DESTABILIZING THE RELATIONSHIP BETWEEN STATUS, CONDUCT, AND MESSAGE: A *303 CREATIVE* CASE ANALYSIS

Danielle King[*]

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[*] J.D. Candidate, May 2025, Rutgers Law School–Camden.

I. INTRODUCTION

Five years after dodging the major questions in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[1] the Supreme Court took another stab at reconciling First Amendment protections with public accommodations laws in *303 Creative LLC v. Elenis*.[2] With a newly minted conservative supermajority, the Court sided with petitioner Lorie Smith, a Christian[3] website designer who refused to make wedding websites for same-sex couples.[4]

Many commentators decried the decision, fearing it would severely weaken public accommodations laws.[5] Justice Sotomayor, joined by two of her colleagues in dissent, lamented 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."[6] However, there is reason to believe the decision is quite narrow. The case was decided on free speech grounds, relying heavily on the parties' stipulations that Smith's services are "expressive."[7] The Court noted that "the First Amendment extends to all persons engaged in *expressive conduct*, including those who seek profit (such as speechwriters, artists, and website designers)."[8] On the other hand, "expressive conduct" appears broader than Smith's case, which, according to the Court, involved "pure speech."[9] Moreover, the Court cited cases that did not involve pure speech but rather "expressive association."[10]

All this raises the question of what constitutes expressive conduct or activity worthy of First Amendment protection. Unfortunately, the Court fails to provide clear answers.[11] Because the Court relied on the parties' stipulations, there was no need to engage in extensive analysis on this

1. *See generally* 584 U.S. 617 (2018).
2. 600 U.S. 570 (2023).
3. 303 Creative LLC v. Elenis, No. 16-cv-02372-MSK-CBS, 2017 WL 4331065, at *2 (D. Colo. Sept. 1, 2017).
4. *303 Creative*, 600 U.S. at 579–80, 603.
5. *See*, *e.g.*, Andrew Koppelman, *Why Gorsuch's Opinion in* '303 Creative' *Is So Dangerous*, AM. PROSPECT (July 12, 2023), https://prospect.org/justice/2023-07-12-gorsuch-opinion-303-creative-dangerous/; 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.
6. *303 Creative*, 600 U.S. at 603 (Sotomayor, J., dissenting).
7. *Id.* at 594 (majority opinion).
8. *Id.* at 600 (emphasis added).
9. *Id.* at 587.
10. *Id.* at 586 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000)).
11. Solcyré Burga, *The Implications of Supreme Court's* 303 Creative *Decision Are Already Being Felt*, TIME (July 16, 2023, 12:32 PM), https://time.com/6295024/303-creative-supreme-court-future-implications/.

question. There are two related threads to this question that I seek to unravel in this Note. The first is that the Court mistakenly defines the product and service in relation to a protected trait. The second is the extent to which the Court misconstrues existing precedents that sought to reconcile public accommodations laws with the right to free speech. Part I explores the procedural history of the case, including how a small factual record was developed before making its way to the Supreme Court of the United States. Part II provides an overview of the status-conduct distinction, which is a common theme in LGBTQ rights cases, and helps partially explain the disagreement between the majority and dissent in *303 Creative*. Part III explains how the Court adjusts the status-conduct distinction in this case to a status-message distinction, thus entitling Smith to First Amendment protection. In Parts IV and V, I explain how the Court treats gay couples as inherently political in such a way as to guarantee the First Amendment is implicated, and how this maneuvering in turn destabilizes the traditional balance struck by courts between equality and civil liberties.

II. BACKGROUND

Lorie Smith is a website designer who wanted to expand her business to make websites for couples getting married.[12] However, she lives in Colorado, where discrimination on the basis of sexual orientation in public accommodations is prohibited.[13] Smith, who is Christian, claimed that making a wedding website for a same-sex couple would violate her religious beliefs.[14] Wanting to provide her services to the public but not wanting to be in violation of the law, Smith brought a case in federal court challenging the constitutionality of the Colorado statute.[15]

Smith specifically sought a preliminary injunction against Colorado's public accommodations law,[16] challenging the constitutionality of two specific provisions: the "Accommodations Clause"[17] and the

12. 303 Creative LLC v. Elenis, No. 16-cv-02372-MSK-CBS, 2017 WL 4331065, at *2 (D. Colo. Sept. 1, 2017).

13. *Id.* at *1; COLO. REV. STAT. § 24-34-601(2)(a) (2017).

14. *303 Creative*, 2017 WL 4331065, at *2–3.

15. *Id.* at *1, *3.

16. *Id.* at *1.

17. *See* § 24-34-601(2)(a) ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . ."). "Gender identity" and "gender expression" were added as protected

"Communication Clause."[18] The two provisions are closely related. The former prohibits discrimination on the basis of certain characteristics in places of public accommodation, while the latter prohibits places of public accommodation from posting notices saying they will refuse to serve certain customers based on those characteristics. In addition to not wanting to make wedding websites for same-sex couples, Smith wanted to post a notice on her website informing potential customers of her objection.[19]

Smith challenged the statute on multiple grounds, including Free Speech, Free Exercise, Equal Protection, and Due Process.[20] However, the district court initially refused to decide the case on the merits because of the similarities to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which the Supreme Court had just taken up.[21]

After the Court handed down its decision in *Masterpiece Cakeshop*, the district court denied Smith's request for a preliminary injunction.[22] The 10th Circuit affirmed, albeit under different logic. The majority of the appellate court found the case involved compelled speech, but that Colorado's law nevertheless satisfied strict scrutiny.[23] The court sided against Smith on both her religious and free speech claims.[24]

After working its way through the courts, the case eventually made it to the Supreme Court. However, unlike in *Masterpiece*, the Supreme Court granted certiorari not on the religious freedom claims, but instead on free speech grounds.[25] The Court framed the question: "Whether

characteristics to both clauses in 2021. 2021 Colo. Sess. Laws 888 (amending COLO. REV. STAT. § 24-34-601(2)(a)).

18. *See* § 24-34-601(2)(a) ("It is a discriminatory practice and unlawful for a person . . . directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.").

19. *303 Creative*, 2017 WL 4331065, at *2–3.

20. *Id.* at *1.

21. *Id.* at *6–7 (denying Smith's motions with leave to renew after a decision is reached in *Masterpiece* because of the "striking" factual and legal similarities between the two cases).

22. 303 Creative LLC v. Elenis, 385 F. Supp. 3d. 1147, 1164 (D. Colo. 2019).

23. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1181–82 (10th Cir. 2021).

24. *Id.* at 1190.

25. *Cf.* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 640 (2018) ("Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality.").

applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."[26]

The case's procedural posture effectively erased, or at the very least minimized, the interests of the gay community. No gay couple was denied a wedding website by Smith.[27] In fact, Smith never made any wedding website.[28] As a result, there was no face to the potential harm Smith's denial of service would cause.[29] Moreover, the absence of a developed factual record meant the courts had to rely on the parties' stipulations. As one scholar explained: "This was not a case in which the parties developed a full discovery record and then agreed to stipulate to key factual findings that the record clearly supported."[30] Instead, "this was a case in which the parties agreed not to develop a factual record on those key questions at all."[31]

The lack of a factual record meant the case effectively acted as a Rorschach test. The majority could see it as a compelled speech case, while the dissent could see it as a classic discrimination case.

26. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (mem.).

27. *See 303 Creative*, 2017 WL 4331065, at *2.

28. *Id.* Many commentators questioned whether Smith even had standing to bring her claim. *See, e.g.*, Mark Joseph Stern, *The Easy-to-Miss Twist That Makes the Supreme Court's New Gay Rights Case So Strange*, SLATE (Dec. 5, 2022, 6:15 PM), https://slate.com/news-and-politics/2022/12/303-creative-gay-rights-free-speech-supreme-court.html (arguing "[t]here is no live controversy"). This question is ultimately outside the scope of this Note. Notwithstanding, for an extensive discussion of why the Court had standing to hear the case, see Richard M. Re, *Does the Discourse on* 303 Creative *Portend a Standing Realignment?*, 99 NOTRE DAME L. REV. REFLECTION 67, 68 (2023) (arguing that "under existing caselaw, the Court had ample authority to reach the merits").

29. Buried in Smith's court filings was a gay couple named Stewart and Mike who supposedly requested a wedding website from Smith and were denied. Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, NEW REPUBLIC (June 29, 2023), https://newrepublic.com/article/173987/mysterious-case-fake-gay-marriage-website-real-straight-man-supreme-court. Shortly before the decision was handed down, a reporter at *The New Republic* reached out to Stewart, only to be told that he was in fact married to a woman, had children, and never asked Smith for a wedding website. *Id.* Although this reporting raises more questions than it answers, this mystery does not appear to have had any effect on the actual decision. Chris Geidner, 303 Creative: *What We Talk About When We Talk About the Wedding Website (That Isn't)*, LAW DORK (July 6, 2023), https://www.lawdork.com/p/303-creative-preliminary-matters.

30. Tobias Barrington Wolff, 303 Creative *and Constitutional Law by Stipulation*, REGUL. REV. (July 24, 2023), https://www.theregreview.org/2023/07/24/wolff-303-creative-and-constitutional-law-by-stipulation/.

31. *Id.*

III. THE TRADITIONAL STATUS-CONDUCT DISTINCTION

One way to (partially) explain the discrepancies between the majority and the dissent is that the Court struggles with how and whether to delineate between status and conduct. For the majority, the case is not about status-based discrimination. In its version of events, Smith does not deny service to someone because of their status, i.e., sexual orientation; rather, Smith objects to same-sex marriage, and that forms the basis of her refusal.[32]

Of course, the conduct and status—same-sex marriage and sexual orientation—are naturally connected.[33] During oral arguments, the Deputy Solicitor General, in support of Colorado's position, observed that "[t]here are certain rare contexts where status and conduct are inextricably intertwined, and I think the Court has rightly recognized that same-sex marriage is one of them."[34] He compared the situation to Justice Scalia's famous archetype: "A tax on yarmulkes is a tax on Jews."[35] The logic follows that refusing service based on conduct that is inextricably intertwined with status amounts to a status-based refusal. Applying this logic to the public accommodations context, if same-sex marriage is inextricably intertwined with sexual orientation, then a refusal to serve someone for marrying another of the same sex equates to a refusal based on sexual orientation.

The status-conduct distinction is a familiar one within the legal history of gay rights.[36] The military's Don't Ask, Don't Tell Policy

32. Gorsuch relies heavily on the parties' stipulations in this regard. 303 Creative LLC v. Elenis, 600 U.S. 570, 594–95, 598 (2023).

33. Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 252 (2023); *see also* Craig Konnoth, *Discrimination Denials: Are Same-Sex Wedding Service Refusals Discriminatory?*, 124 COLUM. L. REV. 2003 (2024) ("Status does not exist in a vacuum but is constituted through conduct-including coming out, engaging in intimate conduct, marching in pride parades, and choosing whether to love and to whom to express that love.").

34. Transcript of Oral Argument at 126, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

35. *Id.* (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)). For a thoughtful discussion on how one should read *303 Creative* through the lens of *Bray*, see Amy J. Sepinwall, *The Conduct-Status Connection and Expressive Wedding Vendor Cases*, 70 WAYNE L. REV. 245, 246–48 (2024).

36. Yoshino, *supra* note 33, at 251 ("The LGBTQ+ community has encountered this distinction between status and conduct before."). This is not to suggest the distinction is cabined to LGBTQ rights. Take Justice Scalia's famous refrain that a "tax on wearing yarmulkes is a tax on Jews." *Bray*, 506 U.S. at 270. He reasoned "when an institution targets activities that are 'engaged in exclusively or predominantly by a particular class of people,' then 'an intent to disfavor that class can readily be presumed.'" Ian Millhiser, *A New Supreme Court Decision Has Ominous Implications for LGBTQ Discrimination*, VOX (June 21, 2022, 4:50 PM) https://www.vox.com/2022/6/21/23177110/supreme-court-lgbtq-maretta-hospital-davita-medicare-brett-kavanaugh-elena-kagan (quoting *Bray*, 506 U.S. at

("DADT") exemplified this distinction.[37] In 1991, then-presidential candidate Bill Clinton pledged to sign an executive order ending sexual orientation-based discrimination in the military.[38] Clinton hoped gay individuals would be able to serve openly.[39] However, upon assuming office, he was faced with stiff opposition from Congress and military leaders.[40] Eventually, DADT emerged as a compromise.[41] Under DADT, service members would no longer be asked questions about their sexual orientation; however, these service members would also have to keep their sexual orientation private.[42] In theory, the military was not discriminating against status, i.e., sexual orientation, but rather against conduct. Gay people were allowed to serve, but conduct associated with homosexuality was prohibited.[43]

A. Supreme Court Precedent

The status-conduct distinction has made multiple appearances in the Court's gay rights jurisprudence. In 1986, the Supreme Court in *Bowers v. Hardwick* upheld a Georgia statute criminalizing sodomy.[44] The statute was neutral on its face, criminalizing sodomy regardless of the

270). *Bray* itself had nothing to do with yarmulkes. Instead, the case concerned protestors obstructing access to abortion clinics. *Bray*, 506 U.S. at 266. In a later case, Justice Kagan wrote a dissenting opinion, invoking *Bray*'s yarmulke tax language and landmark LGBTQ rights cases to explain why Medicare should not be able to deny coverage for outpatient dialysis in light of a federal prohibition against differentiating benefits between individuals with regard to the existence of end stage renal disease. Marietta Mem'l Hosp. Emp. Health Benefit Plan v. DaVita Inc., 596 U.S. 880, 888–90 (2022) (Kagan, J., dissenting). Kagan emphasized that "[o]utpatient dialysis is an almost perfect proxy for end stage renal disease." *Id.* at 889.

37. Yoshino, *supra* note 33, at 251–52; *see also* Agnes Gereben Schaefer et al., *The History of "Don't Ask, Don't Tell," in* SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY 39, 43–44 (2010).

38. Schaefer et al., *supra* note 37, at 41.

39. *Id.* at 43.

40. *Id.* at 42.

41. *Id.* at 43.

42. *Id.*

43. Of course, this distinction was difficult in practice. In one of the first cases after the policy's enactment, a servicemember declared she was gay while at a political rally. *Id.* at 49. A military tribunal recommended her discharge, but she argued on appeal that the policy only targeted conduct and thus her statement "was not an admission that she practiced or intended to engage in same-sex acts." *Id.* A three-member board agreed that her public statement declaring she was a lesbian did not violate DADT, and the Chief of Naval Personnel affirmed the decision. *Id.* at 49–50. The decision suggested servicemembers could be gay so long as they did not "act" on it. General counsel for the Defense Department quickly closed this "loophole." *Id.* at 50.

44. 478 U.S. 186, 187–89, 196 (1986).

gender of the participants.[45] Despite the neutral language of the statute, the majority had an "almost obsessive focus on homosexual activity."[46] Five justices upheld the law, expressing their unwillingness to recognize a "fundamental right to engage in homosexual sodomy."[47] As one scholar explained, "[t]he 'nonpracticing' homosexual is, for purposes of the United States Constitution, an innocent homosexual."[48] At the time, it was not understood that *Bowers* was imposing "legal penalties for merely *being* a homosexual," assuming that person "refrained from acting on or 'practicing' her homosexuality."[49]

This distinction was unstable from the very beginning. Justice White, writing for the majority, alternatively describes the right at issue as "a fundamental right to engage in homosexual sodomy" as well as a "fundamental right to homosexuals to engage in acts of consensual sodomy."[50] On its face, the former is neutral. It only addresses conduct; there is no indication that any class is targeted since no one possesses this right. The latter, on the other hand, naturally raises a critical question: If gay people lack a fundamental right to engage in consensual sodomy, do straight people possess this right? The different phrasing is likely unintentional. The very next sentence again fixates on conduct, stating, "Proscriptions against that *conduct* have ancient roots."[51] Whether intentional or not, the variation reveals the distinction's inherent instability.

Justice Scalia further exposed this instability a few years later, albeit for the purpose of restricting LGBTQ rights. Justice Scalia dissented from the majority's decision in *Romer v. Evans*, which struck down a Colorado state constitutional amendment banning anti-discrimination ordinances from including sexual orientation as a protected characteristic.[52] In a strongly worded dissent, Justice Scalia expressed

45. *Id.* at 200–01 (Blackmun, J., dissenting); *see also id.* at 214 (Stevens, J., dissenting).

46. *Id.* at 200 (Blackmun, J., dissenting). Part of the reason for this obsessive focus is that the injured parties in this case were a gay couple. *See id.* at 201. However, Blackmun explains in his dissent that the Court did not have to treat the case as an as-applied challenge. *Id.* at 200–01.

47. *Id.* at 191 (majority opinion).

48. Sherry F. Colb, *Some Thoughts on the Conduct/Status Distinction*, 51 RUTGERS L. REV. 977, 980 (1999).

49. *Id. But see* Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1734, 1737 (1993) (arguing that what the majority "described as 'homosexual sodomy' ha[d] become homosexuals *as* sodomy" and consequently, "[s]odomy in these formulations is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us").

50. *Bowers*, 478 U.S. at 191–92.

51. *Id.* at 192 (emphasis added).

52. Romer v. Evans, 517 U.S. 620, 623–24, 635–36 (1996).

disbelief at how the majority's opinion could square with the Court's holding in *Bowers*. He reasoned that "[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[53] In support, he cited the D.C. Circuit's decision in a prior case affirming summary judgment for the Federal Bureau of Investigation ("FBI") after the agency refused to hire an individual because of her sexual orientation.[54] Alluding to *Bowers*, the D.C. Circuit found "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[55] The D.C. Circuit and Justice Scalia recognized that the manner in which *Bowers* targeted conduct inescapably targeted status as well.

B. The Court's Turn Away from the Status-Conduct Distinction

In 2003, the Supreme Court overturned *Bowers* in *Lawrence v. Texas*.[56] Unlike its predecessor, the statute at issue only criminalized sodomy between two individuals of the same sex.[57] However, the Court did not limit itself to *Bowers*'s formulation of the right at stake.[58] Instead, Justice Kennedy, writing for the majority of the Court, viewed the liberty at stake at a higher level of abstraction. He noted that while the statute on its face only criminalized a particular sexual act, it had "more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[59] He characterized the type of statute at issue as "seek[ing] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[60] For Justice Kennedy, the law at issue touched upon an individual right that could not be cabined to the gay community.

53. *Id.* at 641 (Scalia, J., dissenting).
54. *Id.* (citing Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)).
55. *Id.* (quoting *Padula*, 822 F.2d at 103). The D.C. Circuit in *Padula* further stated, "[i]f the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious." *Padula*, 822 F.2d at 103. Despite the Court's attempt in *Bowers* to focus on conduct, the D.C. Circuit immediately recognized the implications were far greater.
56. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
57. *Id.* at 563.
58. *See id.* at 567.
59. *Id.*
60. *Id.*

While the majority defined the right at stake without reference to a class of persons, it refused to ignore the law's discriminatory purpose. Justice Kennedy declared, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[61] The Court refused to create an arbitrary distinction between status and conduct and went a step further in acknowledging that a law targeting conduct could also constitute discrimination against status.

Justice O'Connor's concurrence emphasized this latter point. She explained that while the law only applied to conduct, the conduct at issue was "closely correlated" to sexual orientation.[62] She concluded, "[u]nder such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[63]

The majority of the Court in C*hristian Legal Society v. Martinez* explicitly rejected the distinction between status and conduct in the context of sexual orientation.[64] The petitioners, Christian Legal Society ("CLS"), were a group of law students denied "Registered Student Organization" status by their school.[65] The school refused to confer such status because the group violated the school's nondiscrimination policy.[66] In particular, CLS required members to sign a "Statement of Faith" and "to conduct their lives in accord with prescribed principles," including the belief that individuals should not engage in "unrepentant homosexual conduct."[67] CLS tried to argue that it did not violate the school's nondiscrimination policy because the group excluded individuals based on specific conduct, and those individuals' reluctance to acknowledge this conduct was wrong.[68] In rejecting this argument, Justice Ginsburg cited *Lawrence v. Texas*, noting "[o]ur decisions have declined to distinguish between status and conduct in this context."[69]

Nonetheless, the status-conduct distinction only partially explains the diverging viewpoints between the majority and dissent in *303*

61. *Id.* at 575.
62. *Id.* at 583 (O'Connor, J., concurring). Although, O'Connor disagreed with the majority insofar as she would not have overruled *Bowers*. She recognized the relationship between status and conduct but did not believe that a sodomy law that criminalized all forms of sodomy regardless of the participants' sex would violate the Equal Protection Clause. *Id.* at 579.
63. *Id.* at 583.
64. 561 U.S. 661, 689 (2010).
65. *Id.* at 672.
66. *Id.* at 672–73.
67. *Id.* at 672.
68. *Id.* at 689.
69. *Id.*

Creative.[70] Although the distinction arose during oral arguments, it is largely absent from the actual decision. The majority seemingly "denies that there is any troubling connection between conduct and status in the case," and the dissent, "even while it readily acknowledges that the Court's conclusion legalizes discrimination, nowhere appeals to the conduct-status connection."[71] Moreover, the dissent provides mere cursory citations to *CLS* and *Lawrence* for entirely unrelated reasons.[72] As the next Part will explain, the free speech claim at the heart of the case alters the traditional status-conduct distinction.

IV. MORPHING INTO A STATUS-MESSAGE DISTINCTION

The traditional status-conduct distinction is complicated by the fact that this is a free speech case. Rather than a traditional status-conduct distinction, the Court in *303 Creative* struggles to distinguish between status and *message*. At issue is no longer the gay couple's conduct but rather the message they send. Justice Barrett, during oral arguments, observed among her colleagues "a difference of opinion about whether turning down the same-sex couple simply for purposes of a marriage announcement is a turn-down based on status or message."[73] Unlike the status-conduct distinction, both the majority and dissent acknowledge the distinction between status and message at play. Part IV explains why this distinction, like the status-conduct distinction, is inherently problematic in this context.

A. Wedding Vendor Cases

Before *303 Creative*, similar wedding vendor cases involving the intersection between the First Amendment and public accommodations laws worked their way through state and federal courts.[74] In some cases,

70. *See supra* notes 32–35 and accompanying text.

71. Sepinwall, *supra* note 35, at 246.

72. The dissent cites *Lawrence* once when recounting the broader struggle for LGBTQ rights. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 638 (2023) (Sotomayor, J., dissenting) (quoting Lawrence v. Texas, 539 U.S. 558, 571 (2003)). The reference to *CLS* is limited to a discussion about viewpoint neutral laws. *Id.* at 635–36 (citing Christian Legal Soc'y v. Martinez, 561 U.S. 661, 695 (2010)).

73. Transcript of Oral Argument, *supra* note 34, at 125.

74. This Part discusses two cases in particular. However, there are several other cases that fall within this category. *See* Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 559–60 (W.D. Ky. 2020) (granting preliminary injunction against city from compelling Nelson to photograph same-sex weddings); State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1209, 1221–22 (Wash. 2019) (en banc) (rejecting the status-conduct distinction and reaffirming decision holding florist violated state public accommodations law by refusing to sell wedding flowers to a gay couple); Telescope Media

courts were able to resolve some issues by citing Supreme Court precedent on the status-conduct distinction. The prime example is *Elane Photography, LLC v. Willock*, where the New Mexico Supreme Court sided against a commercial photography business that refused to serve a same-sex couple for their commitment ceremony.[75] The photography business, similar to Lorie Smith, claimed it was not discriminating against a protected trait because its refusal stemmed from its unwillingness to endorse a wedding that violated its religious beliefs.[76] The New Mexico Supreme Court dismissed this argument outright, explaining:

> Elane Photography's argument is an attempt to distinguish between an individual's *status* of being homosexual and his or her *conduct* in openly committing to a person of the same sex . . . [W]hen a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. Otherwise we would interpret the [law] as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation.[77]

The court cautioned that allowing discrimination based on conduct "inextricably tied" to status would "severely undermine the purpose" of New Mexico's public accommodations law.[78] The expressive nature of photography failed to change the court's analysis because Elane Photography sold its expressive services to the general public.[79] As long as Elane Photography held its services out to the general public, it could not perform services for an opposite-sex couple and then refuse to perform those same services for a same-sex couple.[80]

In stark contrast, the Arizona Supreme Court in *Brush & Nib Studio, LC v. City of Phoenix*, another wedding vendor case, found the status-conduct distinction entirely irrelevant.[81] The procedural posture of the case was very similar to the one in *303 Creative*. An art studio making custom artwork, including wedding invitations, sought to enjoin the city

Grp. v. Lucero, 936 F.3d 740, 747 (8th Cir. 2019) (reversing district court's dismissal of constitutional challenge brought by owners of company that produces wedding videos).

75. 2013-NMSC-040, ¶ 7, 309 P.3d 53.
76. *Id.* ¶ 14.
77. *Id.* ¶ 16–17 (emphasis added).
78. *Id.* ¶ 16.
79. *Id.* ¶ 35.
80. *Id.*
81. 448 P.3d 890, 895 (Ariz. 2019).

of Phoenix from enforcing its public accommodations law against the studio.[82] The studio did not wish to make wedding invitations for same-sex couples because doing so would violate its religious beliefs.[83] However, the studio simultaneously claimed that it would serve all customers regardless of sexual orientation.[84] The state court sided with the studio.[85] In doing so, it explicitly rejected the contention that the refusal to create custom wedding invitations involved discriminating on the basis of sexual orientation. The court explained:

> The City also argues that because Plaintiffs' refusal affects only same-sex couples, their refusal is essentially a proxy for discrimination based on sexual orientation. We disagree. The fact that Plaintiffs' *message-based* refusal primarily impacts customers with certain sexual orientations does not deprive Plaintiffs of First Amendment protection . . . Plaintiffs' objection is *based on neither a customer's sexual orientation nor the sexual conduct* that defines certain customers as a class. Plaintiffs will make custom artwork for any customers, regardless of their sexual orientation, but will not, regardless of the customer, make custom wedding invitations celebrating a same-sex marriage ceremony.[86]

By characterizing the refusal as message-based, the Arizona Supreme Court in *Brush & Nib Studio* manages to sidestep the status-conduct distinction entirely. Unlike the court in *Elane Photography*, the Arizona Supreme Court gives little weight to the fact the studio holds its services out to the public.[87] The court acknowledges the studio's refusal will necessarily have a disproportionate impact on same-sex couples. Yet, it pushes this argument aside, somehow divorcing the purported message—endorsement of same-sex marriage—from status and conduct. In reality, all three are interconnected.

82. *Id.* at 897–99.
83. *Id.* at 895.
84. *Id.* at 900.
85. *Id.* at 895.
86. *Id.* at 911 (emphasis added).
87. *See id.* at 912 (noting "public accommodation laws are not immune to the First Amendment").

B. Looking Back at Masterpiece

Masterpiece Cakeshop was, in many ways, the precursor to *303 Creative*.[88] The case concerned a baker from Colorado who refused to bake a wedding cake for a same-sex couple because doing so would violate his religious beliefs.[89] Unlike *303 Creative*, *Masterpiece Cakeshop* was primarily a free exercise case, rather than a free speech case.[90] Jack Phillips, the baker in *Masterpiece Cakeshop*, was reprimanded by Colorado's Civil Rights Commission after refusing to bake a wedding cake for a gay couple.[91] Instead of deciding whether Colorado's public accommodations law violated the baker's free exercise rights, the Court reversed the case after condemning the religious animosity exhibited by the commissioners.[92]

Despite side-stepping the major issue in the case, *Masterpiece* does provide insight into the majority's later reasoning in *303 Creative*. A major point of contention in both cases was how exactly to define the product. In *303 Creative*, the majority rejects the state's theory that "all Ms. Smith must do is repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*."[93] The majority chooses to focus instead on the original and customized nature of the end product.[94] In contrast, the dissent focuses on the broader service being offered. Justice Sotomayor summarized the case as follows: "A business claims that it would like to sell wedding websites to the general public, yet deny those *same* websites to gay and lesbian couples."[95] The majority and dissent fundamentally disagree on the extent to which Smith refuses to offer the same service or product.

In *Masterpiece*, Justice Gorsuch wrote that the product at issue was not just a wedding cake, but "a wedding cake celebrating a same-sex wedding."[96] Justice Thomas likewise argued in a concurring opinion that

88. Lydia E. Lavelle, *Freedom of Speech: Freedom to Creatively Discriminate?*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 69, 95–96 (2022) (outlining similarities and differences between *303 Creative* and *Masterpiece Cakeshop*).

89. Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617, 621 (2018).

90. Yoshino, *supra* note 33, at 253.

91. *Masterpiece Cakeshop*, 584 U.S. at 628, 630.

92. *Id.* at 640. For a discussion challenging the Court's characterization of the Commission's comments, see Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 134 (2018); *see also* Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 258 (2018).

93. 303 Creative LLC v. Elenis, 600 U.S. 570, 593 (2023).

94. *Id.* at 593–94.

95. *Id.* at 623 (Sotomayor, J., dissenting) (emphasis added).

96. *Masterpiece Cakeshop*, 584 U.S. at 651 (Gorsuch, J., concurring).

creating and designing custom wedding cakes was expressive in nature.[97] In support, he emphasized how Phillips saw himself as an artist,[98] and further highlighted the history of wedding cakes as communicating a particular message.[99]

Imagine a three-tiered cake adorned with purple flowers made of icing. A baker makes this cake for a heterosexual couple's wedding ceremony. Now imagine a gay couple asks the baker for a wedding cake that is visually identical. Is it the same product? According to Justice Gorsuch's concurrence in *Masterpiece*, the answer is no. Justice Gorsuch argued:

> At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: Describing the cake by its ingredients is too general; understanding it as celebrating a same-sex wedding is too specific; but regarding it as a generic wedding cake is just right.[100]

Contrary to Justice Gorsuch's reasoning, regarding the cake in question as a generic wedding cake *is* just right. Defining at too high a level of abstraction so that a wedding cake is defined merely as a mixture of various ingredients clearly makes no sense. That definition is so broad as to become meaningless. Justice Gorsuch chooses a narrower conception, warning that manipulating the level of generality would allow "civil authorities to gerrymander their inquiries based on the parties they prefer."[101] Yet, this sort of "gerrymander" is exactly the flaw in Justice Gorsuch's reasoning. His concurrence errs in defining and distinguishing the product in relation to a protected characteristic. In effect, the hypothetical three-tiered wedding cake with purple flowers is different if it is served to a gay couple or to a straight couple. The former is a "gay wedding cake," while the latter is not. Thus, the only difference stems from the identity of the customer. Justice Kagan dismissed this reasoning in her own concurrence, stating, "[a] vendor can choose the products he sells, but not the customers he serves—no matter the reason."[102]

97. *Id.* at 658 (Thomas, J., concurring).
98. *Id.* at 658.
99. *Id.* at 659.
100. *Masterpiece Cakeshop*, 584 U.S. at 651 (Gorsuch, J., concurring).
101. *Id.* at 651–52.
102. *Id.* at 642 n.* (Kagan, J., concurring).

While the majority of the Court did not adopt Justice Gorsuch's or Justice Thomas's reasoning at the time, the makeup of the Court has changed dramatically. During his time on the bench, Justice Kennedy wrote several major opinions expanding gay rights.[103] As a Reagan appointee, his stance on gay rights contributed to his reputation as a swing justice.[104] Justice Kennedy's opinion in *Masterpiece* was careful to note that future cases should be careful to balance religious freedom with respecting the dignity of gay persons.[105]

Justice Kennedy has since retired, and the 5–4 conservative majority is now a 6–3 conservative supermajority.[106] It is also worth mentioning that Smith's counsel made repeated references to *Masterpiece* in their argument, implying a wedding cake should receive First Amendment protection.[107]

C. The 303 Creative *Spin*

The conservative concurrences in *Masterpiece* map onto the tension in *303 Creative*—whether Smith is refusing to serve gay couples based on status or based on message. Justice Gorsuch, this time writing for the majority, relies on the parties' stipulations. He writes:

> Colorado next urges us to focus on the reason Ms. Smith refuses to offer the speech it seeks to compel. She refuses, the State insists, because she objects to the "protected characteristics" of certain customers. But once more, the parties' stipulations speak differently. The parties agree that Ms. Smith "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites" do not violate her beliefs.[108]

103. *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

104. *See* Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—And the Landmark Cases It Swayed*, NPR, https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed (June 27, 2018, 7:50 PM).

105. *See Masterpiece Cakeshop*, 584 U.S. at 623–24 (majority opinion).

106. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative.

107. *See* Transcript of Oral Argument, *supra* note 34, at 40–41, 46.

108. 303 Creative LLC v. Elenis, 600 U.S. 570, 594–95 (2023) (citation omitted).

Justice Gorsuch continually repeats this stipulation in the majority opinion, implying that there is a meaningful difference between refusing to serve a couple's marriage ceremony because they are a same-sex couple and refusing to serve a couple based on their sexual orientation. Justice Barrett picked up on this distinction during oral argument, observing among her colleagues "a difference of opinion about whether turning down the same-sex couple simply for purposes of a marriage announcement is a turn-down based on status or message."[109] However, one could just as easily read the stipulation to mean the parties merely agreed that Smith would not discriminate on the basis of sexual orientation in *most* instances.

The majority in *303 Creative* closely mirrors the logic of the Arizona Supreme Court in *Brush & Nib Studio*, even if it is not as explicit. The Arizona Supreme Court claimed the business owners did not discriminate against gay couples because of their sexual orientation, instead labeling the business's refusal as a "message-based refusal."[110] The *303 Creative* majority likewise points to the parties' stipulation that Smith will create custom graphics for gay customers, just not wedding websites, to bolster the claim that the refusal is message-based as opposed to status-based.

V. DESTABILIZING PUBLIC ACCOMMODATIONS LAWS

The justices in the majority in *303 Creative* attempt to convince the American people that they "do not question the vital role public accommodations laws play in realizing the civil rights of all Americans."[111] To be fair, there are legitimate reasons to believe the decision is quite narrow.[112] But the Court's inconsistent reasoning raises serious concerns as to whether the decision is as narrow as some scholars wish it were. In particular, the insistence on defining the product at issue in relation to the protected characteristic risks undermining public accommodations laws more generally.

109. Transcript of Oral Argument, *supra* note 34, at 125.
110. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 910 (Ariz. 2019).
111. *303 Creative*, 600 U.S. at 590.
112. *See generally* Catherine J. Ross, *The Real and the Phantom* 303 Creative*: Which Is More Dangerous?*, GEO. WASH. L. REV. ON THE DOCKET (July 25, 2023), https://www.gwlr.org/303-creative-elenis-response/ (describing the issue before the U.S. Supreme Court in *303 Creative* as a "narrow question").

A. Brief History of Public Accommodations Laws

Colorado's public accommodation statute at issue in *303 Creative* is "unexceptional."[113] The underlying concept of public accommodations laws, i.e., equal access, dates to the common law.[114] This is not to suggest that the common law restrictions were identical to their modern-day statutory counterparts. For instance, the common law was generally limited to public accommodations like hotels and restaurants.[115] Additionally, the consumer was defined much more narrowly under the common law than today because it was "closely linked to citizenship."[116] After Reconstruction ended, but before the Civil Rights Act of 1964, many Southern states rejected the common law rule and passed laws ensuring the denial of equal access to Black citizens.[117] Nevertheless, the principle motivating the common law rule serves as the backbone for modern-day public accommodations laws: Having opened their doors to the public, businesses cannot exclude customers without good cause.[118]

B. Legal Underpinnings

The Court has historically held that prohibiting racial discrimination in public accommodations does not interfere with a business owner's personal liberty.[119] The truth is that to some extent, "[a]ll antidiscrimination statutes pose a tension between equality and liberty."[120] A key objection at the time of passage of the Civil Rights Act of 1964, which prohibits discrimination on the basis of certain protected

113. *303 Creative*, 600 U.S. at 591. ("[A]pproximately half the States have laws like Colorado's that expressly prohibit discrimination on the basis of sexual orientation. And, as we have recognized, this is entirely 'unexceptional.'" (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 632 (2018))).

114. Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 276–77. *See generally* Justin Muehlmeyer, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J. L. & GENDER 781, 786–98 (2013) (tracing the evolution of public accommodations laws from the common law to the present).

115. *303 Creative*, 600 U.S. at 590. *But see* Sepper, *supra* note 114, at 277 (claiming the common law public accommodations rule applied more broadly to "barber shops, victuallers, bakers, tailors, and traders").

116. Sepper, *supra* note 114, at 277.

117. *Id.*

118. *Id.*

119. Heart of Atlanta Motel v. United States, 379 U.S. 241, 260 (1964) ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.").

120. Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court's Decision in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 43 ABA HUM. RTS., no. 4, 2018, at 11, 11.

characteristics in public accommodations, was that the law would interfere with a business's freedom to choose its customers or employees.[121] Even today, some conservative legal scholars warn of the "growing threat antidiscrimination laws pose to civil liberties."[122]

None of this is to say that equality and liberty are always mutually exclusive—far from it. Rather, the two are and must be in a constant balancing act. Although anti-discrimination laws on some level "interfere[] with the freedom to choose one's customers or employees[,] Congress and the courts both deemed ending discrimination to be more important than protecting the right to discriminate."[123]

There is a long line of cases in which the Court has had to reconcile public accommodations laws with freedoms enshrined in the Bill of Rights, and in many cases, the Court upheld these statutes. Justice Sotomayor's dissent in *303 Creative* canvasses some of them. One such case is *Newman v. Piggie Park Enterprises, Inc.*, where the Court dismissed a drive-in owner's argument that requiring him to serve Black customers violated his right to freedom of religion.[124]

On the other hand, many of these cases do not deal directly with the right to free speech. Such cases have achieved mixed results. The next section starts off with a brief overview of some of these cases.

C. The Intersection with Free Speech

In the free speech context, courts strike a balance between equality and liberty by resting on the proposition that public accommodations laws "regulate *conduct*, not *speech*—specifically, they regulate the act of discriminating in the sale of goods and services."[125]

1. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston involved an annual St. Patrick's Day parade sponsored by the city of Boston but organized by a council of veterans.[126] In 1992, the Irish-

121. *Id.*

122. DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 3 (2003).

123. Chemerinsky, *supra* note 120, at 11.

124. 303 Creative LLC v. Elenis, 600 U.S. 570, 620 (2023) (Sotomayor, J., dissenting) (citing Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402–03 (1968) (per curiam)).

125. Brief of Public Accommodations Law Scholars as Amici Curiae in Support of Respondents at 4, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) [hereinafter Brief of Public Accommodations Law Scholars].

126. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S 557, 560 (1995).

American Gay, Lesbian and Bisexual Group of Boston ("GLIB") sought to march in the parade under its own banner, but were denied.[127] The following year, after the council again denied the group's request for a permit to march, the group sued the city and the Veterans Council, arguing the denial violated the state's public accommodations law.[128] The lower court sided with GLIB under the theory that the parade did not have a clearly expressive purpose and, therefore, the First Amendment was not implicated.[129] The Supreme Court plainly rejected the lower court's reasoning and addressed the First Amendment question head-on.[130]

A unanimous court made a fine distinction between status and message.[131] The Court explained, "Petitioners disclaim any intent to exclude homosexuals as such . . . . Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner."[132] GLIB wanted to march under its own banner in order to celebrate their identity as members of the gay community as well as their Irish heritage.[133] The Court reasoned that admission of GLIB under these circumstances had the effect of altering the parade organizers' speech.[134] The Court continued, "once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation."[135] This use of the state's public accommodations law was deemed unconstitutional as it impermissibly compelled speech.[136]

2. *Boy Scouts of America v. Dale*

A 5–4 majority drew an even finer line between status and message in *Boy Scouts of America v. Dale*, which reversed the New Jersey Supreme Court's determination that the Boy Scouts' revocation of a gay scoutmaster's membership violated the state's public accommodations law.[137] The Court referred to Dale, the assistant scoutmaster removed

127. *Id.* at 561.
128. *Id.*
129. *Id.* at 564.
130. *See id.* at 569.
131. *Id.* at 574–75.
132. *Id.* at 572.
133. *See id.* at 572–73.
134. *Id.* at 573.
135. *Id.*
136. *Id.* at 581.
137. 530 U.S. 640, 644 (2000).

from his post, as "an avowed homosexual and gay rights activist."[138] By emphasizing Dale's openness about his sexuality, the majority could pretend the Boy Scouts' actions were based on the message Dale sought to promote rather than his status as a gay individual. The Court was careful to note that its holding did not mean "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[139] For example, take another expressive association case, *Roberts v. United States Jaycees*, in which the Court held Minnesota could force a civic organization to provide women full membership.[140] The organization tried to argue that women would have different attitudes about a variety of issues and consequently change the overall group's message.[141] But the Court rejected these "unsupported generalizations about the relative interests and perspectives of men and women."[142] In contrast, "Dale, by his own admission, is one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.'"[143]

Both *Hurley* and *Dale* try to draw a fine line between status and message in order to strike a balance between a First Amendment right to free speech and the state's interest in eradicating discrimination in places of public accommodation.

3. *Runyon v. McCrary*

While the majority in *303 Creative* focuses on *Hurley* and *Dale*, it "studiously avoids" *Runyon v. McCrary*.[144] In that case, the Court rejected a private school's assertion of a First Amendment right to exclude black children from enrollment.[145] The Court in *Runyon* went on to explain that while invidious private discrimination can sometimes be protected under the First Amendment, it "has never been accorded affirmative constitutional protections."[146] The distinction between speech and conduct plays a critical role in the Court's reasoning. The Court recognized that the private school had a First Amendment right to

138. *Id.* at 655–56.
139. *Id.* at 653.
140. 468 U.S. 609, 626 (1984).
141. *Id.* at 627–28.
142. *Id.* at 628.
143. *Dale*, 530 U.S. at 653 (quoting App. Brief at 11); The dissent makes a compelling argument that this rationale is pretense. *See id.* at 691, 692 n.20 (Stevens, J., dissenting).
144. 303 Creative LLC v. Elenis, 600 U.S. 570, 620 (2023) (Sotomayor, J., dissenting) (citing Runyon v. McCrary, 427 U.S. 160 (1976)).
145. *Runyon*, 427 U.S. at 176.
146. *Id.* (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)).

advocate for racial segregation.[147] However, the First Amendment does not protect private schools when they try to act in accordance with that stance.[148] This meaningful distinction lies at the heart of anti-discrimination laws and is what allows these types of laws to avoid facial challenges.[149]

D. Level of Scrutiny

Multiple scholars wrote an amicus brief outlining how the Supreme Court has historically handled free speech challenges to public accommodations laws.[150] Public accommodations laws target conduct rather than speech and, therefore, generally do not implicate the First Amendment right to freedom of speech.[151] There are instances, however, where a public accommodations law may burden speech.[152] In those instances, the question is whether the law "interfere[s] with activity that is both subjectively intended and objectively understood as expressing the regulated party's 'own message.'"[153] The amicus brief identifies three main factors in the objectivity inquiry: selectivity, commerce, and custom.[154] For example, in *Hurley*, all three factors weighed in favor of First Amendment protection.[155]

But the Court in *303* Creative did not seriously engage in this type of analysis. The majority claimed the "First Amendment extends to all persons engaged in expressive conduct, including those who seek profit."[156] Yet, this ignores the reality that *Hurley* and *Dale*, cases that form the backbone of the opinion, were peculiar applications of public accommodations laws that did not involve the sale of commercial goods or services. Smith's business portends to hold itself out to the public and is a for-profit business, both of which weigh against First Amendment protection.[157] As to the last factor, custom, "it is not customary in American life to presume that web designers approve, endorse, or

147. *See id.*
148. *See id.*
149. *See* Brief of Public Accommodations Law Scholars, *supra* note 125, at 1 ("Public accommodations laws regulate conduct, not speech. So long as they are content neutral, any incidental impact on speech generally does not raise First Amendment concerns.").
150. Brief of Public Accommodations Law Scholars, *supra* note 125.
151. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 622 (2023) (Sotomayor, J., dissenting).
152. Brief of Public Accommodations Law Scholars, *supra* note 125, at 1.
153. *Id.* at 5–6 (quoting Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S 557, 573 (1995)).
154. *Id.* at 8–10.
155. *Id.*
156. 303 Creative LLC v. Elenis, 600 U.S. 570, 600 (2023).
157. Brief of Public Accommodations Law Scholars, *supra* note 125, at 13–15.

otherwise personally associate themselves with every website they design."[158] Compare this to parades, which the Court deemed inherently expressive, stating, "we use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[159]

Moreover, the Court does not engage in any kind of scrutiny analysis, whether it be strict or intermediate scrutiny. The purpose of the scrutiny analysis is to force courts to balance the government's interests in promoting equality with individuals' civil liberties. Instead, Justice Gorsuch takes a categorical approach, finding the case to be compelled speech and, therefore, impermissible.[160] Yet, the compelled speech cases cited by Justice Gorsuch[161] involved laws that were facially aimed at speech or content-based.[162] As Justice Sotomayor states, "[a] content-neutral equal-access policy is 'a far cry' from a mandate to 'endorse' a pledge chosen by the Government."[163] Professor Kenji Yoshino argues that Justice Sotomayor's dissent maps out a strict scrutiny analysis, albeit implicitly.[164] She effectively identifies a compelling government interest in public accommodations laws, namely to secure "*equal access* to publicly available goods and services" and secure "*equal dignity* in the common market."[165] Because one of the core purposes of public accommodations laws is equal dignity in the marketplace, the existence of other available vendors makes no difference.[166] Thus, the public accommodations law cannot be any more narrowly tailored to achieve that compelling interest.[167]

E. The Court's Focus on Expressive Activity

Shortly after the Court handed down its decision in *303 Creative*, a hairdresser in Michigan announced she would refuse to serve clients who use different pronouns than the ones they were assigned at birth.[168] Many advocates and scholars were quick to point out that it was

158. *Id.* at 15.
159. Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston, 515 U.S 557, 568 (1995).
160. Yoshino, *supra* note 33, at 280–81.
161. *303 Creative*, 600 U.S. at 585–86 (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).
162. Brief of Public Accommodations Law Scholars, *supra* note 125, at 7.
163. *303 Creative*, 600 U.S. at 636 (Sotomayor, J., dissenting).
164. Yoshino, *supra* note 33, at 280.
165. *303 Creative*, 600 U.S. at 606–07.
166. Yoshino, *supra* note 33, at 283.
167. *Id.* at 282.
168. Burga, *supra* note 11.

unreasonable to interpret the Court's decision as allowing salons to discriminate since cutting hair does not involve speech.[169] Moreover, the majority of the Court acknowledged "there are no doubt innumerable goods and services that no one could argue implicate the First Amendment."[170]

The glaring question left open by the opinion is when exactly a product becomes sufficiently expressive enough to warrant First Amendment protection. The parties stipulated that Smith's services were expressive in nature.[171] Responding to the dissent, the majority writes, "[d]oubtless, 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."[172] It is noteworthy that Justice Gorsuch uses the term "expressive activity." In explaining why the First Amendment applies, the majority repeatedly referenced the lower court's determination that Smith's services involve "pure speech."[173] Neither the 10th Circuit nor the Supreme Court explains the term "pure speech" and how it compares to "expressive activity."

Professor Dale Carpenter attempts to provide a helpful framework for interpreting the Court's decision, suggesting the ruling is narrow because it applies only where the product is both customized and expressive and where the objection is to the "message in the product, not the customer's status."[174] But this obfuscates the larger conceptual flaw in the Court's reasoning. Notwithstanding any confusion between "pure speech" and "expressive activity" or the parties' stipulations, the problem remains that Justice Gorsuch defines the product at issue in a manner guaranteed to implicate the First Amendment while necessarily implicating status in the process. Consider the following exchange between the majority and dissent:

> The majority protests that Smith will gladly sell her goods and services to anyone, including same-sex *couples*. She just will not sell websites for same-sex *weddings*. Apparently, a gay or lesbian

169. *Id.* (quoting Sarah Warbelow, Human Rights Campaign Legal Director); *see also id.* (quoting Professor Katie Eyer as saying the case was "decided on relatively narrow grounds").

170. *303 Creative*, 600 U.S. at 591 (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 632 (2018)).

171. *Id.* at 582.

172. *Id.* at 599.

173. *Id.* at 587, 593, 597, 599.

174. Dale Carpenter, *How to Read* 303 Creative v. Elenis, VOLOKH CONSPIRACY (July 3, 2023, 2:11 PM), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis/.

> couple might buy a wedding website for their straight friends. This logic would be amusing if it were not so embarrassing.[175]

The majority responds in a footnote:

> The dissent labels the distinction between status and message "amusing" and "embarrassing." But in doing so, the dissent ignores a fundamental feature of the Free Speech Clause. While it does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message—even when we may disapprove of the speaker's motive or the message itself.[176]

What is missing from this exchange is a discussion of how the majority conceptualizes the product at issue. The dissent views Smith as selling her services to create wedding websites—the hypothetical gay customers are simply asking for a wedding website. But to the majority, it is not just a wedding website but rather a wedding website celebrating same-sex marriages. Justice Gorsuch analogizes to a case from the United Kingdom, *Lee v. Ashers*, where a baker refused to bake a cake that displayed the message, "Support Gay Marriage."[177] The court ruled in favor of the baker, finding "[t]he less favourable treatment was afforded to the message not to the man."[178] But is this an appropriate analogy to the facts (or lack thereof) in *303 Creative*?

"Support Gay Marriage" certainly appears to be a political statement. One reason is the use of the word "support." Another reason is that the message is depersonalized. The words directly express support for an idea; their aim is not to celebrate one couple in particular. Imagine a gay customer instead asked for a cake that read, "Happy Anniversary" or "We're Engaged."[179] The political issue of same-sex marriage is admittedly implicated, but can we really say the message is political in the same way? Yet, if we take Justice Gorsuch's concurrence in *Masterpiece* seriously and use it to make sense of his majority opinion in *303 Creative*, then the exact words on the cake carry little weight. Recall in *Masterpiece* that Justice Gorsuch dismissed the very existence of words on a wedding cake as irrelevant because the wedding cake, by its

175. *303 Creative*, 600 U.S. at 633–34 (Sotomayor, J., dissenting).
176. *Id.* at 595 n.3 (majority opinion).
177. Lee v. Ashers Baking Co. Ltd., [2018] UKSC 49, ¶ 12.
178. *Id.* ¶ 47.
179. *See* Brief of Public Accommodations Law Scholars, *supra* note 125, at 5 (arguing "a family restaurant that sings 'Happy Anniversary' for all married couples cannot refuse to do so for interracial couples").

very nature, was expressive.[180] He explained: "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."[181] Contrary to Justice Gorsuch's contention, sometimes a cake is just a cake; a wedding cake is just a wedding cake; and a wedding website is just a wedding website. At least, that is how public accommodations laws are supposed to operate. The political issue of same-sex marriage exists in the background, but the message does not appear to be a political statement on its own. Any hint of the underlying political issue requires an examination of the status of the customers buying the cake or website, which is exactly what public accommodations laws are meant to guard against.

VI. THE IMPLICATIONS

Imagine a plaintiff wishes to sell wedding websites but does not wish to do so for interracial couples. This proposition arose several times in different forms during oral arguments, yet the justices in the majority do not squarely address such a possibility in their opinion. Early on in the oral arguments, Justice Sotomayor asked whether a website designer could refuse to provide wedding websites to interracial couples or disabled couples.[182] Smith's counsel responded, "[i]n the context of race, it's highly unlikely that anyone would be serving [B]lack Americans in other capacities but only refusing to do so in an interracial marriage context," to which Justice Kagan interjected that it was not impossible.[183] In fact, a few years prior, a Mississippi wedding venue received public outcry after explaining in a video why it would not serve interracial couples or gay couples.[184]

Later, during oral argument, Justice Alito took umbrage with the suggestion that opposition to same-sex marriage was equivalent to opposition to interracial marriage.[185] But this distinction is not based in

180. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 650 (2018) (Gorsuch, J., concurring) ("To suggest that cakes with words convey a message but cakes without words do not . . . is irrational.").

181. *Id.*

182. Transcript of Oral Argument, *supra* note 34, at 13.

183. *Id.* at 14.

184. Katie Reilly, *A Mississippi Wedding Venue Refused to Serve Gay or Interracial Couples. Amid Backlash, the Owner Is Now Apologizing*, TIME (Sept. 4, 2019, 2:25 PM), https://time.com/5668444/mississippi-wedding-venue-gay-interracial-marriage/.

185. Transcript of Oral Argument, *supra* note 34, at 81 (Justice Alito: "In light of what Justice Kennedy wrote in *Obergefell* about honorable people who object to same-sex marriage, do you think it's fair to equate opposition to same-sex marriage with opposition to interracial marriage?"). The quote Justice Alito appears to be referencing is the following:

law. Colorado's legislature, as well as many others across the country, have concluded that discrimination on the basis of sexual orientation is a form of invidious discrimination that should be prohibited in places of public accommodation.[186] Granted, some forms of discrimination receive higher levels of scrutiny by the courts. For example, race discrimination must pass strict scrutiny, while discrimination on the basis of sexual orientation inhabits a lower level of scrutiny.[187] However, these tiers apply to government actions; they have no bearing on the extent to which certain classes receive protection under public accommodations laws. Intermediate or strict scrutiny applies in cases like this only as it relates to the burden on free speech, not to the class of protected characteristics at issue.

The four corners of the decision do not limit the case to same-sex couples.[188] The majority's logic could just as easily apply to a hypothetical wedding website designer who does not wish to serve interracial couples or disabled couples.[189] In the majority opinion, after reiterating the parties' stipulations, Justice Gorsuch explains, "[n]or, in any event, do the First Amendment's protections belong only to speakers whose motives the government finds worthy; its protections belong to all, including to speakers whose motives others may find misinformed or offensive."[190] Justice Alito and others on the Court may view the refusal to serve interracial couples as more objectionable and offensive than refusing to serve a gay couple. But as the majority opinion points out, the First Amendment protects offensive views.

This is not to say that the Court will inevitably expand its decision to interracial couples. Professor Carlos A. Ball points out that between oral arguments and the written opinion, significant attention was paid to the

"Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." Obergefell v. Hodges, 576 U.S. 644, 672 (2015). However, Justice Kennedy clarifies that "when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.* Moreover, "[u]nder the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right." *Id.*

186. *Public Accommodations*, Hum. Rts. Campaign, https://www.hrc.org/resources/state-maps/public-accommodations (Nov. 14, 2024).

187. Kaleb Byars, *Bostock: An Inevitable Guarantee of Heightened Scrutiny for Sexual Orientation and Transgender Classifications*, 89 TENN. L. REV. 483, 489 (2022).

188. Yoshino, *supra* note 33, at 265.

189. Transcript of Oral Argument, *supra* note 34, at 13.

190. 303 Creative LLC v. Elenis, 600 U.S. 570, 595 (2023).

sincerity of Smith's beliefs.[191] While sincerity plays a limited role in free exercise cases, it generally has no role in free speech cases.[192] Nonetheless, Professor Ball argues that the majority's attention to Smith's sincerity "helped render her justifications for excluding same-sex couples from her wedding-related business services reasonable and nonprejudiced, and therefore substantively distinguishable from the views of bigoted business owners."[193] While this is not really a proper legal distinction, it does reveal a lack of appetite to broaden *303 Creative* outside the context of sexual orientation.

At the same time, it reveals a different standard for anti-gay discrimination cases. What accounts for this disparity? It is not simply that anti-gay discrimination appears comparatively reasonable and nonprejudiced in the Court's judgment. Nor can the disparity be traced to some of the justices' willingness to acknowledge the allegedly "honorable people" who oppose same-sex marriage.[194] At the core of the majority opinion is an implicit assumption that gay identity is inherently political.

The conflation between identity and politics can be found in previous gay rights cases. Justice Stevens's passionate dissent in *Dale* seems particularly relevant on this front. In response to the majority's holding that the Boy Scouts of America could revoke the membership of a gay scoutmaster, Justice Stevens argued:

> The majority . . . does not rest its conclusion on the claim that Dale will use his position as a bully pulpit. Rather, it contends that Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality—even if Dale has no intention of doing so.[195]

The dissent continued:

> The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen,

191. Carlos A. Ball, *First Amendment Exemptions for Some,* 137 HARV. L. REV. F. 46, 53 (2023).
192. *Id.*
193. *Id.* at 54.
194. Transcript of Oral Argument, *supra* note 34, at 81.
195. Boy Scouts of Am. v. Dale, 530 U.S. 640, 692 (2000).

> communicates a message that permits his exclusion wherever he goes.[196]

In Dale's case, the fact he was "out" meant his mere existence was a message. And because it was a message or a statement, it was easier for the Court to allow the Boy Scouts to distance itself from Dale. The Scouts could claim it was not distancing itself from a man because of his sexual orientation but rather because of his political viewpoints.

VII. CONCLUSION

Turning back to *303 Creative*, viewing the hypothetical gay couple who wishes to buy a wedding website as inherently political helps us understand some of the tensions plaguing the opinion and oral argument. Both the majority and dissent devised numerous analogies to highlight the case's potential implications.[197] For instance, the majority opinion suggests siding against Smith would mean "the government could require 'an unwilling Muslim movie director to make a film with a Zionist message.'" [198] This argument is somewhat disingenuous because the typical filmmaker works on a freelance basis and would almost certainly fail to constitute a public accommodation.[199]

The majority further suggests forcing Smith to design a wedding website for a same-sex couple is equivalent to "forcing a male website designer married to another man to design websites for an organization that advocates against same-sex marriage."[200] The hypothetical gay couple, however, is not asking Smith to design a website advocating for same-sex marriage. Their website does not advocate for same-sex marriage any more than an interracial couple's website advocates for interracial marriage, or a straight couple's advocates for marriages between one man and one woman. The gay couple is asking Smith for the same services she provides to other couples. To differentiate the services requires looking at status, which defeats the purpose of public

196. *Id.* at 696.

197. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 589–590 (2023); Mark Walsh, "*Scenes with Santa" and Online-Dating Inquiries at the 303 Creative Argument*, SCOTUS BLOG, https://www.scotusblog.com/2022/12/scenes-with-santa-and-online-dating-inquiries-at-the-303-creative-argument/ (Dec. 6, 2022, 2:22 PM).

198. 303 Creative LLC v. Elenis, 600 U.S. 570, 589 (2023) (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1199 (10th Cir. 2021)).

199. David D. Cole, *"We Do No Such Thing":* 303 Creative v. Elenis *and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 YALE L.J. F. 499, 508 (2024) (arguing filmmakers selectively choose their projects and clients rather than hold their services out to the general public).

200. *303 Creative*, 600 U.S. at 589–90.

accommodations laws. The website could be as simple as providing the date of the wedding, a registry, and information on hotels and travel; yet Smith would only object to making this website for a same-sex couple.[201] The objectionable message is implicit and stems from the identity of the couple. In other words, the message, and in turn the product, is necessarily defined in relation to status. Whether the couple wants a cake or a website, under the Court's logic, those products are imbued with political meaning solely based on whether the customers belong to a protected class.

Public accommodations laws regulate conduct, not speech. Even if Smith is forced to provide her services to same-sex couples, she is still free to advocate that marriage is between one man and one woman. She could even insist on including Bible passages describing marriage as between one man and one woman.[202] All the law requires is that a company like Smith's "offer its services without regard to customers' protected characteristics."[203] This is why the ACLU, an organization famous for its pro-free speech stances in high-profile cases, wrote a brief in favor of Colorado rather than Smith.[204]

By defining the product in relation to the protected class, the majority necessarily implicates the First Amendment. What traditionally would have been considered an incidental effect on free speech suddenly becomes compelled speech. The result is 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."[205]

201. *See* Transcript of Oral Argument, *supra* note 34, at 6–9.
202. *303 Creative*, 600 U.S. at 629 (Sotomayor, J., dissenting).
203. *Id.*
204. Brief for Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Colorado in Support of Respondents, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).
205. *303 Creative*, 600 US. at 603.