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# Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of 303 Creative

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## ABSTRACT

In *303 Creative LLC v. Elenis*, the United States Supreme Court ruled that Colorado's Anti-Discrimination Act's prohibition of discrimination on the basis of sexual orientation violated the First Amendment rights of Lorie Smith, a website designer who refused to make wedding websites for same-sex couples. This Article argues that the Court's ruling rested on a vision of state control over speech that was divorced from the law before it. Using this framing of the law to conjure up inapplicable hypothetical scenarios of state-mandated expression, the Court found in Smith's favor. And yet, in responding to the dissent's concerns that the Court's logic could be employed to justify discrimination in a host of additional circumstances, such as interracial marriages, the Court dodged, asserting that those weren't the facts before the Court.

I parse out the errors in the Court's reasoning and demonstrate why its assurances of a limited holding are groundless. The logic the Court employs in *303 Creative* may extend to a host of cases, including interracial marriages, any case in which a business argues that its goods or services are expressive, and, potentially, to cases involving free exercise claims by individuals and businesses seeking to discriminate on religious grounds.

In the face of these potential consequences, I propose two strategies for limiting *303 Creative*'s impact. The first proposes a more restrictive approach to First Amendment claims when businesses seek to discriminate against members of suspect classes identified in the Court's Equal Protection jurisprudence. But this approach carries a risk of stagnation in a nation of diverse prejudices, as the Court has proven loathe to identify new suspect classes. This leads to an alternate approach. Drawing on Jamal Greene's scholarship, I propose that courts engage in proportional analysis of competing rights claims. Rather than the standard approach of maximizing the rights claims of one side of a dispute and minimizing other's, courts should weigh the interests of each against each other. Doing so may rein in the absolutist and overly abstract reasoning on display in the Court's *303 Creative* opinion, and encourage more measured and realistic discussion of rights in future case.


## INTRODUCTION

On the last day of the United States Supreme Court's October 2022 term, the Court issued its opinion in *303 Creative LLC v. Elenis*.[1] Colorado's Anti-Discrimination Act prohibited most businesses from refusing to provide "services to any customer based on his race, creed, disability, sexual orientation, or other statutorily enumerated trait."[2] A website developer, Lorie Smith, challenged the law, stating that she did

1. *See* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).
2. *Id.* at 581.

not intend to create wedding websites for same-sex couples, and claimed that the Anti-Discrimination Act infringed upon her First Amendment right to free speech.[3] On June 30, 2023, the Court ruled in Smith's favor, holding that Colorado's Anti-Discrimination Act put Smith in a position where "she must either speak as the State demands or face sanctions for expressing her own beliefs."[4] The Court asserted that a decision to the contrary would permit the government to "compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait."[5] Accordingly, the Court concluded that applying Colorado's Anti-Discrimination Act to penalize Smith's refusal to serve same-sex couples violated the First Amendment.[6]

The Court claimed that its holding was limited. Acknowledging that numerous states had passed laws prohibiting discrimination on the basis of sexual orientation, the Court stated that these states could continue to enforce those laws so long as their enforcement did not implicate the First Amendment.[7] The Court took issue with Justice Sotomayor's dissent, in which she argued that the majority's logic opened up the possibility of successful First Amendment challenges in a wide range of contexts, such as cases involving services for interracial couples who hope to marry.[8] In response, the Court stated that "those cases are not *this* case" and emphasized that the parties had stipulated that Smith's conduct in creating wedding websites would be expressive.[9]

Reactions to the ruling were heated. Critics accused the Court of undermining vital protections against discrimination on the basis of sexual orientation and warned that the Court's logic could extend to instances of interracial marriage and other forms of sexual orientation, racial, and sex discrimination.[10] In response, commentators argued that the Court's ruling

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3. *See id.* at 579.
4. *Id.* at 588.
5. *Id.*
6. *Id.* at 589.
7. *See id.* at 591.
8. *See id.* at 636–39 (Sotomayor, J., dissenting).
9. *Id.* at 599.
10. *See* Aaron Tang, *The Supreme Court Has Opened the Door to Discrimination. Here's How States Can Slam It Shut*, N.Y. TIMES (July 1, 2023), https://www.nytimes.com/2023/07/01/opinion/supreme-court-gay-303-creative.html [https://perma.cc/W68G-3WPA]; Elie Mystal, *The Supreme Court Has Kicked the Door Wide Open to Jim Crow–Style Bigotry*, THE NATION (July 3, 2023), https://www.thenation.com/article/politics/supreme-court-303-creative-decision-mystal/ [https://perma.cc/52YJ-7T37].

was limited and that most forms of discrimination on the basis of sexual orientation could be prohibited without implicating the First Amendment.[11]

This Article begins by parsing through the Court's analysis in *303 Creative*. Part II begins with a brief summary of the relevant context, including the Court's earlier punting of a similar challenge to Colorado's Anti-Discrimination Act in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[12] After summarizing the Court's reasoning and ruling in *303 Creative*, including the interplay between the majority and dissenting opinions, I address the reactions to the case, including concerns that the ruling may pose a significant threat to public accommodations laws, and assurances that the ruling is limited.[13]

Part III, takes a closer look at how the Court reached its decision by digging into its framing of Smith's rights claims and how the Court claimed her rights were threatened by Colorado's Anti-Discrimination Act. I argue that the Court, relying on its precedent and prior characterizations of public accommodations laws, ended up deciding the case based on a contrived set of hypothetical concerns that had no basis in the law before the Court. These concerns, including the notion that a Muslim filmmaker may be forced to produce a Zionist film, or that a gay wedding website designer would be forced to develop a site critiquing same-sex marriage, could only come to pass under a dramatically different form of public accommodations law that identified protected classes based on the content of their expression, rather than characteristics like race, sex, or sexual orientation. Such hypothetical laws would face swift and likely fatal scrutiny as content-based restrictions on speech, meaning that

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11. *See* William Dailey, *The Supreme Court got it right on free speech and accommodating our LGBT neighbors*, AM. MAG. (July 10, 2023), https://www.americamagazine.org/politics-society/2023/07/10/303-creative-supreme-court-lgbt-weddings-compelled-speech-245663 [https://perma.cc/RTG8-Y7UP]; Gerard Baker, *The Supreme Court Declares Independence*, WALL ST. J. (July 3, 2023, 2:06 PM), https://www.wsj.com/articles/the-supreme-court-declares-independence-303-student-loan-racial-preferences-roberts-71859d37 [https://perma.cc/FZT8-D97E].

12. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

13. I do not address reactions critiquing the opinion on standing grounds, or on the basis that the case was based on invented facts. While these reactions are worth noting, they are tangential to the points I make here, and I therefore exclude them in the interest of space and focus. For more on this dimension of the discourse, *see* Richard M. Re, *Does the Discourse on 303 Creative Portend a Standing Realignment?* 99 NOTRE DAME L. REV. REFLECTION (forthcoming 2023).

hypothetical challenges such as those the Court considered would never come to pass. Accordingly, the Court's reasoning draws on a set of flawed assumptions.

And yet, the opinion has been issued and we must parse through its aftermath. Part IV digs into the implications of *303 Creative*. The Court's assurances that its opinion is limited ring hollow due to its failure to acknowledge that the logic of its ruling may be applied to different facts in future cases. In the face of concerns over plaintiffs raising First Amendment objections to providing wedding services to interracial couples, for instance, the Court merely asserted that those facts weren't before it.[14] As for the difficult questions the case will raise over what business activities count as expressive conduct and what activities do not, the Court sidestepped again—emphasizing that the parties had stipulated that the conduct at issue was expressive.

Therefore, the Court dodges the potentially significant and disruptive implications of its ruling. As Justice Sotomayor flags in her dissent, nothing in the Court's logic prevents the same objection from being raised by a wedding vendor who refuses to serve interracial couples.[15] Broad formulations of "expressive conduct" may pave the way for challenges against anti-discrimination laws for a host of alternate business practices. And the prospect of religious challenges to public accommodations remains on the horizon—raising the possibility of undoing the expressive conduct limitation on the *303 Creative* ruling.

With the Court dodging the difficult question of how to limit its ruling going forward, I turn to two possibilities. In Part V, I discuss what I suspect is the most likely outcome: the Court's reliance on suspect classes identified in its prior equal protection cases to limit First Amendment challenges to public accommodations statutes. So long as statutes are limited to prohibit discrimination against constitutionally recognized suspect classes, states have a constitutional hook to justify their laws—giving them a stronger argument against constitutional challenges. Such an approach raises a host of questions, several of which I identify and attempt to answer. While I view this as the Court's most likely means of limiting the implications of *303 Creative*, it's by no means a guaranteed outcome. I also argue that this approach is undesirable because of the Court's inflexible approach to suspect classes, particularly its failure to identify new suspect classes beyond race, sex, national origin, parent's

14. 303 Creative LLC v. Elenis, 600 U.S. 570, 598 (2023).

15. *Id.* at 638 (Sotomayor, J., dissenting).

marital status, and citizenship.[16] Tethering statutory discrimination protections to constitutionally protected classes risks stagnation and fails to address a broad range of prejudices.

Part VI explores an alternative in which courts engage in the proportional analysis of rights claims. Drawing on Jamal Greene's distinction between categorical and proportional rights analysis, I argue that *303 Creative* and the Court's public accommodations cases leading up to it exemplify the winner-take-all, categorical approach to rights disputes that Greene critiques. Such an approach creates a counterproductive, confusing, overly adversarial environment to adjudicate claims between parties, often leading courts to find in favor of one party at the expense of ruling that any opposing rights claims are entirely without basis.[17] I argue that when parties inevitably invoke *303 Creative* to transform their discriminatory conduct into constitutionally protected free speech, a balancing approach that accounts for interests on all sides, as well as the intricacies of the parties' speech claims, is preferable to the overly abstract, absolutist approach the *303 Creative* Court employed.

## I. *303 CREATIVE*: THE CASE, ITS CONTEXT, AND AFTERMATH

### *A. The Context: Colorado's Anti-Discrimination Act*

Colorado's Anti-Discrimination Act (the Act) is set forth in Section 24-34-601 of its state code. The Act prohibits places of public accommodation from engaging in discriminatory conduct, including the refusal to provide "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" to individuals or groups on account of their "disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry."[18] As for "place[s] of public accommodation," they include "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public."[19] The Act also contains some exceptions, exempting churches and other religious buildings from the definition of

16. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

17. *See generally* Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 56–57 (2021).

18. COLO. REV. STAT. § 24-34-601(2)(a) (2024).

19. *Id.* § 24-34-601(1).

"places of public accommodation," and allowing sex-based restrictions with bona fide relationships to the goods and services a covered business provides.[20]

Colorado's Anti-Discrimination Act is not unusual, as many states have passed similar laws. All but five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—have passed public accommodations laws that prohibit discrimination on some ground beyond disability.[21] All states with public accommodations laws "prohibit discrimination on the grounds of race, gender, ancestry and religion."[22] Twenty-five of these states prohibit discrimination on the basis of sexual orientation, 24 prohibit discrimination based on gender identity, 20 prohibit discrimination based on age, and 18 prohibit discrimination based on marital status.[23]

Colorado's law faced an earlier challenge that made its way to the United States Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[24] Jack Phillips, the owner of a bakery, Masterpiece Cakeshop, was a "devout Christian," who believed that "'God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.'"[25] Phillips believed that "creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."[26] Based on these beliefs, Phillips refused to make a cake for a same-sex couple, who then filed a discrimination complaint against Masterpiece Cakeshop and Phillips.[27]

Rather than engaging with the broader question of whether Phillips's free speech and free exercise rights trumped Colorado's protection of gay people and others from discrimination, the Court punted.[28] It held that

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20. *Id.* § 24-34-601(1), (3).

21. *See State Public Accommodation Laws*, NAT'L CONF. OF STATE LEG., https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws [https://perma.cc/Z9R2-46HU] (updated June 25, 2021).

22. *Id.*

23. *Id.*

24. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

25. *Id.* at 626.

26. *Id.*

27. *See id.* at 626–28.

28. *See* Mark R. Killenbeck, *Pandora's Cake*, 72 ARK. L. REV. 769, 775 (2020) ("As indicated, the *Masterpiece Cakeshop* Court punted: it did not reach the merits of the two constitutional issues posed, free exercise and compelled speech").

Colorado's law had not been enforced in "neutral and respectful" manner, and that Colorado's Civil Rights Commission had treated Phillips and his claims with hostility.[29] Accordingly, the Court avoided ruling on whether Colorado's Anti-Discrimination Act itself infringed on Phillips's religious freedom—instead focusing on the biased enforcement of that law which warranted strict First Amendment scrutiny.[30]

Colorado could not overcome that scrutiny, and the Court held that Phillips had been denied his right to "a neutral decisionmaker who would give full and fair consideration to his religious objection."[31] Because the problem the Court identified arose from the enforcement of that law rather than the law itself, the Anti-Discrimination Act remained in place—at least until the next challenge came along in the form of a website designer seeking to expand her business.

### *B. The Court's Ruling in* 303 Creative

In *303 Creative LLC v. Elenis*, Lorie Smith ran a business, 303 Creative LLC, which engaged in "website and graphic design, marketing advice, and social media management services."[32] She decided to expand her business to offer services for couples "seeking websites for their weddings."[33] This service, she envisioned, would "provide couples with text, graphic arts, and videos" to describe their unique stories—including how the couples met, their backgrounds, families, plans, and wedding details.[34]

Justice Gorsuch, writing for the Court, characterized Colorado's Anti-Discrimination Act as prohibiting businesses "from engaging in discrimination when they sell goods and services to the public."[35] While Smith had generally provided website and graphic design services to customers "regardless of their race, creed, sex, or sexual orientation," her plan to expand into the wedding website business posed a problem.[36] Smith was concerned that Colorado's Anti-Discrimination Act would

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29. *See Masterpiece Cakeshop*, 584 U.S. at 634.

30. *See id.* at 638. *See also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (holding that non-neutral laws, or laws that are not of general application "must undergo the most rigorous of scrutiny," which the court then states is strict scrutiny).

31. *Masterpiece Cakeshop*, 584 U.S. at 640.

32. 303 Creative LLC v. Elenis, 600 U.S. 570, 579 (2023).

33. *Id.*

34. *Id.*

35. *Id.* at 577–78.

36. *See id.* at 579.

force her to "convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman."[37] To put it another way, Smith wanted to get into the wedding website business but did not want to provide those wedding website services for customers who were gay. She argued that Colorado's law prohibiting her from discriminating against those gay customers would infringe upon her First Amendment right to free speech.[38]

The Court noted that "approximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation," laws which the court described as "'unexceptional,'" as states could "'protect gay persons, just as [they] can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.'"[39] The Court reasoned that these laws raised no constitutional concerns so long as they applied only to "'goods and services that no one could argue implicate the First Amendment.'"[40]

The Court concluded that Smith sought to engage in speech through her business of creating websites—noting that she planned to include clients' unique stories, along with artwork and quotes from each couple.[41] As for Colorado's Anti-Discrimination Act, that law sought to "compel her to create custom websites celebrating other marriages she does not" endorse.[42] Forcing Smith to express a view contrary to her beliefs was "more than enough[] to represent an impermissible abridgment of the First Amendment's right to speak freely."[43]

The Court wasn't done here, though, and invited consideration of "what a contrary approach would mean."[44] As the Court saw things:

> Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait. Taken seriously, that principle would allow the government to force all manner of artists, speechwriters, and others whose services

37. *Id.*
38. *See id.*
39. *Id.* at 590–92 (quoting Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 632 (2018)).
40. *Id.* at 592 (quoting *Masterpiece Cakeshop*, 584 U.S. at 632).
41. *See id.* at 588.
42. *Id.* at 577.
43. *Id.* at 588.
44. *Id.*

> involve speech to speak what they do not believe on pain of penalty. The government could require "an unwilling Muslim movie director to make a film with a Zionist message," or "an atheist muralist to accept a commission celebrating Evangelical zeal," so long as they would make films or murals for other members of the public with different messages. 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. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so.[45]

Colorado argued that the burden Smith faced was minimal, as all she would need to do is "repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*," and that the case involved only an incidental restriction on Smith's speech resulting from the "sale of an ordinary commercial product."[46] The Court took issue with this argument—not so much on its merits, but rather on procedural grounds, stating that it was "difficult to square" with Colorado's stipulation that Smith did not sell ordinary commercial goods, but instead goods that were "customized and tailored" for couples, and that the websites would be "expressive in nature" and tell couples' "unique love stor[ies]."[47] It did not matter that Smith accepted pay for this speech—her activities in creating the website was still expressive conduct which the Court compared with historical works of literature and art that had also been "created with an expectation of compensation."[48]

Justice Sotomayor wrote a dissenting opinion in which Justices Kagan and Jackson joined.[49] Sotomayor argued 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."[50] Sotomayor delved into the purpose of the Anti-Discrimination Act, arguing that it, and other public accommodations laws, had two core purposes: (1) ensuring "*equal access* to publicly available goods and services" and (2) ensuring "*equal dignity* in the common market" by preventing the "humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is

45. *Id.* at 588–90 (internal citations omitted).
46. *Id.* at 593.
47. *Id.* (internal quotations omitted).
48. *See id.*
49. *Id.* at 604 (Sotomayor, J., dissenting).
50. *Id.*

unacceptable as a member of the public because of his [social identity]."[51] The idea of these public accommodations "thus embodies 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."[52] Delving into historic legal treatment of public accommodations law, Sotomayor argued that this duty to serve the public without unjust discrimination applied not only to businesses selling necessities or those with monopolies, but to "any business that holds itself out as ready to serve the public."[53]

As for Smith's and 303 Creative's First Amendment claims, Sotomayor argued that the First Amendment did not entitle her "to a special exemption from a state law that simply requires them to serve all members of the public on equal terms."[54] Sotomayor noted that the First Amendment does not "'prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech,'" noting that Congress's ability to prevent employment discrimination based on race would require employers to take down signs reading "White Applicants Only" even though those signs constituted speech by the employer.[55] Sotomayor argued that this resolved the present case, and noted that Smith could remain free to "advocate the idea that same-sex marriage betrays God's laws" in her private capacity—but not to the extent that she held herself out as providing "goods or services to the public at large."[56]

Sotomayor argued that the Court's conclusion to the contrary would have profound, negative impacts:

> By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status. In this way, the decision itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service. The opinion of the Court is, quite literally, a notice that reads: "Some services may

51. *Id.* at 607 (internal quotations omitted).

52. *Id.* at 609 (Sotomayor, J., dissenting) (citing Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1298 (1996)).

53. *See id.* at 608–15 (Sotomayor, J., dissenting).

54. *Id.* at 624 (Sotomayor, J., dissenting).

55. *Id.* (Sotomayor, J., dissenting) (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011).

56. *Id.* at 628–29 (Sotomayor, J., dissenting).

be denied to same-sex couples."[57]

Sotomayor argued that the harm this message would cause to LGBTQ individuals would be compounded by the "slew of anti-LGBT laws [that] have been passed in some parts of the country," which sent the message of desire to harm this politically unpopular group.[58] Sotomayor also noted that the Court's logic "cannot be limited to discrimination on the basis of sexual orientation or gender identity," arguing that "[a] website designer could equally refuse to create a wedding website for an interracial couple, for example."[59] Moreover, many more businesses could be implicated by the ruling, such as stationery companies refusing to sell birth announcements for disabled couples, retail stores refusing to take family portraits of "non-traditional" families, and more.[60]

In response to these concerns about its ruling's implications, the Court claimed that the dissent spent "much of its time adrift on a sea of hypotheticals," but "those cases are not *this* case."[61] The Court recognized that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions," but no such complications existed in the present case due to the parties' stipulations.[62] While the Court had engaged in similar hypothetical reasoning only five pages earlier in the same opinion—and even returned to this reasoning immediately after critiquing the dissent's overreliance on hypotheticals—it deemed this style of argument unconvincing to the extent it suggested an outcome different than that the Court was determined to reach: that Colorado was constitutionally prohibited from barring Smith and 303 Creative from refusing to provide gay couples with wedding website services.[63]

### *C. Reactions to* 303 Creative

*303 Creative* was one of the more high-profile decisions in the Court's October 2022 term. As tends to be the case with such decisions, the ruling was delayed until the end of the Court's term—indeed, until the last day of June. It followed on the immediate heels of is ruling in *Students for Fair Admissions v. Harvard University*, in which the Court struck down

57. *Id.* at 637 (Sotomayor, J., dissenting).
58. *Id.*
59. *Id.* at 638 (Sotomayor, J., dissenting).
60. *Id.*
61. *Id.* at 599.
62. *Id.*
63. *See id.* at 588–90, 602–03.

multiple affirmative action programs,[64] and was accompanied by *Biden v. Nebraska* in which the Court struck down the Biden administration's student loan forgiveness program.[65] Things were already heated in the hours leading up to the Court's ruling.[66]

Reactions to the decision were similarly acute. The Biden Administration described the ruling as a "disappointing decision" that "undermines that basic truth" that "no person should face discrimination simply because of who they are or who they love."[67] Senate Majority Leader Chuck Schumer characterized the ruling as "a giant step backward for human rights and equal protection in the United States."[68] The day after the ruling, Aaron Tang argued that the Court's ruling was "legally dubious" that "threaten[ed] to obliterate a vital tool in efforts to protect the L.G.B.T.Q. community at a time when it faces hatred and violence."[69] Elie Mystal argued that the decision was a victory for bigots, that people would "suffer an assault on their human dignity" as a result of the decision—even in cases where expressive conduct was not at issue—and that "you'd be a

64. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023).

65. *See* Biden v. Nebraska., 143 S. Ct. 2355 (2023).

66. *See* Cleve R. Wootson Jr., *Biden sharply criticizes Supreme Court after affirmative action case*, WASH. POST (June 29, 2023, 6:17 PM), https://www.washingtonpost.com/politics/2023/06/29/biden-blasts-supreme-court-affirmative-action/ [https://perma.cc/HUW6-3TKR] (reporting on President Biden's statement that "the current Supreme Court has done 'more to unravel basic rights and basic decisions than any court in recent history'"); Rich Lowry, *The Left's Campaign to Destroy the Supreme Court*, POLITICO, https://www.politico.com/news/magazine/2023/06/29/fake-crisis-supreme-court-00104106 [https://perma.cc/4895-KZAT] (updated June 29, 2023, 2:18 PM) (claiming that the Court was on the "brink of destruction" as a result of a campaign by the political left to attack the Court's legitimacy).

67. *See Statement from President Joe Biden on Supreme Court Decision in 303 Creative LLC v. Elenis*, WHITE HOUSE (June 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/statement-from-president-joe-biden-on-supreme-court-decision-in-303-creative-llc-v-elenis/ [https://perma.cc/6YCY-ZEK3].

68. *Majority Leader Schumer Statement On Supreme Court Decision Denying Equal Protection To LGBTQ+ Americans*, SENATE DEMOCRATIC CAUCUS (June 30, 2023), https://www.democrats.senate.gov/newsroom/press-releases/majority-leader-schumer-statement-on-supreme-court-decision-denying-equal-protection-to-lgbtq-americans [https://perma.cc/Q4YX-7NAA].

69. Tang, *supra* note 10.

fool to think that these indignities will be limited to the LGBTQ community and their wedding celebrations."[70]

Defenders of the Court's ruling spoke out as well. Gerard Baker of the Wall Street Journal proclaimed that "Fourth of July celebrations arrive with special resonance for conservatives this year," claiming that the ruling in *303 Creative*, along with the Court's decisions on affirmative action and student loans, "struck solid blows for the principles and values that helped create the U.S. in the first place."[71] The Thomas More Society noted that the *303 Creative* decision provided strong support for its own litigation on behalf of a California baker who had refused to make a wedding cake for a gay couple.[72]

Attorneys and other officers of the Alliance Defending Freedom—the group that had represented Smith in the *303 Creative* case—took to a variety of news outlets to proclaim the virtues of their cause. Bryan Neihart (an attorney associated with the Alliance Defending Freedom) argued that the decision would prevent the government from dictating what people could say, and claimed that the decision "encourages human flourishing and a healthy, diverse society" and "allows people to pursue truth."[73] Neihard claimed that the decision would prevent government compulsion of all manners of speech, including a requirement that people can only use the term "literally" using the government's preferred meaning (a meaning that Neihart doesn't specify in his hypothetical).[74] Lathan Watts, Vice President for Public Affairs at the Alliance Defending Freedom, argued that the case was "a victory for all Americans" that reaffirmed the

70. Elie Mystal, *The Supreme Court Has Kicked the Door Wide Open to Jim Crow–Style Bigotry*, THE NATION (July 3, 2023), https://www.thenation.com/article/politics/supreme-court-303-creative-decision-mystal/ [https://perma.cc/GV9H-GX5U].

71. Baker, *supra* note 11.

72. *See* Tom Ciesielka, *US Supreme Court Decision Favoring 303 Creative Solidifies Tastries Bakery Free Speech Win*, THOMAS MORE SOC'Y (June 30, 2023), https://www.thomasmoresociety.org/news/us-supreme-court-decision-favoring-303-creative-solidifies-tastries-bakery-free-speech-win [https://perma.cc/U7W4-Z2Y2].

73. Bryan Neihart, *The Supreme Court Issues a Superb Free-Speech Decision – Literally*, NAT'L REV. (June 30, 2023, 6:03 PM), https://www.nationalreview.com/2023/06/the-supreme-court-issues-a-superb-free-speech-decision-literally/ [https://perma.cc/D685-4ZTN].

74. *Id.* How Neihart's strained "literally" hypothetical related to public accommodations laws remains unclear.

"bedrock principle: the government cannot force us to say something we do not believe."[75]

Kristen Waggoner (CEO of Alliance Defending Freedom) and Erin Hawley (Senior Attorney with Alliance Defending Freedom) argued that the case was "a crucial victory for every American regardless of their religious, political, or ideological views" that upheld "a great constitutional tradition of valuing and protecting speech not for its content but because individual freedom of thought and mind is our most basic liberty."[76] They took care to distinguish this case from other denials of public accommodations:

> The decision in *303 Creative* rejects the dark days in our nation's history where people were refused service because of the color of their skin or the faith they profess. Federal and state public-accommodation laws will continue to apply to millions of transactions every single day, ensuring that goods and services are not denied to anyone. In short, nondiscrimination principles remain firmly in place under the Supreme Court's decision.[77]

Depending on who you ask, the *303 Creative* ruling resurrects the "separate but equal" doctrine set forth in *Plessy v. Ferguson*,[78] or a "win for every American" that will "serve as a reminder to all governmental bodies that they cannot force people to speak a message contrary to their beliefs."[79] The *303 Creative* dissenters raised the concern of expression-

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75. Lathan Watts, *303 Creative v. Elenis Is a Win for Everyone*, RICOCHET (July 7, 2023), https://ricochet.com/1466171/303-creative-v-elenis-is-a-win-for-everyone/ [https://perma.cc/Q7Y9-98RE].

76. Kristen Waggoner & Erin Hawley, *Web designer's victory at Supreme Court is free speech win for all*, FOX NEWS (June 30, 2023, 11:23 AM), https://www.foxnews.com/opinion/web-designer-victory-supreme-court-free-speech-win-all [https://perma.cc/XAJ4-MQCQ].

77. *Id.* For a demonstration of why this assurance is baseless, *see infra* Parts IV.A & IV.B.1.

78. *See* Sabrina Haake, *The Supreme Court's new "separate but equal" doctrine*, SALON (July 8, 2023, 6:00 AM), https://www.salon.com/2023/07/08/the-new-separate-but-equal-doctrine/ [https://perma.cc/A4Q7-Q99D].

79. *See* Nicole Hunt, *Landmark Victory for Free Speech at the U.S. Supreme Court*, DAILY CITIZEN (June 30, 2023), https://dailycitizen.focusonthefamily.com/landmark-victory-for-free-speech-at-the-u-s-supreme-court/ [https://perma.cc/V739-XBNH].

based racial discrimination, which the majority dismissed as a fanciful hypothetical, despite its own reliance on fanciful hypotheticals.[80]

## II. THE COURT'S ARGUMENT FROM CONTRIVED HYPOTHETICALS

Despite the *303 Creative* Court's criticism of the dissenters' purported overreliance on hypotheticals, the Court itself was quick to turn to a similar analysis in support of its own arguments. But before getting into these hypotheticals and how the Court presented them, some table setting is required. In making its argument, the Court relied on three cases which it claimed were analogous to Smith's situation.[81]

The Court cited *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, a case in which the private organizers of a St. Patrick's Day parade refused the request of an organization of "gay, lesbian, and bisexual descendants of the Irish immigrants" to march in the parade to "express pride in their Irish heritage" and to demonstrate that some people with Irish heritage were, in fact, gay, lesbian, and bisexual.[82] The Court held that the parade organizers could exclude the organization and rejected the application of the State's public accommodations law to require the organization's participation, reasoning that "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[83] As the *303 Creative* Court characterized the case:

> In *Hurley*, the Court found that Massachusetts impermissibly compelled speech in violation of the First Amendment when it sought to force parade organizers to accept participants who would "affec[t] the[ir] message."[84]

The Court also cited *Boy Scouts of America v. Dale*, a case in which the Boy Scouts of America revoked the adult membership of an assistant scoutmaster, James Dale, because gay people were not allowed to be members of the Boy Scouts, prompting a suit by Dale in which he alleged that this revocation violated New Jersey's public accommodations law.[85]

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80. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 588–90, 598–99 (2023); *id.* at 638–39 (Sotomayor, J., dissenting).

81. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

82. *Hurley*, 515 U.S. at 561.

83. *Id.* at 573.

84. *303 Creative*, 600 U.S. at 589 (quoting *Hurley*, 515 U.S. at 572).

85. *See Boy Scouts of Am.*, 530 U.S. at 645.

The Court found that the Boy Scouts "believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members" and that applying New Jersey law to require the Scouts to admit Dale would force them to "propound a point of view contrary to its beliefs."[86] I can vouch for the sensibility of such a claim, as I—in obtaining the rank of Eagle Scout—was not only required to recite the Scout Oath, tie a variety of knots, and organize an extensive service project, but also required to discuss at length why homosexuality was contrary to scouting practices like community service, preparedness, and respect for America and its institutions.[87] As the *303 Creative* Court summarized:

> In *Dale*, the Court held that New Jersey intruded on the Boy Scouts' First Amendment rights when it tried to require the group to "propound a point of view contrary to its beliefs" by directing its membership choices.[88]

Finally, the Court pulled out the big guns, drawing on the classic, beloved, and beautifully written *West Virginia State Board of Education v. Barnette*.[89] There, the petitioners, parents and children who were Jehovah's Witnesses, challenged a requirement that public school students salute the American Flag while stating the Pledge of Allegiance or face disciplinary measures including expulsion, and the potential criminal prosecution of parents for their children's delinquency.[90] This requirement, the petitioners argued, would force them to express sentiments contrary to their faith.[91] Justice Robert Jackson, writing for the

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86. *See id.* at 654.

87. Just kidding. While it's true that I obtained the rank of Eagle Scout and had to recite the oath, tie knots, and organize a service project in order to accomplish that undertaking—the remainder of this sentence is false.

88. *303 Creative*, 600 U.S. at 589 (quoting *Boy Scouts of Am.*, 530 U.S. at 654).

89. *Id.* (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626–29 (1943)). *See also* Genevieve Lakier, *Not Such a Fixed Star After All: West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 741–42 (2019) (recognizing that there "are few 75-year old opinions that are as important to contemporary free speech law as Justice Jackson's gorgeous opinion in *West Virginia State Board of Education v. Barnette*," and—even more relevant to the overall point of this Article—noting that the Barnette opinion's continuing relevance demonstrates a "subtle but profound shift" from a "democracy-focused First Amendment towards an autonomy-focused one").

90. *W. Va. State Bd. of Educ.*, 319 U.S. at 626–29.

91. *See id.*

Court, characterized the law as "a compulsion of students to declare a belief," and that doing so was contrary to the First Amendment, proclaiming that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[92] Jackson further noted that the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts," and that the right to free speech was one such protected right.[93]

With this groundwork of precedent laid, the *303 Creative* Court analogized the enforcement of Colorado's Anti-Discrimination Act to the laws at issue in *Hurley*, *Dale*, and *Barnette*:

> Here, Colorado seeks to put Ms. Smith to a similar choice: If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in "remedial . . . training," filing periodic compliance reports as officials deem necessary, and paying monetary fines. Under our precedents, that "is enough," more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely."[94]

With this foundation, it's no longer apparent that the Court is discussing public accommodations laws prohibiting discrimination against certain disadvantaged groups as it is discussing compulsion that individuals speak "as the State demands."[95] This framing underlies the Court's turn to hypotheticals. Claiming to describe "what a contrary approach" would mean, the Court listed several hypothetical scenarios that it claimed could come to pass:

> The government could require "an unwilling Muslim movie director to make a film with a Zionist message," or "an atheist muralist to accept a commission celebrating Evangelical zeal," so long as they would make films or murals for other members of the public with different messages. Equally, the government could

92. *Id.* at 631, 642.

93. *Id.* at 638.

94. *303 Creative*, 600 U.S. at 589 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 574 (1995)) (internal citations omitted).

95. *See id.*

> force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. As our precedents recognize, the First Amendment tolerates none of that.[96]

Are these outcomes likely under Colorado's Anti-Discrimination Act? The Court does not explain how any application of the Act could give rise to these scenarios—likely because they have no basis in the law before the Court. Indeed, each of these examples raise objections because of the messages conveyed by the pure speech at issue, rather than the identity of the consumer. The law that would require a director to make a film with a Zionist message, a muralist to create an evangelical mural, or a gay website developer to create a website that advocates against same-sex message would need to define protected classes *by reference to these expressive positions*. After all, it does not follow that these requests track the identity of the prospective customer, as a gay person could very well request a website advocating against same-sex marriage and an atheist or Muslim person could seek to produce a Zionist film. Accordingly, the only way this hypothetical works without stereotypical assumptions about the protected customers' status is to assume an anti-discrimination law that calls out particular content of speech.

But public accommodations laws like the one at issue in *303 Creative* do not identify protected groups based on the content of their expression. Instead, they identify protected groups based on characteristics like sexual orientation, gender, nationality, religion, veteran status and other, non-expressive characteristics. This is a far cry from the hypotheticals the Court sets forth.

The Colorado law at issue in *303 Creative* is one such law. Colorado's Anti-Discrimination Act is one of 25 state public accommodations laws that prohibit discrimination on the basis of sexual orientation.[97] Numerous other states prohibit discrimination on the basis of gender identity, marital status, and age.[98] And a few states prohibit discrimination on the basis of veteran, military, and pregnancy status.[99] None of these states create protected classes on the basis of the content of the classes' speech or views—there are no public accommodations laws that prohibit

96. *Id.* at 589–90 (internal citations omitted).
97. *State Public Accommodation Laws*, *supra* note 21.
98. *See id.*
99. *See id.*

discrimination against customers on the basis of their views regarding Zionism, evangelical Christianity, or opposition to same-sex marriage. To be sure, the Court claims that it is concerned about the prospect that "the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait."[100] But the Court's examples only fit into this category if one assumes (incorrectly) that only people of a certain religion can express Zionist or evangelical views, or that only people of a certain sexual orientation can oppose same-sex marriage.[101]

If such laws existed, they would likely face strong First Amendment challenges as content-based restrictions on speech. Rather than identifying prohibited discrimination based on non-expressive characteristics like race, sex, sexual orientation, nationality, religion, veteran status, or marital status, these hypothetical laws the Court invokes would have to refer to the content of speech by potential patrons of businesses. The laws would therefore be content-based restrictions on speech—at least from the perspective of the businesses who would be required to provide goods or services with customers who express certain legally defined views. Content-based speech restrictions typically must pass strict scrutiny to survive a First Amendment challenge.[102] This is distinct from the incidental restrictions on speech at issue in *303 Creative*—restrictions that resemble incidental limits on speech that result from laws governing the permissible time, place, and manner of speech. First Amendment doctrine accounts for these laws and subjects them to a lower level of scrutiny.[103]

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100. *303 Creative*, 600 U.S. at 589.

101. *See, e.g.*, Tom Geoghegan, *The gay people against gay marriage*, BBC NEWS (June 11, 2013), https://www.bbc.com/news/magazine-22758434 [https://perma.cc/6PPZ-L5UT] (noting that some gay people remain opposed to same-sex marriage despite laws permitting it, with some describing same-sex couples' adoption of the trappings of heterosexual marriage as "weird" and some lesbians opposing marriage on feminist grounds).

102. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

103. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) ("[W]e reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved

Defenders of the decision make similar arguments. For example, Rick Claybrook suggests that "all vendors who object to serving same-sex marriages" are not discriminating "against sexual orientation," rather they are "refusing to collaborate with a message."[104] Claybrook compares this scenario to a Black restaurateur who refuses "to cater a white supremacist organization's banquet," asserting that the discrimination here "is not against whites as a class, but against the *message* of these particular whites."[105] This makes the same assumption that the Court's majority makes in its hypotheticals: that a same-sex wedding is equivalent to a political statement in favor of the institution of same-sex marriage.

This closer look at the Court's hypotheticals proves them to be not only distinct from Colorado's laws, but also unlikely to ever come about due to their reliance on hypothetical, content-based public accommodations laws. This raises serious questions over both the Court's hypotheticals, as well as the arguments of those defending the *303 Creative* outcome who rely on similar concerns to claim that invalidation of public accommodations laws is, in certain cases, necessary.

Even though the hypothetical arguments the *303 Creative* Court employs in support of its argument have significant problems, the Court seems to think they are enough to prove its point. With these questionable claims and—as discussed in more detail below—the parties' stipulations doing a significant amount of the work, *303 Creative* sets the stage for expansive discriminatory practices fueled by First Amendment claims.

## III. THE IMPLICATIONS OF *303 CREATIVE*: MORE DISCRIMINATION

While many states have public accommodations laws that prohibit discrimination against LGBTQ individuals, holes remain in these protections. While numerous states and localities prohibit discrimination on the basis of sexual orientation, several of these states have legislative carveouts that permit religious exemptions.[106] *303 Creative* threatens to take things even further by creating a constitutionalized basis for individuals and businesses to discriminate, no matter what laws are passed at the national, state, and local level. While the *303 Creative* Court and some commentators claim this is unlikely, this Part demonstrates why

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less effectively absent the regulation.'") (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

104. Rick Claybrook, *Speech by Association*, L. & LIBERTY (July 25, 2023), https://lawliberty.org/speech-by-association/ [https://perma.cc/Q6Z2-CUV9].

105. *Id.*

106. *See* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 635–36, 653–54, 657 (2016).

these claims are unconvincing, and details the potential discriminatory outcomes that may result from the Court's ruling.

*A. Unconvincing Arguments Regarding Limitations*

In *303 Creative*, Justice Sotomayor raised a number of hypothetical scenarios in her dissenting opinion:

> Although the consequences of today's decision might be most pressing for the LGBT community, the decision's logic cannot be limited to discrimination on the basis of sexual orientation or gender identity. The decision threatens to balkanize the market and to allow the exclusion of other groups from many services. A website designer could equally refuse to create a wedding website for an interracial couple, for example. How quickly we forget that opposition to interracial marriage was often because "'Almighty God ... did not intend for the races to mix.'" Yet the reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for "traditional" families. And so on.[107]

The majority rejected these arguments, arguing that they were based on facts that were not before the Court:

> Instead of addressing the parties' stipulations about the case actually before us, 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. 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 complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve "pure speech." Nothing the dissent says can alter this—nor can it displace the First Amendment protections that follow.[108]

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107. 303 Creative v. Elenis, 600 U.S. 570, 638–39 (2023) (Sotomayor, J., dissenting) (internal citations omitted).

108. *Id.* at 599 (internal citations omitted).

Other commentators reflect the limits the Majority asserts apply to its holding. Darpana Sheth, of the Foundation for Individual Rights in Education (FIRE), asserts that "thanks to the culture wars," there are a number of mistaken assumptions about the *303 Creative* case and its scope.[109] Sheth asserts that the decision "does not open the door to wanton discrimination in the provision of goods and services" because the case involved "a form of expression, which implicates the First Amendment."[110] Like the *303 Creative* Majority, Sheth argues that many goods and services will not implicate expressive conduct on behalf of the business, and governments may continue to require the provision of these services to various defined protected classes.[111]

Attempts to dismiss arguments about interracial marriage and other examples of potential discrimination are unconvincing. The Majority in *303 Creative* remained laser-focused on the case before it, noting that the parties stipulated that the case involved "pure speech" and that the case did not involve the hypothetical discriminatory actions Sotomayor discussed.[112] The Majority asserted that no manner of hypothetical reasoning or concern over expressive conduct changes the facts before it.[113]

But Sotomayor was not advancing a bizarre argument that the force of her legal arguments somehow alters the facts before the Court. Rather, she argued about the negative implications the Majority's ruling was likely to have and used those negative consequences to argue in favor of an alternative outcome. Indeed, the majority engaged in similar, hypothetical-based reasoning earlier in its opinion where it warned that an alternate ruling would lead to the government forcing muralists and filmmakers to produce art with which they disagree.[114] Even though these were not the facts before the Court, both the majority and dissent recognized that the logic of the Court's opinion may apply to future cases with different facts—so it is no response to simply assert that those facts are not those of the present case.

A similar issue arose with the Court's response to the dissent's critique of the claim that the case is limited to only those situations where

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109. *See* Darpana Sheth, *Myth-busting reactions to the Supreme Court's decision in 303 Creative v. Elenis*, FIRE, https://www.thefire.org/news/myth-busting-reactions-supreme-courts-decision-303-creative-v-elenis [https://perma.cc/6JFJ-DBV6] (updated July 7, 2023).

110. *Id.*

111. *Id.*

112. *See 303 Creative*, 600 U.S. at 587.

113. *See id.*

114. *See id.* at 588–90.

businesses' and individuals' goods and services constitute expressive conduct.[115] The Court was correct that the parties stipulated that the conduct at issue was expressive.[116] The dissent's concern, however, was not with the present parties, but with future cases where businesses attempt to apply the label "expressive conduct" to all types of goods and services.[117] In those cases, there is no guarantee that the parties will simply stipulate away all dispute over the nature of whether the conduct at issue is expressive. Indeed, the fact that *303 Creative* rested on such comprehensive and crucial stipulations likely makes it an exceptionally easy case, compared with future cases that may require litigation and argument over these stipulated facts.[118]

### *B. Avenues for Further Discrimination*

Concerns over the Roberts Court's reliance on the right to free speech to strike down hosts of government laws and regulations did not begin with *303 Creative*. Referring back to an era where the Court struck down swaths of government regulations on the basis of a right to liberty of contract originating in the Fourteenth Amendment, critics refer to modern cases striking down laws on First Amendment grounds as a form of "First Amendment Lochnerism."[119] Jeremy Kessler identifies historical examples of the Court overturning laws on First Amendment grounds "the early years of First Amendment Lochnerism."[120] While the *303 Creative* Court attempted to characterize its holding as limited, this Subsection explores how it fits the mold of these Lochnerism critiques and may extend to a wide array of scenarios involving public accommodations laws.

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115. *See id.* at 591–92.

116. *See id.* at 581.

117. *See id.* at 639–40.

118. *See id.* at 581 (listing the stipulations to which Smith and Colorado agreed).

119. *See* Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1380 (2020) (introducing the phenomenon of First Amendment Lochnerism and parallels drawn by critics between the Court's modern First Amendment jurisprudence and the Court's decisions in the early 20th Century, including *Lochner v. New York*, 198 U.S. 45 (1905)). *See also* Sorrell v. IMS Health Inc., 564 U.S. 552, 603 (2011) (arguing that the Court's invalidation of a state law restricting the disclosure of prescribing information on First Amendment grounds threatened to "reawaken[] *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue").

120. *See generally*, Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

*1. Extending* 303 Creative*'s Logic to Racial Discrimination*

How might the Court's ruling in *303 Creative* pave the way for further discrimination against LGBTQ individuals and other members of protected classes? Sotomayor raises one possibility: there is nothing in the logic of the Court's ruling that prevents website designers like Smith from refusing to create wedding websites for interracial couples if the website designer objects to the notion of interracial marriage.[121] After all, preparing such a website would presumably be contrary to the website designer's "belief that marriage should be reserved to unions between one man and one woman [of the same race]."[122]

Nothing in the Court's reasoning suggests that a refusal to do business with other protected classes, including those of a certain race or sex, is precluded so long as the business can claim that doing business with members of these classes would implicate their expressive conduct in some way. Yet despite imposing no limitations addressing this scenario, the Court does little to address it. Beyond fretting over the dissent's overreliance on hypotheticals and arguing that the hypotheticals are not implicated in the facts of the present case, the Majority fails to respond to this critique.[123]

And why only race and sexual orientation? With no principled limitation to the scope of its holding, there is little in *303 Creative* that suggests any meaningful barrier to private business decisions to refuse service for people based on their sex or nationality. A bar may prohibit female customers out of the concern that serving women alcohol demonstrates approval of women being out on the town rather than caring for their children, or encouragement of sexual immorality.[124] Serving people from other countries may offend a xenophobic businessowner who is concerned that providing these services sends a message that immigrants are welcome in America. These refusals—based on businesses' and individuals' concern over the expressive implications of providing services to certain classes of people—may now be backed by the force of First Amendment protections under the logic of *303 Creative*.

121. *303 Creative*, 600 U.S. at 638–39 (Sotomayor, J., dissenting).

122. *Cf. id.* at 580.

123. *See id.* at 598–99.

124. *See* Elizabeth Sepper & Deborah Dinner, *Sex In Public*, 129 YALE L.J. 78, 86–96 (2019) (describing 1960s-era restrictions barring women from numerous types of businesses for these and other reasons).

*2. Broad Formulations of "Expressive Conduct"*

This leads into the next means by which *303 Creative* may extend to many more types of business: the potential for manipulation of the phrase, "expressive conduct," that purportedly limits the ruling. Recognizing that many states have similar public accommodations laws, the Court suggests that its ruling is limited as it applies only to those instances where public accommodations laws end up compelling speech or expressive activity.[125] The Court did not delve into the weeds of what makes content expressive—relying instead on the parties' stipulation that Smith's planned wedding websites would have been expressive conduct.[126] Accordingly, while the Court's prior case law delves into what makes content expressive, the 303 Creative Court did not clarify how precisely its prior doctrine on the subject applied.[127]

The dissent, however, took issue with this characterization, arguing that businesses like *303 Creative* were manipulating the notion of goods' and services' "expressive quality" to "exclude a protected group," a tactic that would "nullify public accommodations laws."[128] Indeed, the Court's reasoning, which equates the expression involved in developing a wedding website with the expression involved in developing a website critiquing the institution of same-sex marriage, does a fair amount of work toward an expansive reading.[129] Citing the petitioners' brief, the Court raises the prospect of a "male website designer married to another man to design websites for an organization that advocates against same-sex marriage."[130] But such a hypothetical is divorced from the facts before the Court. Smith was not asked to create a website advocating in favor of same-sex marriage, she was concerned about being asked to create a wedding website that happened to celebrate the union of a same-sex couple. By

125. *303 Creative*, 600 U.S. at 590–92.

126. *Id.* at 593–94.

127. *See, e.g.*, Spence v. State of Washington, 418 U.S. 405, 409–11 (1974) (calling for an analysis of whether conduct "was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," which requires evaluating the activity itself and the context in which that activity occurs); United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (rejecting the notion that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," but assuming that the conduct at issue in the case—burning a draft card—was "sufficient to bring into play the First Amendment").

128. *303 Creative*, 600 U.S. at 633 (Sotomayor, J., dissenting).

129. *See id.* at 590.

130. *Id.*

comparing such a task to a website that engages in political advocacy against gay people, Smith is suggesting that the mere recognition of a same-sex couple's wedding is speech in favor of same-sex marriage, thereby importing all of the argumentative force of speech on political issues and matters of public concern into her First Amendment claim.[131]

Such an argument makes sense if one looks to Justice Gorsuch's prior positions on the issue. Gorsuch, who authored the majority opinion in *303 Creative*,[132] wrote a concurring opinion in *Masterpiece Cakeshop*, in which Justice Alito joined.[133] There, Gorsuch set forth an expansive vision of what constitutes expressive conduct in the context of weddings, arguing that whatever the design, a wedding cake is inherently expressive:

> Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, [or] institution." It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith.[134]

Gorsuch goes on to assert that treating a wedding cake like any other cake is akin to suggesting "that for all persons sacramental bread is *just* bread or a kippah is *just* a cap."[135] With this context, it is little surprise that Gorsuch's majority opinion in *303 Creative* treats the creation of a website

131. *See* Virginia v. Black, 538 U.S. 343, 365 (2003) (recognizing "lawful political speech" as the "core of what the First Amendment is designed to protect"); Meyer v. Grant, 486 U.S. 414, 425 (1988) (stating that speech on political issues raised through initiative petitions is "an area in which the importance of First Amendment protections is 'at its zenith'"); R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (noting a "rough hierarchy in the constitutional protection of speech" in which "[c]ore political speech occupies the highest, most protected position"); Holder v. Humanitarian L. Project, 561 U.S. 1, 42 (2010) (Breyer, J., dissenting) (recognizing the "elementary" notion that "speech and association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection").

132. *303 Creative*, 600 U.S. at 577.

133. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 643 (Gorsuch, J., concurring).

134. *Id.* at 650 (Gorsuch, J., concurring) (internal citations omitted).

135. *See id.* at 653 (Gorsuch J., concurring).

for a same-sex wedding as the expressive equivalent of creating a website advancing political arguments against the notion of same-sex marriage.[136]

This is not to say that developing a wedding website is not an expressive act. But equating expression that tells the story of a couple's relationship, a wedding's location, and the dress code with political stances for or against same-sex marriage ignores nuanced distinctions between different types of expression and portrays expression related to weddings as political speech. This move did not go unnoticed by the dissent. Sotomayor notes that Smith's claim was that the First Amendment permits her to "refuse to sell *any* 'websites for same-sex weddings,' even though the company plans to offer wedding websites to the general public," a "categorical exemption" that Sotomayor argued should be rejected due to its "sweeping nature."[137]

Fueled by the *303 Creative*'s already broad approach to what conduct constitutes protected speech, businesses may feel emboldened to advance similarly broad definitions of "expressive conduct" in support of further litigation against public accommodations laws. Sticking with weddings, if it is already established that the simple act of creating a wedding website that happens to be for a same-sex couple constitutes expression in favor of same-sex marriage, a range of other businesses may refuse service as well simply on the grounds that providing services for a wedding between two people of the same sex constitutes a tacit endorsement of their union. Using this broader logic, a vendor need not claim that the particular good they develop or provide contains an expressive element—rather, the mere act of providing the good or service constitutes an endorsement of same-sex marriage. By this logic, those with colorable First Amendment objections to public accommodations laws may include not the already-litigated professions of website developers and bakers,[138] or the artistic expression of florists, photographers, and cellists, but also vendors who provide services as expressively inert (yet essential) as cutlery, tables, and guest seating.

Other businesses may join the fray. A restaurant may refuse to seat same-sex couples, out of concern that other customers who see gay couples eating at the restaurant will conclude that the restaurant condones their relationship. The same argument applies to a restaurant that disapproves of interracial relationships. Or perhaps all potential customers who happen to belong to a race which the restaurant owner believes are inherently inferior. Don't worry—same-sex couples, interracial couples,

136. *See 303 Creative*, 600 U.S. at 590.

137. *See id.* at 635 (Sotomayor, J., dissenting).

138. *See id. See generally also Masterpiece Cakeshop*, 584 U.S. 617.

and people of color may still order takeout for discrete pickup—so long as they refrain from flaunting their relationships or races to the extent that it contradicts the restaurant's desired message of intolerance.

As noted above, the Court has addressed the question of what makes conduct expressive in prior cases, looking to whether "[a]n intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[139] But the *303 Creative* decision provides no guidance on how to determine whether a business's conduct is expressive—a complicated question in a post-social-media world in which seemingly banal content may take on unpredictable expressive connotations.[140] Instead, because the case was based on stipulations and predictions over future conduct, the Court's determinations over expressive conduct were unargued and decided on the basis of party-provided hypotheticals rather than a pre-existing violation.[141]

*3. Discrimination on the Basis of Religious Exercise*

A less certain, but potentially significant, means by which private businesses may leverage the logic of *303 Creative* to discriminate against customers is by raising First Amendment free exercise claims, or Religious Freedom Restoration Act (RFRA) claims. In challenging Colorado's Anti-Discrimination Act, Smith and 303 Creative raised free exercise claims along with their free speech claims.[142] *Masterpiece Cakeshop* also involved both a free speech and free exercise challenge to the Act.[143]

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139. *See* Spence v. State of Washington, 418 U.S. 405, 410–11 (1974).

140. Mask usage in the wake of COVID-19 is an example, with politicization of the pandemic and safety measures leading to political protests over the wearing of facemasks. Steven Taylor & Gordon J.G. Asmundson, *Negative Attitudes About Facemasks During the COVID-19 Pandemic: The Dual Importance of Perceived Ineffectiveness and Psychological Reactance*, 16 PLoS ONE, no. 2 (Feb. 17, 2021) (describing anti-mask protest activities and how related sentiments connected to opinions over vaccination and other public health policies). *See also* Allen Smith, *Stop Employees from "Mask Shaming" Colleagues*, SHRM (Apr. 4, 2022), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/stop-mask-shaming.aspx [https://perma.cc/J4G2-8QWS] (discussing the phenomenon of "mask-shaming," in which those who wear masks are ridiculed or criticized).

141. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 589–90 (2023).

142. *See* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168 (10th Cir. 2021).

143. *See Masterpiece Cakeshop*, 584 U.S. at 629–31.

In *Masterpiece Cakeshop*, the petitioners argued that providing wedding-related services to a same-sex couple would run contrary to the petitioners' genuinely held religious beliefs, and that any legal requirement that they provide those services would violate the petitioners' religious freedom.[144] While the Court ruled in favor of the petitioners, it did so because those charged with enforcing the law exhibited hostility toward religion—leading the Court to characterize the case as an instance of discriminatory enforcement rather than a case where the law at issue was, itself, constitutionally defective.[145]

In *303 Creative*, Smith argued in the United States Court of Appeals for the Tenth Circuit that *Masterpiece Cakeshop* controlled because Colorado's Act posed more of a burden for religious businesses than secular businesses.[146] As an example, Smith argued that "although Colorado admits that a business is not required to design a website proclaiming 'God is Dead' if it would decline such a design for any customer, [Smith] must design a website celebrating same-sex marriage, even though [she] would decline such a design for any customer."[147] The Tenth Circuit ruled that Smith failed to demonstrate that the law disfavored religious speakers rather than favoring LGBTQ consumers.[148] Favoring LGBTQ consumers, however, did not establish that the state had targeted religious speakers, as Smith provided no evidence "that Colorado permits secularly-motivated objections to serving LGBT consumers."[149] When the case proceeded to the Supreme Court, the Court only addressed Smith's free speech claims.[150]

Neither *Masterpiece Cakeshop* nor *303 Creative* broached the potential conflict between public accommodations laws and religious freedom. For now, these cases remain governed by *Employment Division v. Smith*.[151] There, the Court took up a challenge by two former employees of the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment, who had been fired due to their use of peyote—the possession of which was a felony under Oregon law—and who were denied unemployment benefits because they had been disqualified for

144. *Id.* at 638–39 ("Phillips . . . contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion").

145. *Id.*

146. *303 Creative*, 6 F.4th at 1185.

147. *Id.* (internal citations omitted).

148. *See id.* at 1186 (arguing that the Act subjected religious objections to providing service to greater scrutiny than objections with a secular basis).

149. *Id.*

150. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 583–85 (2023).

151. *See* Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

"work-related 'misconduct.'"[152] The former employees argued that they took peyote for sacramental purposes in connection with their sincere religious beliefs as members of the Native American Church.[153] In previous cases, the Court had subjected laws applied in a manner that incidentally burdened religious exercise to a strict scrutiny analysis—sometimes finding in favor of the plaintiff,[154] and sometimes upholding the enforcement of the law.[155] The *Smith* Court took a different approach, holding that generally applicable laws that incidentally burdened the free exercise of religion did not run afoul of the First Amendment.[156]

Should courts follow *Smith*, they will likely conclude that public accommodations laws are "valid, neutral laws of general applicability" which are therefore not subject to scrutiny in the face of Free Exercise challenges.[157] Yet, *Smith* may not be long for this world. In an opinion concurring in the judgment in *Fulton v. City of Philadelphia*, Justice Alito, joined by Justices Thomas and Gorsuch, argued that *Smith* was "ripe for reexamination," setting forth examples of potential laws that could burden religious exercise, yet be permitted under *Smith*'s rubric.[158] Justices Barrett and Kavanaugh wrote their own concurrence, beginning their discussion with a paragraph suggesting that there were serious textual and

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152. *Id.* at 874.

153. *See id.*

154. *See* Sherbert v. Verner, 374 U.S. 398, 407–09 (1963) (overruling a determination that plaintiff, a Seventh-Day Adventist, was ineligible for unemployment benefits because she refused to accept employment at jobs that required her to work on Saturdays); Wisconsin v. Yoder, 406 U.S. 205, 218–19 (1972) (ruling in favor of Amish plaintiffs challenging a law requiring the compulsory education of children up to the age of 16).

155. *See* United States v. Lee, 455 U.S. 252, 258–60 (1982) (ruling that even though requiring Amish plaintiffs to pay social security taxes constituted a burden on their free exercise rights, the government's compelling interest behind requiring the tax left plaintiffs with "no basis for resisting the tax"); Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983) (rejecting religious university's challenge to adverse tax determination based on the university's refusal to permit interracial dating on religious grounds, finding that the government's interest in eradicating racial discrimination in education was compelling and that there were no less restrictive means available to achieve that interest).

156. *See Dep't of Hum. Res. of Or.*, 494 U.S. at 885.

157. *See* Rodney W. Harrell, *State Religious Free-Exercise Defenses to Nondiscrimination Laws: Still Relevant After Masterpiece Cakeshop*, 87 UMKC L. REV. 297, 301 (2019).

158. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883–84 (2021) (Alito, J., concurring).

structural arguments against *Smith*, although the historical record was "more silent than supportive" of arguments against *Smith*.[159] The remainder of the concurrence, in which Justice Breyer joined, noted that eliminating *Smith* would raise a host of questions, including what level of scrutiny would apply in cases burdening religion, and whether religious organizations and individuals would need to be treated differently.[160]

While *Smith* remains good law for now, statutes may strengthen businesses' case for challenging public accommodations laws on religious freedom grounds. The federal government passed the Religious Freedom Restoration Act (RFRA) three years after *Smith*, which "brought back the same sort of strict scrutiny model that had been jettisoned in Smith."[161] The Supreme Court soon held that RFRA was unconstitutional to the extent it applied to state law, as it was beyond Congress's power to pass such a restriction.[162] While this resulted in the federal RFRA statute's restriction to action by the federal government only, several states passed their own versions of RFRA to require strict scrutiny for laws that create a substantial burden for religious exercise.[163] In *Burwell v. Hobby Lobby*, the Court confirmed that closely-held corporations have an interest in the free exercise of religion for RFRA purposes, holding that the Affordable Care Act violated RFRA to the extent it required Hobby Lobby to provide its employees with healthcare coverage that included coverage for certain forms of contraception.[164]

This sets the stage for a conflict between businesses' rights to religious freedom and public accommodation laws that prohibit discrimination on the basis of sexual orientation. Rodney Harrell notes that eight states fit this description—with Connecticut, Illinois, New Mexico, and Rhode Island having passed statutes that require strict scrutiny for government action that burdens religious freedom, and Massachusetts, Minnesota,

159. *See id.* at 1882 (Barrett, J., concurring). Justice Breyer did not join in the first paragraph of this concurrence, although he joined the remainder of the opinion. *Id.*

160. *Id.* at 1882–83 (Barrett, J., concurring).

161. Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 471–72 (2010); Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb).

162. *See* City of Boerne v. Flores, 521 U.S. 507, 532, 535–36 (1997).

163. Lund, *supra* note 161, at 476–79.

164. *See* Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682, 703–04, 708, 736 (2014).

Washington, and Wisconsin interpreting their state constitutions to require "strict scrutiny similar to that required by many state RFRAs."[165]

Were the Court to begin recognizing religious objections to public accommodations laws—whether through overruling or narrowing *Smith* or through a federal or state RFRA statute—it could create a significant gap in legal protections for disadvantaged groups.[166] Defenders of the Court's *303 Creative* decision assert that the ruling would have been narrower had it been decided on free exercise grounds, as such a determination would require the assertion of a sincere religious belief in support of a desire to discriminate against potential customers.[167] While this characterization is accurate, its argumentative force derives from the assumption that *303 Creative* will not be extended into the realm of religious freedom—an assumption that is unlikely given ongoing efforts to employ the clause to attack laws including the one at issue in the *303 Creative* case.[168]

Bringing things back to *303 Creative*, one of its key limiting principles—the notion that a business or individual must be providing a good or service that constitutes expressive conduct—would not apply in cases involving free exercise claims. All that would be necessary would be a claim of a sincerely held religious belief that precludes providing service to the protected class at issue.[169] Because courts refuse to entangle

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165. Harrell, *supra* note 157, at 298.

166. *See* Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171, 173 (2019) ("The central aim of civil rights law is to protect members of vulnerable groups from the harms of structural injustice; that vital project would be undermined by a broad carve out for religious dissent.").

167. *See, e.g.*, *A Huge Win for the First Amendment*, NAT'L REV. (June 30, 2023, 5:01 pm) https://www.nationalreview.com/2023/06/a-huge-win-for-the-first-amendment/ [https://perma.cc/797H-5VEL] (arguing that because *303 Creative* was not decided on religious liberty grounds, its holding is "more broadly applicable, as it does not require business owners to prove that their objections are specifically religious").

168. *See* Howard Gillman & Erwin Chemerinsky, *The Weaponization of the Free-Exercise Clause*, THE ATLANTIC (Sept. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/09/weaponization-free-exercise-clause/616373/ [https://perma.cc/7JY4-ENA3]; Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 629–31 (2018); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168 (10th Cir. 2021).

169. *See Burwell*, 573 U.S. at 724 (noting that the Court cannot examine whether a plaintiff's belief in a RFRA case is flawed or reasonable); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981) (in the context of a claim for unemployment benefits after an employee terminates employment due to a claim that religious beliefs preclude the work required, the "narrow function

themselves with the inner working of religious groups or their doctrines, courts do not to consider whether the religious belief is reasonable or if a business's or individual's interpretation of their particular religious doctrine is a valid one.[170] Accordingly, plaintiffs in free exercise suits would not need to demonstrate expressive conduct and would need only demonstrate that being required not to discriminate against certain customers is contrary to their sincerely held religious beliefs—thereby avoiding one of the primary limits the *303 Creative* Court emphasizes.[171]

## IV. CONSTITUTIONALLY SUSPECT CLASSES: A LIMITING PRINCIPLE?

The prospect of speech-based racial discrimination poses concerns for potential extensions of *303 Creative*. But the Court's existing case law suggests that where discrimination strays from anti-LGBTQ behavior and into race-based exclusions, interests in preventing discrimination become so significant that the force of free speech interests runs out. Here, one may find a potential argument for limiting the scope of the Court's *303 Creative* ruling.

In *Bob Jones University v. United States*, the Court confronted a university policy prohibiting interracial dating and marriage among students, which the university had promulgated based on what the Court deemed to be its genuinely religious beliefs.[172] The IRS had denied the university's tax-exempt status on the grounds that the school was engaging in racial discrimination, and the university argued that this violated its Free

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of a reviewing court . . . is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.").

170. *See* Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). *See also* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969) (ruling that lower court's examination of whether a religious belief departed from a particular doctrine "require[d] the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion," and that "[p]lainly, the First Amendment forbids civil courts from playing such a role").

171. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023).

172. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580–81 (1983). The school had previously "completely excluded" Black people from admission up until 1971 but revised its policy after a Fourth Circuit decision that prohibited private schools from excluding students based on race. *Id.* at 580.

Exercise rights.[173] As the Court had not yet decided *Employment Division v. Smith*, it applied a stringent level of scrutiny to the government's action, noting that the state "'may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'"[174] The Court concluded that the government had a compelling interest in "eradicating racial discrimination in education," which had "prevailed, with official approval, for the first 165 years of this Nation's constitutional history."[175] The Court further held that the university's free exercise interests "cannot be accommodated with that compelling government interest" and that there were no less restrictive means available to achieve the interest.[176]

Mark Killenbeck flags *Bob Jones University* as an example of the Court grappling with the issue of whether religious beliefs that are, themselves, discriminatory may be invoked to refuse service to consumers.[177] Killenbeck argues that while the Court's ruling provides some cursory discussion of the issue, it is "not at all clear" that it addresses the issue of "whether government can 'devalue[] religious reasons for declining [a] request' to provide services and whether 'religious beliefs . . . [can be] discriminatory in and of themselves.'"[178] Despite this disconnect, Killenbeck thinks it highly unlikely that the Court "will sanction religiously motivated discrimination on the basis of race."[179]

While *Bob Jones University* and Killenbeck's discussion all concern free exercise rights, the discussion suggests a potential answer to hypotheticals like those raised by the *303 Creative* dissent and this Article in which businesses refuse to serve customers on the basis of race, so long as they have expressive reasons for doing so.[180] Even if the Court recognizes that First Amendment interests may be undermined by public accommodations laws that forbid discrimination based on race, the interest in preventing discrimination in public accommodations may be so profound that violation of free speech or free exercise rights may be

173. *See id.* at 602–03, 605.

174. *Id.* at 603 (quoting United States v. Lee, 455 U.S. 252, 257–58 (1982)).

175. *Id.* at 604.

176. *Id.*

177. *See* Killenbeck, *supra* note 28, at 792–93.

178. *Id.* at 793 (citing Brief for Petitioners at 43, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018) (No. 16–111)).

179. *See* Killenbeck, *supra* note 28, at 793.

180. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 639 (2023) (Sotomayor, J., dissenting).

outweighed by the interest of preventing racial discrimination.[181] Preventing racial discrimination may be so significant a government interest that it may override countervailing First Amendment claims.

But such an approach raises the question of whether government interests in shielding protected groups from discrimination extends beyond racial discrimination. *303 Creative* suggests that there are limits on protected classes, as the interest in protecting gay people from discrimination by private businesses is not enough to overcome those businesses' free speech interests.

One possible answer may be to take a more permissive approach to public accommodations laws that protect groups recognized as "suspect classes" in equal protection cases. Despite the Fourteenth Amendment's Equal Protection Clause, state actors may generally treat groups of people differently so long as there is a rational basis for doing so.[182] But there is a small group of exceptions to this general rule. Classifications based on "race, national origin, citizenship, parents' marital status, and sex" are deemed "suspect" classifications and subjected to heightened scrutiny.[183] This is because these classifications are deemed "presumptively invidious," making it "appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."[184] One potential limit on *303 Creative* could be that state public accommodations laws that prohibit discrimination based on these constitutionally founded suspect classes should overcome First Amendment challenges by businesses and individuals who claim that serving these classes of people violates their free expression rights.

Existing precedent suggests that the legal groundwork for such an approach is already in place. While *Bob Jones University* dealt with religious free exercise claims, its logic, which relied on the compelling government interest in eradicating racial discrimination, could be extended to First Amendment claims as well. In *Roberts v. U.S. Jaycees*, the Court upheld a Minnesota law that "prohibit[ed] gender discrimination in places of public accommodation" in the face of a First Amendment

181. *See* Killenbeck, *supra* note 28, at 793 (noting that the United States made this argument in its brief in *Masterpiece Cakeshop*).

182. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482–83, 489 (2004). *See also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 207 (2008) (Scalia, J., concurring) (recognizing poverty and disability as examples of non-suspect classifications).

183. *See* Daniel Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1290 (2018).

184. Plyler v. Doe, 457 U.S. 202, 216–17 (1982).

challenge by a private organization, the Jaycees, that had sought to exclude women from holding full voting membership positions in the organization.[185] To be sure, the First Amendment right at issue was the freedom of expressive association rather than freedom of speech.[186] Still, the *Roberts* Court's reasoning may well apply to cases involving claims that free speech rights permit discrimination on the basis of sex, as the Court noted that the Minnesota law protected people from discrimination "based on archaic and overbroad assumptions," and the deprivations of dignity and lost benefits to society that such discrimination caused.[187] The court concluded that Minnesota had advanced these interests "through the least restrictive means of achieving its ends," and that the Jaycees had failed to demonstrate how requiring women to hold full voting membership roles would impose "any serious burdens on the male members' freedom of expressive association."[188] The First Amendment challenge to Minnesota's public accommodations law therefore failed.[189]

Even if we accept that public accommodations laws limited to constitutionally recognized suspect classes deserve stronger consideration in the face of free speech challenges, this raises the question of what level of constitutional scrutiny ought to be applied to public accommodations laws in such cases. In a classic First Amendment case involving a content-based law restricting freedom of speech, courts tend to apply strict scrutiny—requiring that the government's restriction be narrowly tailored to advance a compelling interest—so long as the speech at issue doesn't fall into one of several narrow categories of unprotected speech.[190]

The analysis is not so clean in public accommodations cases. Recall that in the *Roberts* case above, the Court noted that the State had advanced its compelling interest in preventing discrimination against women "through the least restrictive means of achieving its ends."[191] But subsequent cases striking down public accommodations laws took a more absolutist approach. In *Hurley v. Irish-American Gay, Lesbian and*

185. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 613–16, 625–26 (1984).

186. *See id.* at 617–18.

187. *See id.* at 625.

188. *Id.* at 626.

189. *See id.* at 628–29, 631.

190. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); United States v. Stevens, 559 U.S. 460, 468–69 (2010) (describing the categories of unprotected speech).

191. *See Roberts*, 468 U.S. at 613–16, 625–26.

*Bisexual Group of Boston*, the Court did not discuss whether Massachusetts' public accommodations law was narrowly tailored to further a compelling government interest. Instead, the Court framed Massachusetts' law, when applied in the context of a parade, as having no other object than "simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own."[192] The Court framed this as "nothing less than a proposal to limit speech in the service of orthodox expression," a notion flatly at odds with the First Amendment.[193] As for precedent in which restrictions had been upheld, the Court dismissed those as not resulting in meaningful restrictions on free speech—as the shopping mall in one case was not likely to be associated with the speech of people handing out handbills, and as a dining club subject to a public accommodations law remained free to turn away those with contrary expressive views.[194] Those cases, as *Hurley* characterized them, were not so much instances where restrictions on speech passed strict scrutiny as they were cases where the rights to free expression and association were not meaningfully infringed in the first place.

Moreover, in *Boy Scouts of America v. Dale*, the Court acknowledged its holding in *Roberts*, but emphasized that there had been no proof of "serious burden" on expressive association in that case.[195] Surveying prior cases in which the Court had upheld public accommodations laws, it stated that "in th[o]se cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other."[196] It then relied on *Hurley*, which it claimed "applied traditional First Amendment analysis," which it relied upon to address the application of public accommodations laws to the Boy Scouts' exclusion of a gay assistant scoutmaster.[197] Despite casting the *Hurley* approach as "traditional," and despite rejecting an "intermediate standard of review" urged by Dale, the Court did not go on to identify a level of scrutiny, discuss compelling interests, or analyze how narrowly the law was tailored.[198] As in *Hurley*, the Court stated that retaining Dale as an assistant

192. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 578 (1995).

193. *See id.* at 579.

194. *See id.* at 579–81 (discussing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) and N.Y. State Club Ass'n, Inc. v. City of New York., 487 U.S. 1 (1988)).

195. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657–59 (2000).

196. *Id.* at 658–59.

197. *See id.* at 659.

198. *Id.* at 659–61.

scoutmaster "would significantly burden the organization's right to oppose or disfavor homosexual conduct," and concluded that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[199] Nowhere in its opinion did the Court state what those interests were or whether they were compelling.

This opaque analysis leaves courts in a lurch when it comes to scrutinizing public accommodations laws that prohibit discrimination based on constitutionally suspect classes. One possible solution is that the absolutist approach of *Hurley* and *Dale* may be avoided in cases involving these suspect classes, as *Bob Jones University* and *Roberts* both involved such classes, and both employed something looking more like scrutiny analysis. Alternatively, courts may seize on language in *Dale*, stating that "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other," and conclude that the scale must balance in favor of the State when First Amendment claims are advanced with a goal of excluding constitutionally recognized suspect classes from receiving goods or services.[200] Either of these approaches may avoid some of the tougher potential applications of *303 Creative*—particularly those hypotheticals involving interracial marriages.

But beyond confusion over how to merge the doctrines of constitutional suspect classifications and the First Amendment implications of public accommodations laws, a broader argument against relying on constitutional suspect classes in curtailing the scope of challenges to public accommodations laws, is the inflexibility of constitutional suspect class doctrine. Constitutional suspect classes are limited to only those five groups the Court has recognized in its prior decisions as suspect.[201] The Court has shown little willingness to expand this small list of suspect classes.[202] Kenji Yoshino ties this reluctance to "pluralism anxiety," a notion not dissimilar from the concerns discussed in the preceding Section:

> Many Americans view civil rights as an endless parade of groups clamoring for state and social solicitude. Even traditional liberals decry the nation's "balkanization," calling us back to the ideals of

199. *Id.* at 659.

200. *See id.* at 658–59.

201. *See* Peterman, *supra* note 183, at 1290 (identifying these classes as "race, national origin, citizenship, parents' marital status, and sex").

202. *See* William D. Araiza, *After the Tiers:* Windsor, *Congressional Power to Enforce Equal Protection, And the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 385–86 (2014).

integration and assimilation.

> The jurisprudence of the United States Supreme Court reflects this pluralism anxiety. Over the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress's capacity to protect groups through civil rights legislation. The Court has repeatedly justified these limitations by adverting to pluralism anxiety. These cases signal the end of equality doctrine as we have known it.[203]

Even the Supreme Court's decisions striking down laws targeting gay people and upholding same-sex marriage have not gone so far as to recognize sexual orientation as a suspect classification.[204] In *Romer v. Evans*, the Court took up an equal protection challenge to an amendment to Colorado's state constitution, which prohibited treatment of homosexual and bisexual people as minorities deserving of any protected status.[205] The Court did not reach the question of whether sexual orientation was a protected class, as it held that the amendment failed to have any rational relation to a legitimate end—the most deferential level of scrutiny required under the Equal Protection clause, and one which did not require a suspect class determination to apply.[206] In *Lawrence v. Texas*, the Court struck a Texas law criminalizing sodomy.[207] The Court declined to review the law on Equal Protection grounds—striking it down as a violation of substantive due process instead—and therefore avoided the question of whether sexual orientation was a suspect class.[208] In *Obergefell v. Hodges*, the Court used a hybrid approach employing both the due process and equal protection analysis to strike down state laws prohibiting same-sex marriage.[209] In doing so, however, the Court did not recognize LGBTQ people as a suspect class.[210]

*Obergefell* was a landmark decision, but the Court's failure to recognize sexual orientation as a suspect class is a glaring omission in the

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203. Yoshino, *supra* note 16, at 748.

204. *See* Max Isaacs, *LGBT Rights and the Administrative State*, 92 N.Y.U. L. REV. 2012, 2019–21 (2017).

205. *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996).

206. *See id.* at 631–32.

207. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

208. *See id.* at 574–75, 578–79.

209. *See* Obergefell v. Hodges, 576 U.S. 644, 672–73, 675 (2015).

210. *See id.*

Court's analysis.[211] Peter Nicholas argues that the Court's failure to recognize sexual orientation as a suspect class has caused harm to LGBTQ people, and that this harm will persist in the form of legal uncertainty and attempts at discriminating against LGBTQ people in contexts other than the right to marry.[212] This failure provides compelling support for Kenji Yoshino's claim that the "canon has closed" on the development of suspect classifications.[213]

Should the Court's designation of suspect classifications remain stagnant, it will remain a limited and inflexible constraint on First Amendment challenges to public accommodations laws. To be sure, it is not a meaningless limit—indeed, I suspect this is how disputes involving First Amendment objections to serving interracial couples will be resolved should that scenario come to pass. But while a limitation based in constitutionally suspect classes may help resolve some of the most extreme cases that may result from *303 Creative*, it remains of little use to those who fall outside of these classes, including those who face discrimination on characteristics such as "age, disability, and sexual orientation."[214]

## V. A MIDDLE GROUND: TAKING A PROPORTIONAL APPROACH

In light of the unsatisfactory solution of countering First Amendment challenges to public accommodations laws by resorting to the constitutional law of suspect classifications, this Part proposes an alternative solution of balancing rights claims rather than adopting a winner-take-all approach. Drawing on work by Jamal Greene, I argue that *303 Creative* exemplifies a categorical approach to rights claims—a winner-takes-all approach where the Court's perceived options are to come down entirely on the side of the right to be free of discrimination or the right to free expression. A more nuanced approach to the issue may lead to outcomes that respect both rights—although doing so requires those approaching the dispute to look past extremes and reconceptualize the scope of rights.

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211. *See* Megan M. Walls, *Obergefell v. Hodges: Right Idea, Wrong Analysis*, 52 GONZ. L. REV. 133, 141 (2017) ("By failing to apply, or even discuss, sexual orientation as a suspect class, the Court has left open other questions involving LGBT rights.").

212. *See* Peter Nicolas, *Obergefell's Squandered Potential*, 6 CAL. L. REV. 137, 142 (2015).

213. Yoshino, *supra* note 16, at 757.

214. *See id.* at 756.

*A. The Problem of Categorical Rights Claims*

Jamal Greene begins his Harvard Law Review Foreword, *Rights As Trumps?*, with a discussion of *Masterpiece Cakeshop*.[215] One framing of the dispute presents the customers, Charlie Craig and Dave Mullins, as individuals with rights claims precluding the bakery owner, Jack Phillips, from refusing to sell cakes to them "simply because they are gay men," while Phillips asserts an expressive right that he cannot be compelled to produce art against his will.[216] Under this framing, "Phillips has his rights, so do Craig and Mullins, and, crucially, so do the people of the State of Colorado in whose name its public accommodation law speaks. This is a portrait of rights on all sides, reconcilable only at retail, if at all."[217]

An alternate framing presents a "darker portrait, a legal *Guernica* cluttered with slippery slopes, law school hypotheticals, and assorted horribles on parade."[218] Greene notes the hypotheticals the justices raised in oral argument, with Justice Gorsuch asking whether Colorado law "would require a baker to sell a cake with a cross on it to a member of the Ku Klux Clan," while Justice Alito asked if the "law could force the baker to provide a cake honoring the anniversary of *Kristallnacht*."[219] These questions, Greene argues, reflect "a portrait of rights on one side, bad faith on the other, and powerful disagreement about which is which. This conflict is reconcilable only at wholesale, and without mercy to the loser."[220]

Greene observes that the latter approach is based in a "noble instinct" that balancing rights "against the public good is to deny them altogether."[221] The approach dates back generations, exemplified by Justices Holmes's and Harlan's competing dissents in *Lochner v. New York*.[222] This absolutist approach represents the approach Justice Holmes adopted in his *Lochner* dissent.[223] But Greene goes on to suggest that this approach to framing rights "creates many problems for constitutional law," including difficulties in application to the myriad scenarios that may arise in a complex legal system, tortured definitions of rights and their scope that result from absolute treatment, and an overly adversarial

215. *See* Greene, *supra* note 17, at 31.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 31–32.
220. *Id* at 32.
221. *Id.*
222. *See id.* at 56–57.
223. *Id.*

approach to rights disputes that requires the denial of rights on one side—leading to increased polarization and requiring the parties to argue from extreme positions.[224] Greene surveys arguments over antidiscrimination claims, social and economic rights, abortion, school integration, and Second Amendment rights, and observes that this absolute or "categorical frame" of rights pervades these disputes.[225] He notes common themes in how these disputes are adjudicated:

> First, the Court resorts casually to slippery slope, hypothetical arguments to silence claims made in the here and now, as in disparate impact and positive rights cases. Second, the Court struggles to reconcile potential rights conflicts with existing doctrinal architecture, as in the abortion area. Third, the Court maintains thin heuristics to temper its entry into complex social problems, as in the school integration context. Finally, the Court adopts a romantic vision of doctrinal simplicity and coherence, as in *Heller*.[226]

Over thirty years ago, Mary Ann Glendon critiqued the absolute framing of rights as well, noting that the notion that one's rights "trump[] everything else in sight" pervades rights discourse in the United States even though, in reality, these rights frequently conflict, and these conflicts are routinely resolved.[227] Tracing the origin of these claims back to America's founding and that era's absolutist rhetoric regarding property and other rights, Glendon argues that this longstanding habit of speaking about rights absolutes left Americans with little in the way of conceptualizing harm to rights as time went on.[228] Owen Fiss notes similar issues with a "libertarian view" of the right to self-expression, and argues that an approach to the First Amendment that frames strong rights of people against the government "is unable to explain why the interests of speakers should take priority over the interest of those individuals who are discussed in the speech, or who must listen to the speech, when those two sets of interests conflict."[229] Fiss describes an "impasse" in cases involving state regulation of hate speech, arguing that "liberals have been divided,

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224. *See id.* at 32–34, 70–79.

225. *See id.* at 43–56.

226. *Id.* at 56.

227. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 19–20 (1991).

228. *See id.* at 20–25.

229. *See* OWEN FISS, THE IRONY OF FREE SPEECH 2–3 (1996).

almost at war with themselves, some favoring liberty, some equality."[230] Alex Loehndorf adds to the chorus of critiques, describing how emotional investment along with misinformation about the nature of constitutional rights makes constitutionalized disputes over competing rights claims particularly extreme, toxic, and dangerous to democracy.[231]

An absolutist approach to rights disputes has become pervasive in the wake of the "rights explosion" that has gone on for "half a century and counting."[232] During that time, the diversity of rights has increased and the rights themselves have become more competitive, leaving courts to struggle with reconciling "a diverse, unpredictable array of conflicting, important, and deeply felt individual and group interests with the government's existential interest in governing."[233] Extreme arguments and polarized politics are the result.[234]

Summarizing the arguments of the parties in *Masterpiece Cakeshop*, Greene paints a picture that is strikingly similar to the interplay between the Majority and Dissent in *303 Creative*.[235] A victory for the same-sex couple in *Masterpiece Cakeshop*:

> would mean that "the compelled speech doctrine would cease to exist," that the Thirteenth Amendment would be violated, and that the government could "compel attendance at religious rituals." It could disbar Christian lawyers and strip Christian doctors of their medical licenses. It could force Jehovah's Witness children to salute the flag, or force Virginia Baptists to pay to support mainstream Christian teaching. It would be consistent with the Spanish Inquisition, akin to forcing Christians to bow before Roman gods, to forcing Jews to submit to the golden statue of Nebuchadnezzar, to the beheading of Sir Thomas More for refusing to affirm the annulment of Henry VIII's marriage to Catherine of Aragon and sign the Oath of Succession confirming Anne Boleyn's place as Queen of England.[236]

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230. *Id.* at 15.

231. *See* Alexander Loehndorf, *Rights Talk and Constitutional Emotivism*, 2023 CANADIAN J. L. & JURIS. 1, 24–27 (2023).

232. *See* Greene, *supra* note 17, at 78.

233. *Id.* at 78–79. *See also* Loehndorf, *supra* note 231, at 22–24 (describing how "constitutional emotivism," defined as "the conflation of moral disagreements with constitutional rights grievances" has expanded and given rise to a ungrounded competing claims of absolute rights).

234. Greene, *supra* note 17, at 78–79; Loehndorf, *supra* note 231, at 22–24.

235. *See* Greene, *supra* note 17, at 80–81.

236. *Id.*

But a victory for the baker would "likewise be dismal (though perhaps not equally so) according to the briefs in support of the couple":

> Arguments of Phillips's sort have been used "to justify anti-miscegenation laws" and "school segregation." "Landlords could refuse to rent to interracial couples, employers could refuse to hire women or pay them less than men, and a bus line could refuse to drive women to work . . . . " "[A] racist baker could refuse to sell 'Happy Birthday' cakes to African-American customers, a screen printer could refuse to sell a banner announcing a Muslim family's reunion, and a tailor could refuse to sell a gay man a custom suit for a charity gala." "[A] family portrait studio could enforce a 'No Mexicans' policy. A banquet hall could refuse to host events for Jewish people. A hair salon could turn away a lesbian woman who wants a new hair style" or refuse to help a teenage girl prepare for her quinceañera out of opposition to Mexican immigration.[237]

Were Greene not writing five years before the Court's *303 Creative* opinion, it would be easy to confuse his portrayal of the *Masterpiece Cakeshop* parties' and amici's claims with the arguments in play in *303 Creative*.

The dynamic between First Amendment rights and the rights of LGBTQ people illustrates the absolutist treatment of rights that Greene critiques. Luke Boso describes the "tension between liberty and equality" as an "old yet active fault line that shakes and disrupts our social norms, laws, and the very nature of our public discourse.[238] Boso argues that this tension exists in the context of LGBTQ rights as a result of the Court carving out exceptions to antidiscrimination laws on First Amendment grounds, highlighting the Court's decisions in *Hurley* and *Dale*.[239]

Critiques of categorical rights claims should be distinguished from notions of First Amendment absolutism. Justice Hugo Black, for example, summed up his approach to free speech rights by stating that the First Amendment's statement that "Congress shall make no law" abridging the freedom of speech or the press is an absolute ban and that "I believe that 'no law' means no law."[240] Black suggested that the notion of unprotected

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237. *Id.* at 81.

238. Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 353 (2021).

239. *See id.* at 376–79.

240. Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962). *See also* Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960) (describing the Constitution's

categories of speech like libel, obscenity, and fighting words should be rejected, and strongly opposed the use of "balancing tests" to determine whether speech falls outside of the First Amendment's protections.[241] An absolutist approach like Black's is both deep and broad, and while it carries some of the characteristics of the categorical approach by eschewing balancing analysis, it avoids the tendencies of that approach to avoid potential extreme outcomes by developing curtailed, and sometimes contorted, pictures of the scope of the First Amendment's protection.[242]

Alexander Meiklejohn takes an absolute approach to First Amendment protections that looks more like the categorical approach—arguing that First Amendment rights cannot be overridden in situations where those rights are exercised in connection with the activities of governance, such as voting, education, literature, and "public discussions of public issues."[243] While Meiklejohn presents this approach in an article titled, *The First Amendment is an Absolute*, he dismisses seeming contradictions in his absolutist approach by noting that "there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment," including "'libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, [and] conspiracy.'"[244] This qualification distinguishes Meiklejohn's approach from that of stronger absolutists like Black, who take issue with the tests used to define these unprotected forms of speech and argue for a far broader range of First Amendment protections.[245] But it is closer to the absolutism characterized by *303 Creative* and related disputes—where the analysis boils down to an absolute recognition of the state's interest in

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"absolute guarantees of individual rights"). *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (arguing that the First Amendment should be read to bar all libel suits arising from criticism of the "government, its actions, or its officials").

241. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36, 66–67 (1961) (Black, J., dissenting).

242. *See* Greene, *supra* note 17, at 33–34, 70–79.

243. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 S. CT. REV. 245, 256–57 (1961). Meiklejohn makes this point elsewhere as well, noting that the absolute language of the First Amendment "admits of no exceptions" and "[t]o say that no laws of a given type shall be made means that no laws of that type shall, under any circumstances, be made." ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 20 (1960).

244. MEIKLEJOHN, *supra* note 243, at 258 (quoting *Konigsberg*, 366 U.S. at 49).

245. *See Konigsberg*, 366 U.S. at 63–64 (Black, J., dissenting).

preventing discrimination, or the absolute recognition of a business's or individual's right to free speech.

### *B. Categorical Rights Claims in the Court's Public Accommodations Cases*

While Greene does not discuss the Court's decisions in *Bob Jones University*, *Roberts*, *Hurley*, or *Dale*, these cases all bolster his case that the modern Court applies a categorical approach to rights disputes.[246] As discussed previously, the Court's approach to the clash between the right of access and First Amendment claims tends to involve little meaningful balancing of interests.[247] In cases ruling in favor of laws requiring nondiscrimination, the Court reached its decision by both noting the compelling government interest in avoiding discrimination, while simultaneously downplaying the notion that speech rights were burdened in any meaningful way. In *Bob Jones University*, for example, the Court emphasized the "compelling" interest in "eradicating racial discrimination in education," and concluded that this interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs," without delving into the nature of those interests or the burden of the denial of benefits.[248] The Court stated that those interests "cannot be accommodated with that compelling governmental interest," and concluded, without analysis, that no less restrictive means were available to achieve the interest in eradicating discrimination.[249] The Court was even more explicit in *Roberts*, finding not only that the state had a compelling interest in "[a]ssuring women equal access to . . . goods, privileges, and advantages," but that the Jaycees had "failed to demonstrate that the [Public Accommodations] Act imposes any serious burdens on the male members' freedom of expressive association."[250] In both of these cases, the Court found in favor of the state by minimizing the asserted speech rights of the organization challenging the non-discrimination laws, an approach consistent with the categorical approach to rights that Greene critiques.[251]

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246. *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

247. *See supra* notes 181–90 and accompanying text.

248. *See Bob Jones Univ.*, 461 U.S. at 604.

249. *Id.*

250. *Roberts*, 468 U.S. at 626.

251. *See* Greene, *supra* note 17, at 33–34.

Despite such a one-sided approach in cases rejecting First Amendment claims against non-discrimination laws, the Court takes a similar categorical approach in the opposite direction when ruling in favor of those challenging public accommodations laws. In *Hurley*, the Court acknowledged that Massachusetts' public accommodations law, "[o]n its face," served the objective of ensuring that gays and lesbians who wanted to use public accommodations would "not be turned away merely on the proprietor's exercise of personal preference."[252] But in the context of applying this law to bar parade organizers from turning away a group of gay, lesbian, and bisexual Irish-Americans, this interest shifted from an anti-discrimination purpose to one of "requir[ing] speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own."[253] With this framing, the government's position is easy to reject, and the Court does so emphatically:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.[254]

This approach, which emphasizes the speech interests of the parade organizers while casting the government's interest as little more than seeking to enforce its own views and opinions, demonstrates the tendency of a categorical rights approach to maximize one rights claim while downplaying or ignoring any interests to the contrary.

In *Dale*, the Court took a subtler approach, albeit one that is still consistent with the categorical rights approach. There, the Court distinguished contrary cases like *Roberts* as instances where organizations' First Amendments were not burdened in any meaningful way—unlike the case before it, which involved a burden on the Boy Scouts' right of expressive association.[255] While suggesting that "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other," the Court did little in the way of weighing either interest—instead citing its decision in *Hurley*,

252. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 578 (1995).

253. *Id.*

254. *Id.*

255. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 658–59 (2000).

asserting that enforcing the public accommodations law would "significantly burden the organization's right to oppose or disfavor homosexual conduct," and concluding that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[256] Nowhere in this analysis does the Court explicitly describe the State's interest, and nowhere does the Court elaborate on why the burden on the Boy Scouts' expressive rights is as "severe" as the Court claims. While the *Dale* Court was not as explicit in its one-sided analysis as it was in *Hurley*, this approach to the dispute—coupled with its explicit reliance on *Hurley* throughout the analysis—strongly suggests that the categorical approach is once again at work.

This brings us to *303 Creative*, a case that brings the categorical approach to a head. The discussion above illustrates how the Court's opinion fits into the categorical reasoning that Greene critiques.[257] At the outset of its analysis, the Court pays lip service to the government interests in play, noting its previous recognition "that governments in this country have a 'compelling interest' in eliminating discrimination in places of public accommodation."[258] But this compelling interest is quickly replaced by a story of expanding government power—with Colorado and other states passing public accommodations laws prohibiting discrimination on the basis of sexual orientation.[259] And after a brief survey of its opinions in *Hurley* and *Dale*, the state's interest becomes not one of anti-discrimination, but the conscription of private business owners "to disseminate the government's preferred messages," an outcome that "would spell [the] demise" of the First Amendment.[260] The *303 Creative* Court bolsters this rhetoric with horror stories of the implications of a contrary decision, including compelled Zionist films, atheists being forced to paint evangelical murals, and gay website developers being forced to make websites for organizations advocating against same-sex marriage.[261] Gone is any discussion seeking to balance the State's interest in preventing discrimination against the speech interests of website designers. Indeed, that interest is all but forgotten in the Court's overwhelming focus on Smith's speech interests and the prospects of Colorado using public

256. *Id.* at 659.
257. *See supra* Part III.
258. 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023).
259. *See id.* at 590–92.
260. *See id.* at 592.
261. *See id.* at 589–91. *See also supra* Part III (discussing and critiquing the Court's reliance on hypotheticals).

accommodations laws to enforce its preferred orthodoxy.[262] With such a framing, how could any other outcome be possible?

Some may disagree with this characterization of the *303 Creative* case. William Dailey, for example, mirrors the Court's reasoning by repeating the Majority's claim that a contrary rule would "force a man married to another man to design a website *opposing* same-sex marriage," and describing the dissent's hypotheticals as "quite misleading" in light of Smith's stipulation that she would provide services to gay people "in all ways but those that would require her to create speech that she disagreed with."[263] As Dailey portrays it, "while she would decline to create a lesbian couple's wedding site, she would happily work with them on their business site."[264] In response to backlash about the decisions likely consequences, Dailey asserts that "nothing in the opinion suggests that the proverbial lunch counter may now be closed to L.G.B.T. people" and describes the Court's ruling as "narrow."[265]

Interestingly, Dailey invokes Greene's scholarship on rights, and favorably cites his "prudent guidance" against absolutism and that courts should resolve rather than escalate conflicts.[266] How this applies to *303 Creative* is unclear. Indeed, Dailey references Greene after describing backlash to the *303 Creative* decision, suggesting that he may hold the dissenting justices or critics of the opinion at fault for engaging in rights absolutism.[267] Dailey goes on to compare *303 Creative* to a separate, unanimous ruling in *Groff v. DeJoy*, which involved a dispute over a federal postal worker's request for a religious accommodation.[268] Dailey concludes his article with the following summation:

> The court unanimously followed the path of engaging one another as neighbors rather than litigants in *Groff*, but it was divided on how to do so in *303 Creative*. That means we will continue to have the challenge, and the opportunity, to learn to be more hospitable to those with whom we differ. Rights like free speech, after all, are only meaningful when we recognize them for people with whom we disagree, sometimes passionately. People may also

262. *303 Creative*, 600 U.S. at 589–91.

263. *See* Dailey, *supra* note 11.

264. *Id.* One could just as easily state that "Smith stipulated that she would provide the service of creating wedding websites to all customers other than those who happened to be gay." But that wouldn't be as good for the argument.

265. *Id.*

266. *Id.* (citing Greene, *supra* note 17).

267. *Id.*

268. *Id.* (discussing Groff v. DeJoy, 143 S. Ct. 2279 (2023)).

> differ about whether pressing one's right in a given instance is obligatory or wise. We may find in considering such a path of conciliation that graces abound for us, as they did for that anonymous woman of Shunem and the great prophet Elisha.[269]

On one reading, Dailey appears to be invoking Greene's critique of rights absolutism to chide the dissent and critics of the Court's *303 Creative* ruling for raising the temperature of the dispute. If that is his point, then this entire Article demonstrates why such a claim is misplaced. An alternative, more charitable reading is that one must keep Greene's message in mind in a post-*303 Creative* world. If this is what Dailey is getting at, his invocation of Greene's reasoning in an article that fails to acknowledge the *303 Creative* Court's absolutist approach is puzzling. But bringing Greene's work into the picture is a move worth making. I now turn to how Greene's reasoning has a place in discussions of *303 Creative* and how similar rights disputes may be adjudicated in a more nuanced and context-sensitive manner.

### *C. An Alternative: Proportionality*

At the outset of this Part, I introduced Jamal Greene's portrayal of framing rights disputes as categorical disputes—a framing that results in an all-or-nothing tendency of resolving rights claims, devaluing one side of the dispute in favor of the other, and creating confusing accounts of the scope of rights as new conflicts arise. Greene goes on to offer an alternative approach in which courts take a proportional approach to rights disputes.

Greene contrasts the categorical approach to rights claims with a "proportionality" framing of rights, which involves "a structured approach to limitations on rights."[270] Greene writes that this approach is best "understood as a transsubstantive analytic frame, a kind of intermediate scrutiny for all, that is designed to discipline the process of rights adjudication on the assumption that rights are both important and, in a democratic society, limitable."[271] Rather than treat a finding that one side's rights simply trump the rights of others, recognition of rights on all sides and of the conscious weighing of each side's claims against the other is a more favorable approach. Greene argues that this approach will "force litigants and their fellow citizens to match their claims to *this* world, and

269. *Id.*
270. *See* Greene, *supra* note 17, at 58.
271. *Id.*

to acknowledge the mutual and legitimate presence within it of others who hold contrary values and commitments."[272]

The seeds of this approach to rights proportionality can be found throughout the literature analyzing the tension between public accommodations laws and the First Amendment. Enrique Armijo proposes a version of "Faint-Hearted First Amendment Lochnerism," acknowledging the Court's willingness to strike down laws on free speech grounds, but suggests boundaries for First Amendment rights originating in private law—arguing that the "First Amendment should not stand in the way of government compulsions of speech where a failure to disclose that same information would be a basis for private law liability."[273] Armijo draws on a number of examples from civil law and applies them to laws and regulations regarding fraud, compelled disclosure, and informed consent requirements.[274]

This approach, however, does not cleanly apply to public accommodations laws—a scenario in which "the government is affecting speech in ways only it can."[275] Armijo suggests that while such laws will be subject to First Amendment scrutiny, the interest in eradicating discrimination will likely be compelling enough to justify interference with the right to free speech—although the government will be required to act "as narrowly as possible to achieve its goal."[276] While this characterization is conclusory and, in the case of the discrimination against sexual orientation, ultimately disproven by *303 Creative*, it hints at a balancing of interests that is absent from the case law.

Discussing *Bob Jones University* and *Roberts*, David Bernstein frames the *Bob Jones* and *Roberts* outcomes as instances in which "a state's interest in eradicating discrimination can trump a constitutional right."[277] Bernstein expresses skepticism over the outcome in *Roberts*, noting that federal law did not prohibit public accommodations discrimination on the basis of sex and referred only to a state's "purportedly compelling" interest to "overrid[e] a federal right"—an outcome that Bernstein characterizes as bizarre.[278] While Bernstein is skeptical to the outcome in *Roberts*, his critique contains the skeleton of a proportionality approach—albeit one applied in a questionable manner. Bernstein's argument may be

272. *Id.* at 82.
273. Armijo, *supra* note 119, at 1399.
274. *See id.* at 1400–15.
275. *See id.* at 1429–30.
276. *See id.* at 1430.
277. *See* David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 163–64 (1999).
278. *See id.* at 164.

supplemented by suggesting that a right of access based in federal law has more democratic legitimacy—as a majority of lawmakers representing people from across the country, rather than a single state, would need to reach a consensus that such a statutory right is required.

A proportionality approach in a case like *303 Creative* would delve into the interests on both sides and avoid outcome-oriented mischaracterizations and hypotheticals. This is not to say that reasoning from hypotheticals is off-limits. Indeed, doing so remains essential for parsing out the interests at issue by comparing them with alternate scenarios. For example, determining the level of the free speech interests in *303 Creative* would involve a comparing the magnitude of the free speech interest behind preparing a wedding website for a same-sex couples with alternate hypotheticals, like preparing a business website for that same couple, or preparing a website advocating in favor of same-sex marriage for that same couple. Smith's own admissions suggested that her speech interests are minimal or nonexistent in the case of the business website, as she stipulated that she was "'willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender,' and she 'will gladly create custom graphics and websites' for clients of any sexual orientation."[279]

But what if those clients "of any sexual orientation" sought to make a website espousing the virtues of same-sex marriage? Smith claims that she "will not produce content that 'contradicts biblical truth' regardless of who orders it," which, combined with her "sincerely held religious conviction" that "marriage is a union between one man and one woman" suggests that this would be contrary to what she wishes to express.[280] Smith would arguably have a stronger speech claim in a case like this, compared with a case where she was making some generic business website, because the speech at issue is political speech—which the Court recognizes is at the core of First Amendment protections.[281]

This context helps inform an inquiry into Smith's speech interests in *303 Creative*. Preparing a wedding website for a same-sex couple is expressive conduct—it involves speech, such as how the couple met, what they do for a living, where they live, and when the wedding will be, for example. But it's a logical leap to hold this speech equivalent to the expressive conduct of preparing a website making political arguments in favor of same-sex marriage. While Smith stipulated that her wedding websites would be "expressive in nature" and that the websites would

279. 303 Creative LLC v. Elenis, 600 U.S. 570, 582 (2023).
280. *See id.*
281. *See* discussion *supra* note 127.

"express Ms. Smith's and 303 Creative's message celebrating and promoting' her view of marriage," this is not so much a stipulation of fact as it is to a legal conclusion regarding the level of Smith's speech rights.[282]

To pause the proportionality analysis for a moment, one may argue that creating a wedding website for a couple of any race or gender makeup constitutes a political statement in favor of that particular form of marriage. But this argument is questionable. For one, much, if not all, of the wedding website's speech will originate not with the website developer but with the couple themselves, who will provide the information on how they met, what they do, where they live, where the wedding will be, and whether the dress code will be white-tie, black-tie, formal, cocktail, semi-formal, festive, casual, tropical, themed, come as you are, business casual, or clothing-optional.[283] And does everything on the website bear Smith's seal of tacit approval? If the couple requires a white-tie or black-tie dress code, is Smith endorsing events that are overly formal and alienating to normal people? If the wedding is in a red state or a blue state, is Smith agreeing to the politics of the location? And, God forbid, what sort of speech is Smith advancing if the wedding is themed? If it's a Disney wedding, is Smith advocating a Disney Adult lifestyle?[284]

And even if one grants the assumption that creating a wedding website for a same-sex couple expresses some level of approval for the institution of same-sex marriage, there still seems to be a meaningful difference between the implied approval of a wedding website and the explicit approval of that form of marriage through a political advocacy site. Accordingly, even if one grants Smith's claim that her creation of a wedding website for a same-sex couple would send a message of approval regarding same-sex marriages, the infringement of her speech interests is of a lower degree than the alternate scenario of a same-sex couple asking for a website making political arguments in favor of same-sex marriage.

Getting back to the proportionality discussion, proportionality also requires consideration of the government's interest as well. This means no longer minimizing or ignoring the interest of eliminating discrimination as the Court did in *Hurley* and *Dale*. But it also means no minimizing or ignoring the interest of those challenging the law, as the Court did in *Roberts* and *Bob Jones University*. To be sure, those interests may be

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282. *See 303 Creative*, 600 U.S. at 582.

283. *See* Jen Glantz, *Every Wedding Dress Code Explained*, BRIDES (June 1, 2023), https://www.brides.com/story/wedding-dress-code-explained [https://perma.cc/UGC4-E6RC] (where I got most, but not all, of these dress code labels).

284. *See* Deanna Schwartz, *For some adults who love Disney, it's like a religion*, NAT'L PUB. RADIO (June 11, 2022), https://www.npr.org/2022/06/11/1104056661/disney-adults [https://perma.cc/NZ55-GJHY].

generally abhorrent, such as the sincere belief that "the Bible forbids interracial dating and marriage."[285] But to the extent that abhorrent beliefs are implicated in a rights dispute, there's a fair probability that the interest in preventing discrimination will be even stronger.[286]

Jamal Greene suggests how a proportionality approach may be used to address the dispute in *Masterpiece Cakeshop*, arguing that a court "could have imposed a duty on Phillips to provide a custom cake—or its equivalent—to Craig and Mullins."[287] Phillips could have hired a sous chef or a subcontractor who could have prepared the cake behind the scenes.[288] Alternatively, Greene suggests that wedding ceremonies themselves be treated as fundamentally different from other activities that may be subject to public accommodations laws, given the inherently expressive nature of weddings.[289] Greene acknowledges these are not perfect solutions—couples may still suffer harm to their dignity by being relegated to a subcontractor or suffering speech-based discrimination to the extent their wedding is concerned—but the balancing of the interests may still be preferable to an extreme, categorical approach that ultimately recognizes one side's claim as absolute with the other side's claim as virtually nonexistent.[290]

And consider how the proportionality analysis would change the Court's framing of the dispute in *303 Creative*. Rather than portraying the case as a government seeking to impose a preferred orthodoxy to force a businessowner to speak in a certain way, the analysis would require a dive into the interests on both sides. For Smith, such an approach would recognize that she does have speech interests in play and would acknowledge her concern over the message her website would send about her views on same-sex marriage. At the same time, this approach would distinguish the expressive act of creating a wedding website from alternate actions like Smith creating her own website professing her views on the issue of same-sex marriage or being required to create a website espousing the moral, political, and religious legitimacy of same-sex marriage—actions that would implicate her speech interests to a greater degree.

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285. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983).

286. This may lead to outcomes that track constitutionally protected classes, although the case-by-case nature of proportionality analysis allows the Court to be more flexible in weighing interest than is permitted under the set-in-stone categories of constitutionally suspect classes.

287. Greene, *supra* note 17, at 162.

288. *Id.*

289. *Id.*

290. *See id.* at 162–63.

The approach would also look to context, including the fact that Smith is not a random citizen forced into sending a message by a malicious government, but a citizen who decided to get into the wedding website business with full knowledge that laws now permit same-sex people to get married. This is not to say that Smith's assumption of the risk that consumers would seek out a same-sex wedding completely negates her right to free speech, but it may undermine the strength of Smith's speech claims. And unlike the *303 Creative* Court's analysis, a proportional analysis of the dispute would recognize the government's interest in preventing discrimination against groups who have faced historical discrimination—particularly in Colorado.[291] Rather than pay hasty lip service to the interest without considering whether it is compelling or how it stacks up against Smith's speech claims, a proportional analysis will look into historical and contemporary discrimination against LGBTQ people and how this factors in to the strength of the state's countervailing interests.[292]

This discussion and these examples highlight only several aspects of the nuanced analysis that proportionality brings to rights disputes. To be sure, a wholesale adoption of this approach could lead to the complication or elimination of clear constitutional rules. But to the extent that these rules tend to be based on overly abstract, extreme reasoning characteristic of categorical framing, this change may be welcome. As Greene argues:

> Mediating rights would mean shifting our collective emphasis from whether the Constitution includes particular rights to what the government is actually doing to people and why. Courts should devote less time to parsing the arcane legalisms—probes of original intentions, pedantic textual analysis, and mechanical application of precedent—that they use to discriminate between

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291. *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996).

292. An analysis of contemporary trends will reveal that things look pretty dire. *See* Dustin Jones & Jonathan Franklin, *Not just Florida. More than a dozen states propose so-called "Don't Say Gay" Bills*, NAT'L PUB. RADIO (Apr. 10, 2022, 7:01 AM), https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills [https://perma.cc/X9FB-FYFT]; Jo Yurcaba, *With over 100 anti-LGBTQ bills before state legislatures in 2023 so far, activists say they're "fired up"*, NBC NEWS (Jan. 14, 2023, 7:50 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/100-anti-lgbtq-bills-state-legislatures-2023-far-activists-say-fired-rcna65349 [https://perma.cc/JKU2-HHQD]; Annette Choi & Will Mullery, *19 states have laws restricting gender-affirming care, some with the possibility of a felony charge*, CNN (June 6, 2023, 3:10 PM), https://www.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html [https://perma.cc/24QM-FTVM].

> the rights they think the Constitution protects and the ones they think it doesn't and spend more time examining the facts of the case before them: What kind of government institution is acting? Is there good cause grounded in its history, procedures, or professional competence to trust its judgments? What are its stated reasons? Are those reasons supported by evidence? Are there alternatives that can achieve the same ends at less cost to individual freedom or equality? Knowing that courts will ask these kinds of questions makes other government actors ask them, too, as they craft their own policies and structure their own behavior. It makes rights recognition and enforcement a shared enterprise, one that is of, by, and for all the people and not just the judges.[293]

Critics may argue that all of this discussion over proportionality is misguided, because situations like that in *303 Creative* do not involve competing rights claims. Businesses and individuals subject to public accommodations laws have such a claim, as they're invoking their right to free speech. But the government, in passing laws prohibiting discrimination on the basis of identified protected classes, does not have a similar set of rights claims, as it is ultimately unaffected by discriminatory practices and, as a government, cannot be deemed to hold rights.

This approach takes too narrow of a view of constitutional disputes over public accommodations laws. Public accommodations laws are not properly viewed as conflicts solely between a business and the government, as these laws are only "invoked when an individual seeks access to an establishment and the proprietor tries to prevent his entrance."[294] This implicates the right of individuals to "be free from discriminatory practices when they participate in the marketplace," or a "right of access," with longstanding roots in the common law.[295] Public accommodations laws define and, in some cases, expand the scope of this right of access by prohibiting discrimination against consumers by a wider

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293. Greene, *supra* note 17, at xx.

294. *See* Lauren J. Rosenblum, Note, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. Rev. 1243, 1249 (1997).

295. *See* Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 368 (2015) ("Individuals have a right to be free from discriminatory practices when they participate in the marketplace."). *See generally* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) (discussing the history and evolution of the common law right of access).

range of businesses.[296] It is therefore proper to view constitutional litigation over public accommodations laws as a conflict between the individual right of access and businesses' right of free speech.

Critics may also take issue with the proportionality approach by arguing that it gives too much power to judges and Justices to determine the scope of rights. Eric Segall critiques Greene's proposal approach by arguing that such an approach cedes too much power to unelected judges and Justices:

> [T]he real problem is that federal courts just make too many important decisions. Adding more factors, flexible balancing tests, and warm rhetoric about competing rights by the Justices would likely just push these issues to the lower courts and not to local and national politics, where they truly belong.[297]

Under Segall's approach, "[w]here the constitutional text is unclear, and the history contested, judges should stay out of major political controversies, not inject more subjective judicial factors into them."[298]

Segall's arguments against expansive judicial review and the redistribution of power to other branches are far more extensive than those set forth in his critique of Greene and can only be addressed briefly here.[299] To start, though, caution is warranted when critiquing judicial review in favor of pushing disputes over rights into other branches of government.

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296. *See* Rashmi Dyal-Chand, *Autocorrecting for Whiteness*, 101 B.U. L. REV. 191, 238 (2021) ("Since as early as the enactment of the Civil Rights Act of 1866, statutory and case law has articulated a clear right of access that overrides the rights of owners of public accommodations to exclude individuals on the basis of race and other protected classes."); Michael J. Klarman, *The Plessy Era*, 1998 S. CT. REV. 303, 307 (1998) ("Additional civil rights legislation enacted in the 1870s solidified protection for the suffrage, as well as forbidding race discrimination in jury selection and guaranteeing blacks equal rights of access to common carriers and public accommodations."); Pamela Griffin, Comment, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 PAC. L.J. 1047, 1047–48 (1985); *but see* Singer, *supra* note 295, at 1292–93 (arguing that the historical evidence is "not at all clear" on whether the "common law always limited the duty to serve the public to innkeepers and common carriers").

297. Eric J. Segall, *The Battle Over Rights Is the Problem But Judges Are Not the Solution*, 37 CONST. COMMENT. 171, 180 (2022).

298. *Id.* at 181.

299. *See, e.g.*, ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012) (arguing that the Supreme Court decides cases on the basis of ideological preferences rather than law and arguing for reforms to reduce the Court's power).

Segal favors returning many hot-button rights disputes "to the states and having them decided locally," claiming that keeping judges out of "major political controversies" will "facilitate more healthy discussion among both our citizens and elected officials."[300] This claim, however, minimizes democratic shortcomings at the state and local level—where gerrymandering and turnout issues may result in state and local policies that are not representative of the community.[301] In light of the unrepresentative nature of state and local governments, it is less clear how much less representative court determinations are than government policies.

More fundamentally, though, it is unclear how moving from an absolutist approach to rights disputes to a proportional approach independently results in greater power to the judiciary. Segall's critique draws its force from extensive judicial review practices and the notion that the judiciary has the final word in rights disputes. These are different issues from how rights disputes themselves are adjudicated, and it is unclear how courts taking a more proactive stance to recognizing both sides of a dispute and considering more factual circumstances increases courts' overall power. Indeed, the alternative is for courts to simply hang their hats on a winner-take-all rule and decide in favor of a party on the basis of little more than this determination. If courts are required to go through more analytical hoops in a proportional analysis, this at least forces them to set forth claims on all sides and address relevant facts and interests that may render the ultimate outcome less extreme. While this may not solve problems of courts' disproportionate power over rights disputes, it may lead to more nuanced and thought-out determinations by courts.

## CONCLUSION

If we are to take the Court at its word, *303 Creative* is a limited opinion that will have minimal implications for public accommodations laws. But the Court's own reasoning gives us ample reason to doubt it. In the face of a Colorado law prohibiting discrimination on the basis of sexual orientation in providing goods and services, the Court implied that

300. *See* Segall, *supra* note 297, at 179, 181.

301. *See* ZOLTAN L. HAJNAL, AMERICA'S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS 24, 42–43 (2010) (describing low turnout rates in local elections and how turnout rates vary by race); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1759–62 (2021) (describing barriers to representation at the level of state legislatures, such as winner-take-all rules and gerrymandering).

penalties for discrimination in the provision of same-sex wedding services would lead to a world of atheists forced to make evangelical murals and gay people forced to develop homophobic websites.[302] To be clear, Colorado's Anti-Discrimination Act did not prohibit discrimination on the basis of film content or homophobia. And were it to do so, it would be a content-based restriction on speech deserving of strict scrutiny from the outset.

These inconvenient facts did not stop the Court from relying on overwrought hypotheticals and mischaracterizations of the State's interest to reach its decisions. In doing so, the Court signaled that its opinion may apply to cases beyond the scope of the case before it. And the Court's rush to rely on such flawed argumentation should prompt us to take the Court's assurances that its opinion is limited with more than a grain of salt.

*303 Creative* has the potential to disrupt a host of public accommodations laws. Expansive claims of expressive conduct and extending First Amendment claims to justify racial discrimination are only two examples of what the Court's logic permits. Should the Court take up religious freedom as a further basis for invalidating public accommodations laws, the boundaries of constitutionally shielded discrimination will continue to grow.

But there are limits the Court may impose. A minimalist Court may rely on suspect classes it has identified in Equal Protection cases to keep First Amendment claims from justifying attempts to discriminate based on race or sex. Such an approach, however, is stagnant—relying on an inflexible, limited number of suspect classes ill-suited for evolving prejudices. Instead, courts ought to seriously consider a proportionality approach to adjudicating rights claims—delving into the intricacies of claimed expressive interests, the state's interests in preventing discrimination, and the context in which each dispute plays out. Doing so may lead to a less absolutist approach to rights disputes, mitigate distortion in setting out the scope of rights, and move discussions over rights violations away from the divorced, abstract realm of legal theorizing to somewhere closer to reality.

302. 303 Creative LLC v. Elenis, 600 U.S. 570, 590 (2023).