sincere and reasonable views on same-sex marriage were unrelated to the discrimination suffered by LGBTQ people, discussed at length by the dissent, and its accompanying harms. The same, of course, cannot be said of the bigoted views of First Amendment exemption claimants in the earlier cases that *303 Creative* left undisturbed.

A comparison between the Court's reasoning in *303 Creative* and the earlier case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*¹¹⁹ further illustrates the lengths to which the former went to deny that issues related to LGBTQ discrimination were relevant to the analysis. Like in *303 Creative*, the Court in *Masterpiece Cakeshop* sided with a religious business owner who refused to sell goods to same-sex couples interested in celebrating their unions.¹²⁰ But in doing so, *Masterpiece Cakeshop* at least acknowledged that the case "present[ed] difficult questions as to the proper reconciliation" between the exercise of First Amendment rights and "the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services."¹²¹ The Court added that:

¹¹⁶ See *supra* notes 57–71 and accompanying text.

¹¹⁷ See *303 Creative*, 143 S. Ct. at 2318.

¹¹⁸ *Id.* Justice Sotomayor explored these issues in *id.* at 2322–30 and 2341–42 (Sotomayor, J., dissenting). As Professor Yoshino puts it, "Justice Sotomayor's opinion presented the most vivid representation of the struggle for LGBTQ+ equality that has ever entered the *United States Reports*." Yoshino, *supra* note 4, at 286.

¹¹⁹ 138 S. Ct. 1719 (2018).

¹²⁰ *Id.* at 1732. *Masterpiece Cakeshop* arose after a bakery owner refused a same-sex couple's request to make their wedding cake on the ground that their union was inconsistent with his Christian values. *Id.* at 1724. The Court deemed it unnecessary to reach the ultimate question of whether the Constitution provided a private business that sells goods to the general public with a constitutional right to refuse to serve same-sex couples. See *id.* at 1728–29. Instead, the Court ruled more narrowly by concluding that some members of the Colorado Civil Rights Commission had violated the baker's rights to free exercise by expressing antireligious animus during their consideration of his case. *Id.* at 1729–31.

¹²¹ *Id.* at 1723.

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason[,] the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.¹²²

There is nothing in *303 Creative* that similarly acknowledges the existence, relevance, or impact of discrimination against LGBTQ individuals. For the *303 Creative* Court, the sincerity and reasonableness of Ms. Smith's views dispensed with any need to account for the ruling's implications for the future of antidiscrimination laws. Indeed, the substance of Ms. Smith's views conveniently rendered the fact that she was willing to provide services to different-sex couples that she refused to provide to same-sex couples both invisible and irrelevant.¹²³ As Professor Yoshino puts it, "[o]ne 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."¹²⁴

It is difficult to imagine that the Court would have completely ignored the impact of a free speech exemption on issues related to discrimination had Ms. Smith's personal beliefs led her to deny commercial services to people of color. But that is precisely what the Court did when it refused to acknowledge that *303 Creative* had *any* implications for the equality rights of LGBTQ people.

In short, understanding Ms. Smith's beliefs as being free of prejudiced, anti-LGBTQ content allowed the Court to ignore the relevance of its long list of precedents denying First Amendment exemptions to commercial actors from the application of antidiscrimination laws. Those earlier cases were about exclusionary business policies grounded in bigoted beliefs; Ms. Smith's sincerely held and reasonable views were of a different sort altogether. This is why, according to the Court, the dissent's contention that its ruling recognized a constitutional right of businesses to discriminate on the basis of a protected trait was "[p]ure fiction."¹²⁵

It bears noting that the distinction that conservative Justices in cases like *Windsor*, *Obergefell*, and now *303 Creative* have made between racial discrimination and opposition to marriage equality is *not* linked to

¹²² *Id.* at 1727.

¹²³ The fact that no same-sex couple ever asked Ms. Smith for wedding-related services also seems to have blinded the Court to the status-based implications of her refusal to provide services to same-sex couples seeking to celebrate their unions. As Professor Yoshino notes: "[T]he *303 Creative* litigation seemed designed to render gay individuals who would be harmed by the exemption invisible. Because it was a preenforcement suit for an injunction, no gay couple had ever been turned away. . . . In *303 Creative*, there were no actual human beings who could bring to light the dignitary interests on the other side." Yoshino, *supra* note 4, at 285 (footnote omitted).

¹²⁴ *Id.* at 286.

¹²⁵ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2319 (2023).

the importance of the state's interest in eradicating racial as opposed to sexual orientation discrimination.¹²⁶ In fact, the majority in *303 Creative* stated that it does “not question the vital role public accommodations laws play in realizing the civil rights of all Americans. This Court has recognized that governments in this country have a ‘compelling interest’ in eliminating discrimination in places of public accommodation.”¹²⁷ Instead, the distinction that conservative Justices repeatedly have made in cases implicating same-sex marriage is grounded in the notion that, while it is not possible to promote racial inequality without being bigoted, it is entirely possible to oppose marriage equality without being prejudiced. The distinction is founded in a normative assessment holding that, while it is not possible for business owners to turn down Black individuals or interracial couples as customers while abiding by sincere and nonprejudiced views, it is entirely possible for them to refuse to provide wedding services to same-sex couples based on sincere and nonprejudiced views regarding the proper definition of marriage. In other words, the distinction is based on the idea that while no reasonable person can disagree on whether discrimination against people of color is morally defensible, there is still — despite the transformative changes in the degree of social and legal acceptance of the equality rights of lesbians, gay men, and bisexuals — room for reasonable disagreement, religious or otherwise, on the question of whether legal marriage should be limited to the union of a man and a woman.

A defender of *303 Creative* might argue that what distinguishes the ruling from earlier race-based exemption cases is that Ms. Smith's web-design services are sufficiently expressive to qualify for the free speech exemption while the commercial offerings by the racist business owners in the earlier cases were not. The differences in constitutional protection, the defender might contend, is explained not by the *content* of the speech but by its *degree* of expressiveness.

There are three reasons to be skeptical of this claim. First, the *303 Creative* Court did not attempt to distinguish the cases on the basis of the degree of expressiveness in the commercial services at issue. Second, the Court failed to provide *any* guidance on what constitutes sufficiently expressive business conduct, leaving the issue entirely for future adjudication.¹²⁸ One would think that if the Court had relied on the degree of expressiveness to distinguish *303 Creative* from the earlier exemption cases that it left undisturbed, it would have had something to say about how courts should determine the necessary quantum of expression

¹²⁶ In rejecting a religious exemption claim made by a university whose religious values led it to exclude Black students, the Court, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), concluded that the government's “fundamental, overriding interest in eradicating racial discrimination in education” trumped the religious liberty claim. *Id.* at 604.

¹²⁷ *303 Creative*, 143 S. Ct. at 2314 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984)) (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 571–72 (1995)).

¹²⁸ Yoshino, *supra* note 4, at 275.

that qualifies commercial providers of goods and services for First Amendment immunity from antidiscrimination laws.

Finally, it is not plausible to contend that the racist owners of the private schools in *Runyon*, through their teaching and counseling of students, were not sufficiently engaged in otherwise protected expression under the First Amendment. What factually distinguishes *Runyon* from *303 Creative* is not the degree of expressiveness that inhered in the commercial services in question, but is instead the substantive content of the expression: bigoted and prejudiced in *Runyon*; sincere and reasonable (according to the Court) in *303 Creative*.

Professor Yoshino, in reasoning that *303 Creative* allows any defendant in any antidiscrimination case involving the sale of a good or service with sufficient expressive content to claim a free speech exemption “against anyone based on any classification, including race,”¹²⁹ notes that the Court has made clear that the Free Speech Clause does not permit the government to sanction hate speech as a means of advancing equality objectives.¹³⁰ For Professor Yoshino, this means that “[w]eb designers would also be protected should they refuse to make websites for interracial couples.”¹³¹

It bears pointing out, however, that none of the Court’s hate speech cases arose in the context of speech by business owners denying jobs, housing, or goods and services to classes protected by antidiscrimination laws. Instead, when the Court has interpreted the Free Speech Clause to protect hate speech — such as the burning of a cross by KKK members,¹³² the protesting with bigoted anti-LGBTQ placards near a soldier’s funeral,¹³³ and the marching by Nazis on public streets¹³⁴ — it has done so outside of the commercial marketplace context. In commercial cases involving the application of antidiscrimination laws, the Court has not protected hate speech. It is possible that the Court going forward will explicitly overrule cases like *Runyon* and hold that racist business owners, and others with clearly prejudiced views, have a First Amendment right to exclude, but that is not what it did in *303 Creative*.

In the end, what most persuasively accounts for the difference in the Court’s constitutional treatment of Ms. Smith’s turning away of same-sex couples when compared to the earlier business owners’ turning away of other protected groups is *the substantive justification for the exclusion*: If the justification is grounded in prejudice, then the constitutional exemption does not apply. But if the justification constitutes what the Court understands to be a good-faith and nonprejudiced objection to serving particular customers, then to not grant the exemption is a

¹²⁹ *Id.* at 262.

¹³⁰ *Id.* at 266.

¹³¹ *Id.* at 245.

¹³² *Virginia v. Black*, 538 U.S. 343, 348 (2003).

¹³³ *Snyder v. Phelps*, 562 U.S. 443, 454 (2011).

¹³⁴ *Nat’l Socialist Party of Am. v. Skokie*, 432 U.S. 43, 43–44 (1977) (per curiam).

violation of the First Amendment. Therefore, Ms. Smith got her exemption, while the racist restaurant owner in *Newman*,¹³⁵ the racist operators of private schools in *Runyon*,¹³⁶ and the sexist law partners in *Hishon*¹³⁷ did not.

The fact that *303 Creative* left the prior cases denying business owners First Amendment exemptions from antidiscrimination laws undisturbed may help limit the ruling's deleterious impact on the future enforcement of those laws. The problem, as I explain next, is that this limitation in the scope of *303 Creative* stands on untenable doctrinal grounds because it violates the bedrock First Amendment principle of viewpoint neutrality.

IV. *303 CREATIVE* IS NOT VIEWPOINT NEUTRAL

There is arguably no more important principle in American free speech jurisprudence than “that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.”¹³⁸ As the Court has made clear, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹³⁹ It is for this reason that, as *303 Creative* puts it, “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 deeply ‘misguided,’ and likely to cause ‘anguish’ or ‘incalculable grief.’”¹⁴⁰

In applying this principle, the Court has been highly skeptical of laws that regulate speech according to the viewpoint expressed by speakers. In 2019, for example, the Court struck down a provision of the Lanham Act¹⁴¹ that prohibited the registration of “immoral or scandalous” trademarks.¹⁴² For the Court, the prohibition constituted impermissible viewpoint discrimination because the statute “permits registration of marks that champion society’s sense of rectitude and morality, but not marks that denigrate those concepts.”¹⁴³

¹³⁵ *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, 438 (4th Cir. 1967) (Winter, J., concurring), *aff’d*, 390 U.S. 400).

¹³⁶ *Runyon v. McCrary*, 427 U.S. 160, 173–75 (1976).

¹³⁷ *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

¹³⁸ *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995)).

¹³⁹ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹⁴⁰ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023) (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)).

¹⁴¹ 15 U.S.C. §§ 1051–1141n.

¹⁴² *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

¹⁴³ *Id.*

A crucial part of the reasoning in *303 Creative* regarding why Ms. Smith was constitutionally entitled to an exemption from the Colorado antidiscrimination law was grounded in the idea that a core objective of the Free Speech Clause is to protect unpopular speech, which is why Justice Gorsuch made the point of noting that “Ms. Smith acknowledges that her views about marriage may not be popular in all quarters.”¹⁴⁴ The ruling emphasized that it was irrelevant to her free speech claim whether the government approved of her views on same-sex marriage.¹⁴⁵ It is not the case, Justice Gorsuch reminded us, that the “First Amendment’s protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive.”¹⁴⁶ Justice Gorsuch supported this point by citing to Chief Justice Roberts’s opinion in *FEC v. Wisconsin Right to Life, Inc.*¹⁴⁷ for the proposition that “a speaker’s motivation is entirely irrelevant,”¹⁴⁸ as well as to some of the Court’s rulings protecting hate speech.¹⁴⁹

But if a speaker’s motivation is entirely irrelevant to whether the Free Speech Clause protects the expression, and whether a speaker expresses bigoted views is also irrelevant, then it is not clear why Justice Alito during oral arguments in *303 Creative* repeatedly emphasized the substantive differences between Ms. Smith’s views on same-sex marriage and those of racist bigots. Furthermore, if motivation and bigotry are irrelevant to the question of the scope of free speech protections, it is similarly not clear why *303 Creative* placed so much analytical weight on the fact that Ms. Smith held sincere, reasonable, and nonprejudiced views on the question of same-sex marriage.

As already noted, conservative Justices have for years emphasized the substantive differences between the views of racist bigots and the beliefs of those whom the Justices deem to be “decent” and “fairminded people” who hold sincere and reasonable views opposed to equal marital rights for lesbians, gay men, and bisexuals. Such an emphasis by itself is not improper in equality cases given that plaintiffs who challenge laws under the Equal Protection Clause must show that the measures evince discriminatory intent.¹⁵⁰ It was therefore not inconsistent with equal

¹⁴⁴ *303 Creative*, 143 S. Ct. at 2308.

¹⁴⁵ *Id.* at 2317.

¹⁴⁶ *Id.* (citing, inter alia, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007)).

¹⁴⁷ 551 U.S. 449.

¹⁴⁸ *303 Creative*, 143 S. Ct. at 2317 (quoting *Wis. Right to Life*, 551 U.S. at 468). Questions related to a speaker’s intent or motivation in free speech jurisprudence are complex and multifaceted. For detailed explorations, see generally, for example, Larry Alexander, *Free Speech and Speaker’s Intent*, 12 CONST. COMMENT. 21 (1995); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013); and Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366 (2016).

¹⁴⁹ *303 Creative*, 143 S. Ct. at 2317 (citing *Nat’l Socialist Party of Am. v. Skokie*, 432 U.S. 43, 43–44 (1977) (per curiam); *Snyder v. Phelps*, 562 U.S. 443, 456–57 (2011)).

¹⁵⁰ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

protection doctrine for conservative Justices to account for what they understood to be the nondiscriminatory intent behind the enactment of DOMA in *Windsor* and same-sex marriage bans in *Obergefell*.

But the constitutional principles under the Free Speech Clause are entirely different. Under that clause, the government is not permitted to take into account the viewpoints expressed in speech when determining whether to regulate or protect that speech.¹⁵¹ By granting Ms. Smith the exemption she demanded while making it clear that its holding did not disturb the precedents in which the Court had rejected First Amendment exemptions for business owners in disputes implicating bigoted motives and views, *303 Creative* granted constitutional protection to a speaker based on the content of her speech in ways that are inconsistent with foundational free speech principles. The Court, in trying to have its cake and eat it too by recognizing Ms. Smith's claim because it was grounded in sincere and reasonable objections to marriage equality, while leaving undisturbed earlier cases rejecting First Amendment exemptions claimed by bigots who expressed offensive views, violated a bedrock principle of First Amendment jurisprudence by allowing the substantive content of a speaker's views to determine the extent of protection afforded by the Free Speech Clause.

Like Professor Yoshino, I am concerned about the possible deleterious impact of *303 Creative* on the enforcement of civil rights laws going forward.¹⁵² It is possible, as he warns, that a future Court will allow *any* defendant in *any* antidiscrimination case involving the sale of a good or service with sufficient expressive content to claim a free speech exemption.¹⁵³ But the fact that the Court placed significant weight on the substantive content of Ms. Smith's views, while leaving undisturbed earlier cases involving business owners with bigoted and offensive views, suggests that the Court may continue to condition the granting of exemptions on the sincerity and reasonableness of the beliefs expressed by owners who resist the application of antidiscrimination laws. Although this approach would be inconsistent with free speech principles, it would limit the number of instances in which free speech exemptions would be constitutionally required.

I also share Professor Yoshino's additional concern that *303 Creative* may lead the Court to overcome what he insightfully notes is the apparent reluctance of some members of the conservative majority to overrule *Employment Division v. Smith*.¹⁵⁴ As Professor Yoshino explains, "[f]ree speech exemptions could normalize conscience-based objections to civil rights law to such a degree that they could pave the way for a future

¹⁵¹ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

¹⁵² See Yoshino, *supra* note 4, at 246.

¹⁵³ *Id.* at 244–45.

¹⁵⁴ 494 U.S. 872 (1990); see also Yoshino, *supra* note 4, at 259 ("For all the steady criticism of *Smith*, the Court seems unwilling to take the final step of overruling it altogether.")

overruling of *Smith*.¹⁵⁵ It is worth pointing out, however, that the Free Exercise Clause, like the Free Speech Clause, prohibits courts from conditioning exemptions on the substantive content or reasonableness of religious beliefs.¹⁵⁶ Although the sincerity of a religious exemption claimant can be subjected to a minimal form of judicial scrutiny, the Free Exercise Clause prohibits judicial assessments or weighing of the underlying merits or reasonableness of the claimed religious values.¹⁵⁷ As a result, in the same way that it is inconsistent with the Free Speech Clause to grant exemptions based on the reasonableness and nonprejudiced content of the claimant's speech, it would be inconsistent with the Free Exercise Clause to grant exemptions based on the reasonableness and nonprejudiced content of the claimant's religious beliefs.

This means that if the Court overrules *Smith* by granting free exercise exemptions from the application of neutral and generally applicable antidiscrimination laws, it will, in theory, have to allow the exemptions in cases like *Newman* in which a business owner refused to provide services to Black customers due to religious beliefs that were patently racist. But even if the currently composed Court overrules *Smith*, I suspect that, for the reasons articulated in this Response, it may still find ways of denying religious exemptions to racists and other bigots while granting them to business owners like Ms. Smith whom the conservative majority deem to profess nonbigoted religious views.

CONCLUSION

The Court going forward may not be inclined to grant exemptions to business owners who deny jobs, housing, or goods and services to protected classes on the basis of ideological, moral, or religious objections that a majority of Justices deem to be insincere and bigoted. Those who believe that *303 Creative* erred in granting a free speech exemption to the business owner, and that Justice Sotomayor's dissent, therefore, had the better arguments, are likely to welcome any limitation on the scope and impact of a ruling that, as Professor Yoshino points out, could significantly undermine the enforcement of antidiscrimination laws.¹⁵⁸ The problem is that this particular limitation on the scope of *303 Creative* is constructed on doctrinal quicksand because it is based on viewpoint distinctions that are prohibited by the First Amendment.

The question then becomes whether and, if so, how the Court rectifies its mistake by making sure it does not use business owners' viewpoints to help determine whether they are constitutionally entitled to free speech exemptions from antidiscrimination laws. One possibility might be that the Court, as Professor Yoshino suggests, will grant an

¹⁵⁵ Yoshino, *supra* note 4, at 280.

¹⁵⁶ See, e.g., *United States v. Ballard*, 322 U.S. 78, 87 (1944).

¹⁵⁷ See, e.g., *United States v. Seeger*, 380 U.S. 163, 184 (1965).

¹⁵⁸ Yoshino, *supra* note 4, at 272–73.

exemption to any business owner who engages in the requisite amount of expression in providing goods and services to the general public while refusing to sell to some customers on any basis, including race.¹⁵⁹ A more optimistic possibility — from the perspective of those who believe that *303 Creative* was incorrectly decided and that it poses a significant threat to the robust enforcement of civil rights laws — is that a future Court will return to the principle that past Courts repeatedly recognized in First Amendment exemption cases involving racial and gender discrimination: that it is untenable and unworkable to grant constitutional exemptions to business owners who have ideological, moral, or religious objections to being subjected to neutral and generally applicable anti-discrimination laws whose purpose is to sanction harmful and stigmatizing discrimination in commercial marketplaces rather than to restrict speech.

¹⁵⁹ *Id.* at 265–69.