THE UNFINISHED MASTERPIECE: COMPULSION AND THE EVOLVING JURISPRUDENCE OVER FREE SPEECH

JONATHAN TURLEY*

This Article explores how free expression conflicts have been addressed under religious, associational, and free speech rationales. A proponent of a natural rights or autonomous view of free speech, the Article lays out how a new and promising approach coalesced in the recent decision of the Supreme Court in 303 Creative LLC v. Elenis. *Indeed, the Article explains how the decision completed the work left undone in* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission *in 2018. However, it argues that this rationale remains an "unfinished masterpiece" due to the lack of a clear natural right or autonomous foundation for free speech. That vulnerability was vividly illustrated just a week after* 303 Creative*, when the Fourth Circuit rejected the free speech claims of a professor in* Porter v. Board of Trustees of North Carolina State University. *The Fourth Circuit not only continued a past rationale of speech-as-conduct, but adopted a narrow view of the function of the speech by the dissenting faculty member. The case shows that the Supreme Court must complete the work in* 303 Creative *by increasing the scope and depth of free speech protection. To that end, the Article argues that religious speech should be protected first and foremost as speech as opposed to a violation of the Religion Clauses. Moreover, it must be grounded in either a natural right or autonomous rationale rather than past functionalist rationales. Only then will the Court truly achieve a long-sought masterpiece of free speech.*

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* J.B. & Maurice C. Shapiro Chair of Public Interest Law, George Washington University Law School. I would like to thank Editor in Chief Rosemary Ardman and the entire staff of the *Maryland Law Review* for organizing the symposium on the Supreme Court where the original version of this paper was presented as well as providing such excellent insights throughout the editing process. The issuance of the *303 Creative* opinion shortly before publication required a rewrite and a new round of edits from the law review members, who took on the task with enthusiasm. I would also like to thank my assistant, Seth Tate, for his editing and administrative assistance.

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INTRODUCTION

The emergence of a stable conservative majority on the Court has produced a series of opinions sweeping away years of nuanced, and at times, conflicting 5-4 decisions. That new clarity has come through the rejection of past doctrines, including pronounced changes in religious challenges like *Kennedy v. Bremerton School District*[1] where the Court dispensed with the *Lemon* Test. Those significant changes also include the decision in *Groff v. DeJoy*,[2] where the Court rejected the de minimis test for establishing whether employers must accommodate the religious beliefs of employees. The strengthening of protections under the Religion Clauses could have easily extended to religious speech cases.

Five years ago, the Court was faced with a potentially historic challenge in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[3] That case, involving a baker who refused to prepare a wedding cake for a same-sex couple, offered a defining moment in the conflict between anti-discrimination laws and religious freedom. The divided Court, however,

1. 142 S. Ct. 2407 (2022).
2. 143 S. Ct. 2279 (2023).
3. 138 S. Ct. 1719 (2018).

issued an anemic decision, remanding the case on narrow grounds without resolving the underlying constitutional question.[4] When the issue returned to the Court in *303 Creative LLC v. Elenis*,[5] the author of *Masterpiece Cakeshop*, Anthony Kennedy, had been replaced by Brett Kavanaugh. Additionally, Ruth Bader Ginsburg had been replaced by Amy Coney Barrett. A six-Justice majority now existed with the strongest view of the Religion Clauses in decades. Yet, when a website designer brought both challenges under both the Free Exercise and Free Speech Clauses, that majority accepted only the free speech challenge.[6] It would become one of the most consequential free speech victories in the history of the Court.

Originally written in conjunction with remarks at the *Maryland Law Review* Supreme Court symposium, this Article began as an exploration of why the Court should embrace expressive works from cakes to websites as protected speech under the First Amendment.[7] Some of us have argued for years that these cases belong under free speech rather than free exercise jurisprudence. The ultimate decision in *303 Creative v. Elenis* was written along those lines. It was the "masterpiece" that many of us hoped for in 2018, but it remains a work in progress. That was made clear by a ruling of the United States Court of Appeals for the Fourth Circuit issued a week after *303 Creative*—a major loss for free speech in the academic setting. The decision in *Porter v. Board of Trustees of North Carolina State University*[8] rejected a professor's claim that his opposition to diversity policies was protected speech.[9] The university disciplined the professor for a "lack of collegiality," and the Fourth Circuit supported the university by treating the expression of the views as conduct rather than speech.[10] It showed the same cabined view of free speech as the lower court decisions in *303 Creative* and, more importantly, showed that the Court's strong defense of free speech remains an unfinished work.

In its decision in *303 Creative*, the United States Court of Appeals for the Tenth Circuit upheld Colorado's Anti-Discrimination Act ("CADA") ruling that artist Lorie Smith had to create websites for same-sex marriage

4. *Id.* at 1732.

5. 143 S. Ct. 2298 (2023).

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

7. The original title of my remarks and this article was "The Unfinished Masterpiece: Speech Compulsion and the Evolving Jurisprudence Over Religious Speech." It was changed to reflect how the Court will now be confronted with tests of the decision in both religious and non-religious speech cases.

8. 72 F.4th 573 (4th Cir. 2023).

9. *See* Jonathan Turley, *Fourth Circuit Rules Against North Carolina State Professor Who Spoke Out Against Diversity Policies*, JONATHAN TURLEY (July 8, 2023), https://jonathanturley.org/2023/07/08/fourth-circuit-rules-against-north-carolina-state-professor-who-spoke-out-against-diversity-policies/.

10. *Porter*, 72 F.4th at 584.

despite her religious objections to such unions. It further held that she could be sanctioned for posting her opposing views on her own site. The Tenth Circuit was unusually candid in both its interpretation and its implications. There was nothing nuanced or evasive in the opinion, which stated that "[e]liminating . . . ideas is [the law's] very purpose."[11] That one line captured the continuing danger from decades of muddled jurisprudence over the ability of states to coerce or compel speech. The Tenth Circuit maintained this view despite prior cases strongly disfavoring the manipulation or management of public expression. For example, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,[12] the Court struck down a New York law that diverted profits from books by accused or convicted persons that discussed their alleged underlying crimes. Justice O'Connor stressed that the First Amendment is designed in part to block "the government's ability to impose content-based burdens on speech" and thereby prevent "the specter that the government may effectively drive certain ideas . . . from the marketplace."[13]

While free speech cases often focus on censorship of opposing views, speech controls run across a spectrum from speech censorship to speech compulsion. That broader threat to free speech was vividly demonstrated in *303 Creative*. Even when compelling citizens to speak, the purpose remains the same: to eliminate opposing ideas and to substitute them with state-endorsed ideas. What is most chilling in the Tenth Circuit opinion is not just the rejection of an autonomy theory for free speech protection, but the adoption of a monopoly theory for speech compulsion. The Tenth Circuit faulted Smith with withholding her unique abilities and characterized her refusal to speak as akin to economic monopoly.[14] That decision is now thankfully reversed, and the Court has reaffirmed that the "very purpose" of the First Amendment is to prevent the government from eliminating ideas.[15] However, as discussed below, the foundation for this right remains ambiguous, with rationales that float between an autonomy-based and a more functionalist-based right. It is the former view that might have precluded the decisions by both the Tenth Circuit in *303 Creative* and the Fourth Circuit in *Porter*.

This Article will look at the evolution of Supreme Court cases on free expression under a variety of approaches, from free exercise to free association to free speech rights. While these areas continue to be major

11. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

12. 502 U.S. 105 (1991).

13. *Id.* at 116.

14. *303 Creative*, 6 F.4th at 1180–81.

15. *303 Creative*, 143 S. Ct. at 2313.

works in progress for the new majority, they show the inherent limits in the protection of free speech in anti-discrimination cases. Yet, after decades of conflicting and confusing decisions, the Court in *303 Creative* brought a long-needed clarity that protects citizens from speech compulsion, including in areas of public accommodation. It was decades overdue, but the Court forced its own hand. While the Court could have reviewed the case under both free exercise and free speech, it issued a Cortez-like order, effectively burning its ship at the water's edge by dropping the free exercise question.[16] It considered only one question—free speech—and finally gave the answer that many of us have long hoped for in these cases of public accommodation. Yet, the Court acknowledged in *303 Creative* that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions."[17] One of those questions was presented by the Fourth Circuit within a week and showed that the newfound clarity of the Court must now be given the necessary reach to combat compelled speech in every form.[18]

I. THE SPEECH AS DISCRIMINATION: THE COLLISION OF FREE EXERCISE AND FREE SPEECH JURISPRUDENCE

Before addressing the free speech model for understanding religious speech in public accommodations, it is useful to discuss the prior approaches of the Court under free exercise and free association models. In both areas, the result has been a morass of decisions that turned on distinctions so subtle as to be indiscernible. While this is a relatively brief survey of key decisions, these case lines struggle with standards that often prove fluid and indeterminant. In the area of free speech, such uncertainty creates a chilling effect for citizens, who struggle to know what values they can express—and when they can refuse to express opposing values required by the government.

A. The Free Exercise Morass and the Continued Struggle Over Faith-Based Denials of Public Accommodation

Many years ago, I wrote about the inevitable collision of the Court's two lines of cases. I have long been an advocate of resolving these disputes under an alternative free speech approach.[19] This view was not only based on the

16. *See supra* note 6.

17. *303 Creative*, 143 S. Ct. at 2319.

18. *See infra* Section III.A.

19. Jonathan Turley, *Discrimination or Free Speech? Supreme Court Decides to Weigh In*, THE HILL (Feb. 24, 2022, 10:45 AM), https://thehill.com/opinion/judiciary/595642-discrimination-or-free-speech-supreme-court-decides-to-weigh-in/; Jonathan Turley, *Liberals Can't Have Their Cake and Eat It Too*, THE HILL (May 14, 2018, 2:00 PM), https://thehill.com/opinion/judiciary/387589-liberals-cant-have-their-cake-and-eat-it-too-in-supreme-court-case/; Jonathan Turley, *Of Cake*

clarity offered by framing these disputes in free speech terms, but in recognizing the unholy mess of the Court's religion clause cases. While the Court seemed to reach *terra firma* on the Free Exercise Clause after *Sherbert v. Verner*,[20] the Court would later struggle with the standard for applying strict scrutiny.

The opinions under the Establishment and Free Exercise Clauses have been some of the most fiercely contested in the last three decades of the Court. The Court seemed to veer wildly on when and how strict scrutiny would apply. In *Employment Division, Department of Human Resources v. Smith*,[21] the Court rejected strict scrutiny in a case that would remain the focus of challenges for over two decades. The Court denied the claim of the Native American Church that the criminal prohibition on the use of peyote denied them free exercise of religion.[22] Justice Antonin Scalia found that the State satisfied the rational basis test, giving the government wide discretion to impose neutral, generally applicable laws that incidentally restrict religious practice.[23] However, he reserved vague exceptions, including for cases where the government purposefully discriminates against religion and "hybrid situations" where free exercise is mixed with another constitutional claim like free speech.[24] The deferential position of the Court in *Smith* would stand in contrast to the cases developed under the evolving conservative majority of the Roberts Court.

Smith has been criticized for its lack of protection for a minority religious practice, fueling claims that the conservative majority has a bias in favor of Western religions.[25] Scalia insisted that there had to be a logical limit to the ability to challenge neutral, generally applicable rules:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence,

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Shops and Coffee Shops, JONATHAN TURLEY (Oct. 10, 2017), https://jonathanturley.org/2017/10/10/of-cake-shops-and-coffee-shops-recent-controversies-raise-the-question-of-when-owners-can-refuse-service-to-those-with-opposing-views/; Jonathan Turley, *Critics of Indiana's Religious Freedom Are Trying to Have Their Cake and Eat It Too*, WASH. POST (Apr. 3, 2015, 1:57 PM), https://www.washingtonpost.com/posteverything/wp/2015/04/03/critics-of-indianas-religious-freedom-law-are-trying-to-have-their-cake-and-eat-it-too/; *see also* Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59, 59–60 (Douglas Laycock et al. eds., 2008).

20. 374 U.S. 398 (1963).

21. 494 U.S. 872 (1990).

22. *Id.* at 874–75.

23. *Id.* at 885–87.

24. *Id.* at 882.

25. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1133–36 (1990); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 139 (1992).

> we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[26]

Scalia himself acknowledged the fact that the reliance on democratic rationales would disadvantage those with minority practices or beliefs: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government . . . ."[27] That "unavoidable consequence" would soon occupy the Court when a specific practice associated primarily with one religion was barred by a city.[28]

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[29] a religious group would prevail on the basis of purposeful discrimination. In that case, the City of Hialeah enacted prohibitions on religious sacrifices of animals, not for a neutral purpose, but rather to purposefully discriminate against the Santeria religion. The case undermined the claims of the Court's bias in favor of majoritarian faiths. Yet, it left *Smith* in place, which would be repeatedly honored in the breach by the Court in later cases. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[30] for example, the Court ruled against a Missouri program paying for the resurfacing of playgrounds that excluded religious schools. Chief Justice Roberts wrote the majority opinion and found a purposeful targeting of religion. Applying strict scrutiny, the Court held the exclusion to be a free exercise violation.[31]

The Roberts Court continued to build on the exceptions that all but swallowed the *Smith* rule. A major line of cases soon developed around church autonomy. In *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*,[32] a church-affiliated school did not follow a "valid and neutral law of general applicability" contained in the Americans with Disabilities Act ("ADA").[33] The ADA was raised by fired teacher Cheryl Perich, who suffered from narcolepsy.[34] Yet, the Court held that, unlike *Smith*, *Hosanna-Tabor* concerned a ministerial function: "[A] church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference

26. *Smith*, 494 U.S. at 888 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).
27. *Id.* at 890.
28. *Id.*
29. 508 U.S. 520 (1993).
30. 137 S. Ct. 2012 (2017).
31. *Id.* at 2024.
32. 565 U.S. 171 (2012).
33. *Id.* at 190.
34. *Id.* at 171.

with an internal church decision that affects the faith and mission of the church itself."[35] The decision reinforced the special protection afforded to religious ideas under the Constitution. The approach in *Hosanna-Tabor* was further reinforced in *Our Lady of Guadalupe School v. Morrissey-Berru*,[36] where the Court dealt with anti-discrimination laws in the firing of elementary school "lay teachers," allegedly due, respectively, to breast cancer and aging.[37] While neither teacher was a minister, Justice Alito's majority opinion relied upon the religious status of the schools to bar the application of the law.[38]

As with the individual autonomy approach to free speech discussed later in Part III, church autonomy cases offered clarity and bright-line rules for controversies under the Religion Clauses. For example, the Tenth Circuit declared "[t]his church autonomy doctrine prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity."[39] Even in cases of neutral laws, the courts have refused to allow intrusion into the autonomous decisions of churches.[40] Those cases offer the type of bright-line rule that has escaped religious speech cases. Clearly, the ministerial cases contain the added dimension of an institution that serves additional values in allowing for collective worship and religious exercise. Yet, this also fits into an associational framework, particularly in the role of churches in protecting and fostering diverse forms of faiths.

As shown in *Smith*, free exercise jurisprudence (even with the relative clarity of church autonomy cases) has proven dangerously fluid for free speech controversies. *Smith* involved a minority religion that lost the protection of strict scrutiny under the Court's construction.[41] It was not treated as discrimination against that religious practice, and that threshold conclusion had determinative effects. In *Lukumi*, a minority religion did ultimately prevail when the Court struck down ordinances barring ritual animal sacrifice.[42] Yet, the Court repeatedly asked for evidence of "targeting" of the religion and noted that "adverse impact will not always lead to a

35. *Id.* at 190.

36. 140 S. Ct. 2049 (2020).

37. *Id.* at 2079.

38. *Id.* at 2066.

39. Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002).

40. For example, the D.C. Circuit held:

> We acknowledge that . . . cases that we and other courts have cited in support of the ministerial exception did not involve neutral statutes of general application. Nevertheless, we cannot believe that the Supreme Court in Smith intended to qualify this century-old affirmation of a church's sovereignty over its own affairs.

EEOC v. Cath. Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996).

41. Emp't Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 886–90 (1990).

42. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

finding of impermissible targeting."[43] The emphasis remains on discrimination between religions, or between religion and non-religion. Expressive association cases offer an alternative framing for these controversies under a free speech construct for such conflicts. The free speech model demands bright-line rules to avoid the chilling of speech, while free exercise cases turn on shifting views of the underlying intent or the application of government policy. As discussed below, free exercise is poorly suited to deal with the myriad of speech conflicts in public accommodation.

B. Association and the Subjectivity of Expression in Public Accommodation

The Court has another line of cases addressing the conflicts between free speech and antidiscrimination laws as a denial of expressive association. Expressive association embodies the critical dialogic and interactive element to First Amendment rights. Those rights rely on a "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[44] In cases such as *NAACP v. Alabama ex rel. Patterson*,[45] the Court recognized the close nexus between associational and speech rights. Associations are essential to the expression of "public and private points of view, particularly controversial ones."[46] These cases drive closer to the core free speech values raised in these conflicts: the right to express what the Court has referred to as the "individual freedom of mind."[47] The need for an expressive component to the associational question places the speech values in sharper focus in these cases. The problem is that these cases inevitably fall back into the same balancing of the expression against other state interests. Moreover, the need to show a denial of free expression allowed holdings where courts simply refused to recognize the association as inherently involving speech.

In 1984, the Court handed down a decision that captures the uncertain protection afforded to speech under the expressive association model. In *Roberts v. United States Jaycees*,[48] the Court rejected the associational claims of the Jaycees in seeking to continue an all-male membership policy. There, the Court was faced with an organization that expressly declared its purpose to "promote and foster the growth and development of young men's civic organizations . . . and to develop true friendship and understanding among

43. *Id.* at 535.
44. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).
45. 357 U.S. 449 (1958).
46. *Id.* at 460.
47. Wooley v. Maynard, 430 U.S. 705, 714 (1977).
48. 468 U.S. 609 (1984).

young men of all nations."[49] The Court simply ignored that core organizational statement to avoid addressing any real expressive loss from being compelled to abandon its selective gender policy. On the infringement question, the Court held that the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association."[50] The Court further held that, even if infringement occurs, the limit on expressive association may be "justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[51] The framing of the policy as non-expressive and unprotected allowed the Court to avoid speech elements raised by the organization.

In 1988, the Court rejected another challenge to an antidiscrimination law in *New York State Club Ass'n v. City of New York*.[52] The Supreme Court upheld the use of New York City's Human Rights Law to force the New York State Club Association to accept female members. After again finding a compelling interest in ending such discrimination, the Court declared that the law employed the "least restrictive means to achieve its ends because it interfere[d] with the policies . . . of private clubs only 'to the extent necessary to ensure that they d[id] not automatically exclude persons from membership . . . on account of invidious discrimination.'"[53] The case, however, also laid out the expected burden for an organization to show a protected expressive association. The organization must be able to "show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion."[54]

49. *Roberts*, 468 U.S. at 612–13, 616.

50. *Id.* at 626. Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court simply rejected the Rotary Club's stated rationale for its gender membership policy. 481 U.S. 537, 546–47 (1987). The Club had stated the policy was tied to its culture and cohesiveness. *Id.* at 541. The Court simply held that it did not believe the organization was right about the impact of women or the centrality of the policy to the group's identity. *Id.* at 549 n.8.

51. *Roberts*, 468 U.S. at 623. The holding, therefore, can be read consistently with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). That case, which upheld the right of a private group to exclude a gay organization from a parade, was based on the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573; *see infra* notes 55–61 and accompanying text.

52. 487 U.S. 1 (1988).

53. *Id.* at 7–8 (quoting N.Y. State Club Ass'n, Inc. v. City of New York., 505 N.E.2d 915, 921 (N.Y. 1987)).

54. *Id.* at 13.

Over ten years after *Roberts*, the Court would hand down *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[55] with distinctly different assumptions and results. The Court rejected the use of a law barring discrimination based on sexual orientation to compel the inclusion of the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") in the St. Patrick's Day Parade.[56] The private council of veterans turned down the group as inconsistent with their underlying values.[57] Notably, the parade did not have a specific message contravened by GLIB. Rather, the Court found the process of selection of individual floats and groups to be an expressive act. It rejected the notion that protected speech had to be generated by the speaker: "Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others."[58] While accepting the anti-discrimination statute as pursuing a valid purpose, the Court found the law unconstitutional as applied.[59] Drawing a distinction between discrimination on the basis of orientation and discriminating on the basis of the message of the group, the Court held "that a speaker has the autonomy to choose the content of his own message."[60] In a statement that carried obvious implications for *303 Creative*, the Court explained that "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[61]

In 2000, the Court again relied on organizational expressive purpose in ruling for associational expression in *Boy Scouts of America v. Dale*.[62] The Court held that New Jersey's public accommodations law could not be used to compel the incorporation of gay scout leaders because it would deny a core value of the organization. The Scouts maintained that the exclusion policy "has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations."[63] The Court looked at that long-standing policy and declared, "[w]e cannot doubt that the Boy Scouts sincerely holds

55. 515 U.S. 557 (1995).
56. *Id.* at 572–73.
57. *Id.* at 561.
58. *Id.* at 570.
59. *Id.* at 578.
60. *Id.* at 573.
61. *Id.* at 579.
62. 530 U.S. 640, 657 (2000).
63. *Id.* at 652.

this view."[64] Yet, it had done precisely that in *Roberts* in dismissing the Jaycee's justification for a male-exclusive membership.[65] Moreover, the Court was faced with a *Roberts*-like finding by the lower court that the ability of the Boy Scouts to disseminate its message was not significantly affected by the compelled inclusion of Dale, a gay assistant scoutmaster: "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality."[66]

The Court pushed back on the finding of the lower court on three grounds. First, the Court noted that:

> [A]ssociations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.[67]

Further, in cases like *Roberts*, which rejected expressive association claims, the Court "conclude[d] that the enforcement of [public accommodations] statutes would not materially interfere with the ideas that the organization sought to express."[68] The Court noted that in *Dale*, even though the Scouts might discourage the discussion of sexuality, the First Amendment still protects the organization's right to support its core values

64. *Id* at 653. The striking contrast with prior holdings like *Roberts* was not lost upon the dissent, particularly Justice Stevens. Justice Stevens flagged the total acceptance shown in this case as opposed to prior cases on the centrality of discriminatory policies:

> This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, "we are obligated to independently review the factual record." It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims. But the majority insists that our inquiry must be "limited" because "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."

Id. at 686 (Stevens, J., dissenting) (quoting *id.* at 650–511 (majority opinion)).

65. *See supra* notes 48–51 and accompanying text.

66. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1223 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000) (emphasis added).

67. *Dale*, 530 U.S. at 655.

68. *Id.* at 657.

and to "teach only by example."[69] Finally, the Court said that it is immaterial if there are those who disagree with the values when the organization takes an official position on the subject of homosexuality.[70]

Dale did little to bring clarity to the line between protected expressive association and prohibited discrimination. The Court stressed that expressive association cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[71] It then stressed that Dale was a community leader who was publicly open about his sexual orientation. The decision clearly showed greater affinity toward the *Hurley* analysis and presumptions than it did *Roberts*.[72] The Court rejected the need for the policy to be the primary or defining value of the organization. It focused on the expressive act of adding a scout leader as akin to adding a parade float or group.

After *Dale*, the opinions in *Roberts* and *New York State Club Ass'n* appear to hold less relevance for these cases. Yet, the Court continues to distinguish these cases while reaching divergent results. For their part, the dissenting justices in *Dale* offered equally problematic standards. Justices Stevens, Souter, Ginsburg, and Breyer maintained that, before an association can prevail on a freedom of expressive association claim, it must "identify[] a clear position to be advocated over time in an unequivocal way."[73] While the concern over manufactured or opportunistic claims is legitimate, the dissenting justices offer little insight into how long a position must be maintained and what will be deemed "equivocal" in a record to deny such expression. The result is a lack of clarity that is essential to protect free speech from the danger of the chilling effect of potential regulatory action.

II. UNIQUE EXPRESSION AND THE PROTECTION OF RELIGIOUS SPEECH AS SPEECH

For many years, the Court's jurisprudence in this area has been highly conflicted on the underlying theories. That in part reflected the makeup of the Court. The balance of the Court obviously changed with the addition of the three Trump nominees: Neil Gorsuch (2017), Brett Kavanaugh (2018),

69. *Id.* at 655.

70. *Id* at 655–56. The general presumptions in *Dale* were strikingly different than *Rotary Club of Duarte*. In that case, the Court not only dismissed the claims of the organization but also noted that the divergent composition of some meetings could be used against the claims. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 n.8 (1987) ("Appellants' argument also is undermined by the fact that women already attend the Rotary Clubs' meetings and participate in many of their activities.").

71. *Dale*, 530 U.S. at 653.

72. *See supra* notes 48–61 and accompanying text.

73. *Dale*, 530 U.S. at 701 (Souter, J., dissenting).

and Amy Coney Barrett (2020). This shift in the Court is most evident in two post-*Dale* decisions: *Masterpiece Cakeshop* and *303 Creative.*

A. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

For many of us awaiting the Court's reckoning with free exercise and anti-discrimination conflicts, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[74] appeared the perfect vehicle. Jack Phillips, the baker and owner of the Colorado bakery, was asked by Charlie Craig and David Mullins, to make a cake celebrating their same-sex marriage. Phillips declined to do so and, the next day, Phillips explained to Craig's mother that the reason was "his religious opposition to same-sex marriage."[75] Craig and Mullins then filed a complaint with the Colorado Civil Rights Division, alleging that Phillips had violated the Colorado Anti-Discrimination Act ("CADA"), which protects against the denial of service in a place of public accommodation based on one's identity.[76] Specifically, CADA defines a public accommodation as "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public."[77] The law exempts "a church, synagogue, mosque, or other place that is principally used for religious purposes."[78]

There are two clauses that would play a key role in both *Masterpiece Cakeshop* and *303 Creative*. First, under the "Accommodation Clause," a public accommodation may not use sexual orientation as grounds for refusing "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations."[79] Second, under the "Communication Clause," a public accommodation may not issue any written materials indicating that, because of sexual orientation, "the full and equal enjoyment of . . . a place of public accommodation will be refused . . . or that an individual's patronage is unwelcome."[80]

The Commission held a hearing at which Commissioner Diann Rice made a statement that would prove disastrous for the Commission and the complainants:

74. 138 S. Ct. 1719, 1732 (2018).

75. *Id.* at 1724.

76. *Id.* at 1725.

77. COLO. REV. STAT. § 24-34-601(1).

78. *Id.*

79. *Id.* § 24-34-601(2)(a).

80. *Id.* There is an exemption of certain sex-based restrictions from the Accommodation Clause and Communication Clause: "[I]t is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation." *Id.* § 24-34-601(3).

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[81]

The Commission went forward to find against Phillips and to order him to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples."[82] Notably, the Colorado law also protects "creed[s],"[83] defined as "all aspects of religious beliefs, observances or practices . . . as well as the beliefs or teachings of a particular religion, church, denomination or sect."[84] However, stating such views on a business website or limiting services based on these beliefs was not deemed a protected creed.

Phillips appealed to the Colorado Court of Appeals and raised three other cases to show the bias against his religious views.[85] In those cases, William Jack filed discrimination claims after he sought to have cakes made with Bible verses against same-sex marriage.[86] One cake was designed to look like an open Bible with a red "X" over the image of two grooms with the words "God loves sinners."[87] Another showed an open Bible with the words "God hates sin. Psalm 45:7" on one side and "Homosexuality is a detestable sin. Leviticus 18:2" on the other.[88] Three bakeries denied him service. The Colorado Court of Appeals dismissed the comparison, finding that the three bakeries could refuse a cake with such offensive messages and rejecting the claim that Phillips was being unconstitutionally compelled to express viewpoints against his faith.[89] It simply declared that such declinations can be made given "the offensive nature of the requested

81. *Masterpiece Cakeshop*, 138 S. Ct. at 1729; *see* Marshall Zelinger, *You've Heard from the Baker. Now Hear from the Woman Called Out by the Supreme Court in Its Ruling*, 9NEWS (June 6, 2018, 7:59 PM), https://www.9news.com/article/news/local/next/youve-heard-from-the-baker-now-hear-from-woman-called-by-the-supreme-court-in-its-ruling/73-562092956.

82. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

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

84. 3 COLO. CODE REGS. § 708-1:10.2(H).

85. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *rev'd sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

86. *Masterpiece*, 138 S. Ct. at 1749 (Ginsberg, J., dissenting).

87. *Id.*

88. *Id.*

89. *Craig*, 370 P.3d at 282 n.8.

message."[90] However, it denied Phillips the same discretion. Thus, bakers could refuse Christian (or racist or anti-Muslim) images or words as offensive, but not images or words found offensive to Christians. This clear discrimination against Christian bakers was rationalized by the court despite the fact that the underlying law prohibited all discrimination in "all aspects of religious beliefs, observances or practices … as well as the beliefs or teachings of a particular religion, church, denomination or sect."[91]

The comparison of the four cases should have reinforced the view that these controversies are better handled under free speech jurisprudence. If the three bakeries were entitled to refuse what they considered an offensive message (as I believe they are), the same would be true for Phillips. However, the case became muddled before the Supreme Court, which found an exit ramp that avoided the question altogether. While Justice Kennedy began with the juxtaposition of the First and Fourteenth Amendments, the Court declared, "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts."[92] Instead, the Court latched on to Commissioner Rice's statement and the Jack cases to find evidence of hostility toward religion and the need to remand the case.[93] While adopting this narrow resolution, Kennedy cited *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* in concluding that "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[94]

Both sides could point to hopeful elements in the decision, though it largely kept the status quo. On the anti-discrimination side, the Court did reaffirm the general proposition that "while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[95] In citing *Newman v. Piggie Park Enterprises, Inc.*,[96] which found combatting racial discrimination to be a compelling state interest, the Court reinforced the state interest behind these laws. Justice Kagan emphasized that point in her concurrence:

> "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and

90. *Id.*
91. 3 COLO. CODE REGS. § 708-1:10.2(H).
92. *Masterpiece*, 138 S. Ct. at 1732.
93. *Id.* at 1729–31.
94. *Id.* at 1731.
95. *Id.* at 1727.
96. 390 U.S. 400, 402 (1968).

> in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration."[97]

However, while the Court recognized CADA as "a neutral and generally application public accommodations law," it did not adopt a *Smith* rational basis test and simply uphold the Commission decision.[98] Kennedy noted "that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion."[99] While the decision turned on the treatment of the challenge by the Commission (and failure of the Colorado court to take that challenge seriously), the Court still, again, fell back on the case line barring actions hostile toward religion.[100]

For Phillips, the "nuanced" resolution of the Court was a continuing nightmare. Colorado filed new charges against Phillips after he denied a person transitioning between genders a custom cake.[101] Phillips has spent over a decade in state and federal courts. In January 2023, he lost his appeal from sanctions for refusing to make the gender transition cake.[102] The Court found that the creation of a cake can be "inherently expressive and therefore entitled to First Amendment protection."[103] However, the court still denied protection to Phillips because the specific cake in this case lacked creative details:

> We conclude that creating a pink cake with blue frosting is not inherently expressive and any message or symbolism it provides to an observer would not be attributed to the baker. Thus, CADA does not compel Masterpiece and Phillips to speak through the creation and sale of such a cake to Scardina.[104]

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97. *Masterpiece*, 138 S. Ct. at 1732 (Kagan, J., concurring) (alterations in original) (quoting *id.* at 1727, 29 (majority opinion)).

98. *Id.* at 1727 (majority opinion).

99. *Id.*

100. *Id.* at 1732 ("The Commission's hostility [is] inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion.").

101. Scardina v. Masterpiece Cakeshop Inc., No. 19CV32214 (Colo Dist. Ct. June 15, 2021).

102. Scardina v. Masterpiece Cakeshop Inc., 528 P.3d 926 (Colo. App. Ct. 2023).

103. *Id.* at 940.

104. *Id.* at 941. The court used the same rationale of the cake's design to deny Phillips religious claims:

> We also reject Masterpiece and Phillips' argument that the statute punishes them for exercising their religious beliefs because CADA is "applie[d] through the Commission's purported use of an 'offensiveness rule.'" For the reasons previously articulated, even if we were to assume such a standard exists, the trial court's ruling in this case was not predicated on the perceived "offensiveness" of the message, but rather on the fact that the pink and blue cake expressed no message, whether secular or religious.

While the majority opinion lacked the bold embrace of an autonomous view that some of us had hoped would emerge, the partial concurrence by Justice Thomas, joined by Justice Gorsuch, hinted at something more for later cases.[105] Thomas concurred to offer a broader view of free speech. He noted that the Tenth Circuit acknowledged that some cakes may have particular writing or imagery connected to a wedding, but he stressed that, regardless of such content, baking is inherently creative and, therefore, speech:

> [A] wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes.[106]

Much was made of this line and whether it suggests that a baker could refuse any cake to a same-sex couple to use in a wedding.[107] However, the concurrence goes on to discuss "[f]orcing Phillips to create *custom* wedding cakes."[108] The point was that wedding cakes contain an inherent message without requiring specific expressive content or imagery. That means that a baker could not refuse pre-made cakes but could still decline to make a custom-made cake for a particular wedding. The Thomas concurrence isolated and rejected the very rationale that would be used by the dissent in *303 Creative*: the claim that any limitation on creative expression is "incidental" and minor.[109]

The obvious concern of the concurrence is that, if the Court tied the free speech protection to inclusion of writing or imagery that is unique to a wedding, it would create a slippery slope as courts debate what images are sufficiently expressive. The same-sex figurines are clearly expressive, but what about otherwise neutral writing celebrating love or commitment? Moreover, if the cake is custom-made, the baker is still crafting the cake for that particular ceremony and couple (often including their names). Taking this to an extreme example, would the Court consider a Jewish baker custom

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Id. (alteration in original).

105. *Masterpiece Cakeshop*, 138 S. Ct. at 1740–48 (Thomas, J., concurring in part and concurring in judgment).

106. *Id.* at 1743 n.2 (2018).

107. *See, e.g.*, Andrew Koppelman, *The Dangerous 303 Creative Case*, CANOPY F. (June 15, 2022), https://canopyforum.org/2022/06/15/the-dangerous-303-creative-case/.

108. *Masterpiece*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and concurring in judgment) (emphasis added).

109. *See id.* at 1741. Indeed, that was precisely how the appellate court had denied protection on the appeal in *Masterpiece Cakeshop*. Because the Colorado Court of Appeals viewed the cake as lacking sufficient expressive elements, it was treated as falling outside the protections of the First Amendment. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015), *rev'd sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018)..

making a Mein Kampf cake neutral on messaging if it does not contain quotes or other writing? The baker is still being forced to prepare a cake to celebrate the underlying event.[110] Any rule needs to adopt a clear and consistent standard for all these conflicts across political, religious, and social spectrums. Otherwise, the Court would place itself on the path of deliberating cake designs for the next decade under the same theory employed by Supreme Court Justice Potter Stewart on pornography: "I know it when I see it . . . ."[111]

The Thomas-Gorsuch concurrence would prove one of the most lasting aspects of the opinion when the Court returned to the question in *303 Creative*. The *Masterpiece Cakeshop* decision was clearly a status quo exit option for the Court. That left these cases as matters of religious objections, and lower courts continued to deny challenges to compelled speech for creative or unique expression including photography,[112] cakes,[113] videography,[114] and floral arrangements.[115] The makeup of the Court in *Masterpiece Cakeshop* appeared to force the result. That led to obvious speculation over how the new majority would bring greater clarity to this area. The Court soon answered that question by selecting *303 Creative LLC v. Elenis* with no obvious "off-ramp" to avoid dealing with religious speech.

B. 303 Creative LLC v. Elenis

Masterpiece Cakeshop effectively maintained the muddled and uncertain lines between free exercise and free speech in anti-discrimination disputes. The case itself was ideally situated to answer long-standing questions, but the Court itself lacked that clarity in its own collective view of this area. With the changed composition of the Court, the majority was ready to finish the work of *Masterpiece Cakeshop*. It would do so with a powerful decision in favor of expressive commercial speech—rejecting the deeply flawed and disturbing analysis of the Tenth Circuit.

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110. An analogy can be raised to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, where law schools objected to being compelled to publicly associate and coordinate meetings with military recruiters, a level of involvement that the Third Circuit found impermissible as compelled speech. 547 U.S. 47 (2006). However, *Rumsfeld* involved an association through access rather than creation. The Court found a trivial level of direct involvement by the schools. *See id.* at 60. It is true that some could claim that the military recruiters' access to the law schools might be viewed as an endorsement. However, unlike the decision in *303 Creative*, law schools can post clear statements disassociating themselves from any such relationship or endorsement. *See infra* notes 248–255.

111. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

112. Elane Photography, LLC, v. Willock, 309 P.3d 53 (N.M. 2013).

113. Klein v. Or. Bur. of Labor & Indus., 410 P.3d 1051 (Or. App. 2017), *vacated and remanded*, 139 S. Ct. 2713 (2019) .

114. Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090 (D. Minn. 2017), *aff'd in part and rev'd in part*, 936 F.3d 740 (8th Cir. 2019).

115. State v. Arlene's Flowers, 441 P.3d 1203 (Wash. 2019).

1. The Tenth Circuit Decision

303 Creative began as a pre-enforcement challenge based on what the Tenth Circuit recognized as Lorie Smith's "sincere" religious objections to same-sex marriages.[116] Smith's for-profit, graphic and website design company is willing to work with anyone regardless of their sexual orientation.[117] That includes the creation of graphics or websites for lesbian, gay, bisexual, or transgender ("LGBT") customers. However, she draws the line at graphics or websites celebrating same-sex marriages because of her religious beliefs.[118] Her art has a clear religious content referencing biblical passages "to explain His true story about marriage, and to use the talents and business He gave me to publicly proclaim and celebrate His design for marriage as a life-long union between one man and one woman."[119] Accordingly, Smith informed the Commission that she would offer wedding-related services in the future but not include those services for same-sex marriages. She stated that this exclusion would extend to not just the same-sex couple, but also to third parties who are seeking to secure the services on their behalf.[120] She also supplied the following "proposed statement" to be posted on her site:

> These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage—the very story He is calling me to promote.[121]

That position and proposed statement ran afoul of CADA. After Smith filed for a preliminary injunction, the district court asked her to file for summary judgment to facilitate review.[122] The district court then dismissed Smith's Accommodation Clause claim on standing grounds and granted summary judgment in favor of Colorado on Smith's Communications Clause claim.[123]

116. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1169–70 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

117. *Id.*

118. *Id.*

119. *Id.* at 1200 n.7.

120. *Id.* at 1170.

121. *Id.*

122. 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147 (D. Colo. 2019).

123. 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019), *aff'd*, 6 F.4th 1160 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

The Tenth Circuit disagreed with the District Court and found standing on both claims. The majority opinion by Judge Briscoe rejected the state's arguments, noting that "Colorado's strenuous assertion that it has a compelling interest in enforcing CADA indicates that enforcement is anything but speculative."[124] It also agreed with Smith that her websites constitute "pure speech" and that "[t]he websites consequently express approval and celebration of the couple's marriage, which is itself often a particularly expressive event."[125] Given those determinations, the Court also agreed that the Accommodation Clause compels speech by Smith that she finds offensive and "works as a content-based restriction."[126] The Court then lay plain the purpose of such actions in removing certain views from areas of public accommodation: "As Colorado makes clear, CADA is intended to remedy a long and invidious history of discrimination based on sexual orientation. Thus, there is more than a 'substantial risk of excising certain ideas or viewpoints from the public dialogue.' Eliminating such ideas is CADA's very purpose."[127] Given that purpose, the Tenth Circuit applied a strict scrutiny standard.

Those determinations would seem to dictate a ruling in favor of Smith. However, the Tenth Circuit took a surprising turn in finding that CADA was still constitutional. The court agreed with Smith that she was being compelled to give her unique artistic approach to these weddings, but it determined that the uniqueness itself justified that compulsion.[128] While acknowledging that others supply similar services to same-sex couples, the Tenth Circuit held that those couples should be able to force Smith to perform that work:

> Excepting Appellants from the Accommodation Clause would necessarily relegate LGBT consumers to an inferior market because Appellants' unique services are, by definition, unavailable elsewhere. As discussed above, our analysis emphasizes the custom and *unique* nature of Appellants' services. For the same reason that Appellants' custom and unique services are speech, those services are also inherently not fungible. To be sure, LGBT consumers may be able to obtain wedding-website design services from other businesses; yet LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those that Appellants offer. Thus, there are no less intrusive means of providing equal access to those types of services.[129]

124. *303 Creative*, 6 F.4th at 1174.
125. *Id.* at 1176.
126. *Id.* at 1178.
127. *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)).
128. *Id.* at 1180–81.
129. *Id.* at 1180.

The court then ruled that the state could bar her statement on the website under the Communication Clause, as she was seeking to express a view that that is forbidden by the state.[130] The court would only concede that Smith's expression of her own faith on her website "might not violate the Accommodation Clause," but still found the statement could be constitutionally barred by the state: "[T]he Proposed Statement also expresses an intent to deny service based on sexual orientation—an activity that the Accommodation Clause forbids and that the First Amendment does not protect. Thus, the Proposed Statement itself is also not protected and Appellants' challenge to the Communication Clause fails."[131]

While clearly rejecting any autonomy theory of free speech, which would treat Smith's speech as an inherent human right, the court proceeded to embrace its monopoly theory to justify speech compulsion. The Tenth Circuit declared:

> This case does not present a competitive market. Rather, due to the unique nature of Appellants' services, this case is more similar to a monopoly. The product at issue is not merely "custom-made wedding websites," but rather "custom-made wedding websites of the same quality and nature as those made by Appellants."[132]

Thus, Smith had to be compelled to create the website precisely because of her unique abilities and artistic sense. That reduced the market to a single supplier and Smith became a monopolist for withholding her own speech.[133] It is a construct that would permit a wide range of compelled speech. Indeed, it would flip the "marketplace of ideas" rationale for free speech by allowing people to be sanctioned for not adding their own voices to the marketplace, even when forced to speak in the words of others.

The majority opinion drew a sharp dissent from Chief Judge Tymkovich who correctly described the holding as "staggering" and sweeping in its implications.[134] Chief Judge Tymkovich declined to enter "the brave new

130. *Id.* at 1182–83.

131. *Id.* at 1183. The ruling on the statement stands in contrast to the decision of the New Mexico Supreme Court in *Elane Photography v. Willock*, where the court also upheld the application of an anti-discrimination law over a free speech objection, but still maintained that:

> Businesses that choose to be public accommodations must comply with the NMHRA, although such businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.

309 P.3d 53, 59 (N.M. 2013).

132. *303 Creative*, 6 F.4th at 1180.

133. *Id*.

134. *Id.* at 1204 (Tymkovich, C.J., dissenting).

world" of the majority where the government can "compel[] both speech and silence."[135] He added:

> This is, in a word, unprecedented. And this interpretation subverts our core understandings of the First Amendment. After all, if speech can be regulated by the government solely by reason of its novelty, nothing unique would be worth saying. And because essentially all artwork is inherently "not fungible," the scope of the majority's opinion is staggering. Taken to its logical end, the government could regulate the messages communicated by *all* artists, forcing them to promote messages approved by the government in the name of "ensuring access to the commercial marketplace."[136]

The dissent further rejected the notion that "ensuring access to a *particular* person's unique, artistic product" is a compelling state interest.[137] Though the dissent contained strong autonomy language, framing speech as a fundamental right rather than a functionalist means to an end, what is most clear is the rejection of the monopoly theory of creative speech that predominates in the majority opinion. Such a theory is equally objectionable from both functionalist and autonomous perspectives.[138]

The case was appealed to the Supreme Court, which spoke early on the case with its grant of the writ of certiorari to answer only the following question: "Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."[139]

2. The Supreme Court Decision

The Supreme Court reversed the Tenth Circuit in a majority opinion by Justice Gorsuch, who was joined by five colleagues. Justice Sotomayor, joined by Justices Kagan and Jackson, wrote in dissent. The Court noted at the outset that it agreed with the Tenth Circuit that "the wedding websites Ms. Smith seeks to create qualify as 'pure speech.'"[140] It further stated its agreement with the lower court that "the wedding websites Ms. Smith seeks to create involve *her* speech."[141] Given these two threshold determinations by the Tenth Circuit, Gorsuch wrote that there was only one possible

135. *Id.* at 1191.
136. *Id.* at 1204–05 (quoting *id.* at 1179 (majority opinion)).
137. *Id.* at 1203.
138. *See infra* Part III.
139. 303 Creative LLC v. Elenis, 142 S. Ct. 1106, 1106 (2022) (mem.).
140. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312 (2023).
141. *Id.* at 2313.

conclusion: Colorado could not compel Smith to speak in support of same-sex marriages or in other ways that she finds offensive.[142]

The framing of the question by Gorsuch was closely tethered to two key elements. First, the opinion only extends to products with "expressive content" of the vendor's views or values.[143] Second, the refusal must be based on the message inherent in the product, not the status of the customer.[144] A wedding cake is designed with the specific celebration in mind, triggering free speech protections. Smith publicly stated that she would serve anyone regardless of their identity group so long as the websites did not involve same-sex marriage or another function that contradicted her religious views.[145] Contrary to some commentary, the Court expressly did not maintain that there is a constitutional right to discriminate on the basis of status.[146] The majority stressed that denying services generally to customers based on their status remains unlawful. It was the expressive content of this product that overreached on the anti-discriminatory rationale.[147] Gorsuch affirmed that "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided.'"[148]

Justice Gorsuch did not fully address the contradictions and tensions in religion and free speech cases. However, a more autonomous view of free speech seems to underly other aspects of the opinion. The monopoly theory was quickly set aside, with the Court noting that it is of little consequence whether Smith's services are "unique," as the Tenth Circuit apparently assumed: It was not Smith's unique skills, but rather her unique voice that drove the opinion.[149] While others may share or disagree with her views, she retained the right to speak in her own voice through her creative expression as a website designer.

142. *Id.* at 2321–22.

143. *Id.* at 2319.

144. *Id.* at 2318–19.

145. *Id*. at 2308. In *Masterpiece Cakeshop*, Phillips offered the same assurances in selling pre-made cakes or non-wedding cakes to any customers regardless of their identity.

146. *Id*.

147. *Id.* at 2320–22.

148. *Id.* at 2312 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., 515 U.S. 557, 574 (1995)).

149. *Id.* at 2315. Indeed, a different monopoly theory was the focus of majority and dissenting Justices and was also the historical argument of Justice Gorsuch regarding the basis for applying nondiscriminatory rules to areas of public accommodation. Gorsuch argued that "these enterprises exercised something like monopoly power or hosted or transported others or their belongings" and thus justified such rules. *Id*. at 2314. Justice Sotomayor rejected that argument. *Id.* at 2326 (Sotomayor, J., dissenting) ("The majority is therefore mistaken to suggest that public accommodations or common carriers historically assumed duties to serve all comers because they enjoyed monopolies or otherwise had market power.").

The Tenth Circuit's monopoly theory and related arguments have been voiced by advocates and will likely be maintained in the future.[150] Yet, it is uniquely destructive for free speech values. By treating the withholding of speech as a type of monopolizing conduct, the court lays the foundation for sweeping demands for compelled or coerced speech. The act of refusing to speak becomes a controlling and threatening act toward society, like little Andrew Carnegies limiting speech by not speaking. It is a clever construct that plays to the free speech model of the "marketplace of ideas." Here Smith is accused of monopolizing that marketplace by refusing to speak in favor of same-sex marriages. The paradigm shift, however, collapses from its own weight. There are no cognizable limits to this rationale of forcing speech to prevent speakers from monopolizing their own speech. In the end, the monopoly framework is clever but too clever by half. Gorsuch dismantles the monopoly argument, noting "In some sense, of course, her voice is unique; so is everyone's. But that hardly means a State may coopt an individual's voice for its own purposes."[151]

If the majority opinion was reassuring for free speech advocates, the dissent was equally chilling in its lack of limiting principles. Notably, Justice Sotomayor does not get to First Amendment jurisprudence until roughly halfway through the opinion, starting instead with a discussion of *Roberts*.[152] While not addressing the inherent contradictions in cases like *Roberts*,[153] Sotomayor justifiably reminds the Court that the Jaycees made clear that the policy was central to their mission and philosophy, yet they were still required to admit female members.[154] Here too, the dissent maintains, "the State's public accommodations law did 'not aim at the suppression of speech' and did 'not distinguish between prohibited and permitted activity on the basis of viewpoint.'"[155] Thus, the government can prohibit not just the refusal

150. Advocates challenge the claim that no effective monopoly exists because of the availability of other suppliers for services. *See, e.g.*, Lindsey Anderson, *Supreme Court Rules in Favor of Anti-LGBTQ+ Website Designer*, SEATTLE GAY NEWS (July 7, 2023), https://www.sgn.org/story.php?326720 (quoting advocates predicting that other businesses will likely turn away such customers). *But see* David French, *The Most Consequential First Amendment Case This Term*, ATLANTIC (Dec. 2, 2022), https://www.theatlantic.com/ideas/archive/2022/12/lgbtq-first-amendment-supreme-court/672321/ (criticizing this approach).

151. *303 Creative*, 143 S. Ct. at 2315.

152. *Id*. at 2323–24 (Sotomayor, J., dissenting)

153. In *Roberts*, the Court simply dismissed the Jaycee's organizational purpose to "promote and foster the growth and development of young men's civic organizations." Roberts v. U.S. Jaycees, 468 U.S. 609, 612–13, 616 (1984). The *303 Creative* Court could have treated that case as an outlier due to its conclusory factual determination that the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626.

154. *303 Creative*, 143 S. Ct. at 2332 (Sotomayor, J., dissenting)

155. *Id.* (quoting *Roberts*, 468 U.S. at 623–24).

to prepare certain expressive products, but also can bar statements about declining service based on religious or political views. This is possible, according to the dissent, because "[t]his Court has long held that 'the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.'"[156] Accordingly, Sotomayor portrays the case about prescribed conduct, not protected speech. The dissent maintained that "[t]he majority commits a fundamental error in suggesting that a law does not regulate conduct if it ever applies to expressive activities."[157]

Justice Sotomayor framed the case as greenlighting discrimination on the basis of sexual orientation despite the facts that the opinion only extends to expressive products and that Smith established (and the state accepted) that she would not and could not discriminate on the basis of identity for anything other than an expressive product that contradicted her values.[158] The same protection would apply to other groups, including the LGBT community, in refusing to prepare a product that a member finds hateful or offensive.

Sotomayor dismissed the objections to Smith being forced to prepare websites as a merely "incidental" denial of free speech.[159] However, the Tenth Circuit held that the clear purpose of CADA was to have not an incidental but total impact on speech, noting that "[e]liminating . . . ideas is [the law's] very purpose."[160] Moreover, the dissent maintained that "the law in question targets conduct, not speech, for regulation, and the act of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group."[161]

The reframing of the refusal to speak as conduct creates a chilling element for free expression. For Justice Sotomayor, there is no difference between refusing to provide generally available products or service and refusing to create a product that expresses a view anathema to the creator.[162] It is all treated as discriminatory conduct. While this case deals with speech in the context of a commercial product, there is a broader potential for this rationale. It would allow the government to compel or censor speech whenever it can establish a nexus to an anti-discriminatory purpose. Speech becomes conduct, treated as fostering a discriminatory or hostile environment, when one refuses to speak in the way countenanced or

156. *Id.* at 2334 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011)).
157. *Id.* at 2332 n.9.
158. *See id.* at 2322–43.
159. *Id.* at 2338.
160. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (2021), *rev'd* 143 S. Ct. 2298 (2023).
161. *303 Creative*, 143 S. Ct. at 2322 (Sotomayor, J., dissenting).
162. *See id.* at 2335.

commanded by the government. In other words, the failure to speak consistently with a government-approved view is treated as an attack on those protected under the law. As a neutral, generally applied statute, CADA clearly seeks to achieve a compelling state purpose in guaranteeing equal access to areas of public accommodation. However, by treating the refusal to speak as conduct, the state went much further and began compelling unique forms of expression. Indeed, the dissent recognized that forcing Smith to speak as an individual was part of a compelling state interest.[163] As discussed in the next section, the Sotomayor dissent shows precisely why cases like *Porter v. Board of Trustees of North Carolina State University* illustrate the need to complete the work of *303 Creative*.

Treating speech as conduct would allow for a much wider range of speech regulation. In *Cohen v. California*,[164] the Court overturned a conviction for disturbing the peace based on the wearing of a jacket displaying the words "Fuck the Draft."[165] It rejected the prosecution's effort to treat expression as conduct. Whether one construes expression as discrimination or disorderly conduct, the effect is the same. An individual is prevented from expressing political or religious views—or, in this case, is actually compelled to express opposing views favored by the government.

The Sotomayor dissent highlights the unfinished work of not just *Masterpiece Cakeshop*, but *303 Creative*. That is most vividly shown in cases like *Porter* where the line between speech and conduct proved dangerously blurred.

III. THE MAKINGS OF A MASTERPIECE: HOW THE COURT COULD BRING LONG-NEEDED CLARITY AND COHERENCE ON SPEECH AUTONOMY

One of the most striking aspects of the *303 Creative* opinion was what was missing: a clear functionalist rationale. Gorsuch offers a full-throated defense of free speech as a critical component of our national identity: "[T]olerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands."[166] What is less clear is the perceived foundation for this right.

In my upcoming book, *The Indispensable Right: Free Speech in an Age of Rage*, I discuss this tension, historically, between a natural rights or autonomous basis for free speech, and the more dominant functionalist

163. *Id.* at 2337.
164. 403 U.S. 15 (1971).
165. *Id.* at 16.
166. *303 Creative*, 143 S. Ct. at 2322.

view.[167] The latter view is captured in the "marketplace of ideas" rationale that we protect free speech to advance democratic norms and governance. While I certainly support that function, I do not believe that it is the true foundation of free speech, which is an essential element of being human. The difference between these views is considerable in how courts approach conflicts over free expression. Functionalism allows for greater tradeoffs on a sliding scale of speech value. As speech is treated as less valuable, it becomes more malleable and less protected. That was most evident in the opinions of the Justice who is most associated with the marketplace rationale, Oliver Wendell Holmes.[168] In a series of decisions, Holmes eviscerated free speech protections for communists and dissenters. While he later tacked back toward greater protection, Holmes' opinions included *Schenck v. United States*,[169] where he arguably made one of the single most damaging analogies for free speech in the Court's history about shouting fire in a theater.[170]

For some of us who had argued for *303 Creative* to be decided on free speech grounds, there was a hope that the Court would shift to an autonomous view.[171] Indeed, Gorsuch was an ideal choice for many of us, not only because of his prior service on the Tenth Circuit, but also his more robust view of certain individual rights.[172] Yet, the opinion seemed to acknowledge all these rationales, without embracing any single view:

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167. JONATHAN TURLEY, THE INDISPENSABLE RIGHT: FREE SPEECH IN AN AGE OF RAGE (forthcoming Simon & Schuster 2024).

168. *See, e.g.*, *Abrams* v. United States, 250 U.S. 616, 630 (1919). Obviously, those of us with an autonomous view of free speech can embrace the truth of Holmes' view that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Id.* Free speech is undeniably a functional benefit to the democratic system. Yet, for some of us, the right extends beyond the functionalist role.

169. 249 U.S. 47 (1919).

170. *Id.* at 52.

171. The Court has voiced autonomous rationales in the past, for instance stating that "at the heart of the First Amendment is the notion . . . that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977). This autonomous view of free speech has been advanced for decades by various scholars. *See, e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 221 (1972); Seana V. Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 288 (2010); C. Edwin Baker, *Symposium: Individual Autonomy and Free Speech: Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253–59 (2011).

172. Gorsuch has often espoused classical liberal views of individual rights. In *South Bay United Pentecostal Church*, Gorsuch secured five votes in a plurality opinion supporting the view that:

> In cases implicating this form of "strict scrutiny," courts nearly always face an individual's claim of constitutional right pitted against the government's claim of special expertise in a matter of high importance involving public health or safety. It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. . . . The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely

> The framers designed the Free Speech Clause of the First Amendment to protect the "freedom to think as you will and to speak as you think." They did so because they saw the freedom of speech "both as an end and as a means." An end because the freedom to think and speak is among our inalienable human rights. A means because the freedom of thought and speech is "indispensable to the discovery and spread of political truth." By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For all these reasons, "[i]f there is any fixed star in our constitutional constellation," it is the principle that the government may not interfere with "an uninhibited marketplace of ideas."[173]

While citing all the above (including Justice Brandeis's concurrence in *Whitney v. California*, where he supported the denial of free speech rights to a communist organizer), the opinion's reference to the inalienable right to speech is a nod, if not a nudge, toward an autonomous view. Yet, it remains a subtle emphasis on the ends rather than the means of free speech.

The indeterminacy of the foundation for free speech rights leaves a maddening fluidity in defining the limits of the government's ability to compel or censor speech. The continued prevalence of functionalist rationales allows for endless tradeoffs in achieving social goals, particularly with regard to speech deemed to have low value or marginal political significance. As the Tenth Circuit boldly stated in *303 Creative*, there are simply some ideas that must be eliminated.[174] As discussed in prior work, the Harm Principle of John Stewart Mill has been used by advocates for both free speech and speech regulation.[175] However, Mill saw free speech as "the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion."[176] He rejected the notion of insults or offense as harms:

> That there is, or ought to be, some space in human existence thus entrenched around, and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question: the point to be determined is, where the limit

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> satisfied standard. . . . Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution.

141 S. Ct. 716, 718 (2021) (plurality opinion).

173. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2310–11 (2023) (alteration in original) (first quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000); then quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); then quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); and then quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

174. *See supra* notes 128–133 and accompanying text.

175. *See generally* Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J.L. & PUB. POL'Y 571 (2022).

176. JOHN STUART MILL, ON LIBERTY 97 (Project Gutenberg ed., 2011) (1859).

> should be placed; how large a province of human life this reserved territory should include. I apprehend that it ought to include all that part which concerns only the life, whether inward or outward, of the individual, and does not affect the interests of others, or affects them only through the moral influence of example.[177]

The effort to treat viewpoints as harmful untethers the right of free speech from this element of Mill's work. It is the "elimination" of ideas for their immoral or harmful influence on our society. The effort to frame speech as conduct achieves the same end. The rationale places speakers on a shifting standard depending on majoritarian mores or values. The dissent in *303 Creative* treated the refusal to create a product with an alleged offensive message as discriminatory conduct for Smith. Yet, for other creators who refuse to create homophobic, racist, or anti-Semitic messages, this is not treated as conduct, but speech in rejecting objectively offensive language.[178] Just a few weeks after that decision was reversed, the Fourth Circuit showed the danger in converting ideas into conduct for the purposes of governmental regulation.

A. Porter *and the Speech-as-Conduct Rationale for Intramural Speech*

The decision in *303 Creative* was a historic realignment of compulsion cases toward a more viable free speech foundation. However, as the dissent suggests, there remains a lingering threat in the speech-as-conduct rationale for state compulsion. That danger was quickly made evident in the Fourth Circuit's decision in *Porter v. Board of Trustees of North Carolina State University*.[179] The case involves what is often called "intramural speech," where academics speak to issues of public significance within their universities or colleges.[180] This is not speech occurring in the classroom (which is subject to strong academic freedom protections) or "extramural" speech to the public at large (which is subject to First Amendment protections). Intramural speech has long occupied a dangerously vague area where professors seek to discuss broader issues within their own academic community.

Dr. Stephen Porter teaches statistics and data analysis as part of North Carolina State's Department of Educational Leadership, Policy, and Human Development.[181] He was tenured in 2011 and became increasingly vocal in

177. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (1848), *reprinted in* 3 THE COLLECTED WORDS OF JOHN STUART MILL 455, 938 (J.M. Robson ed., 1965).

178. *See* Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1749–50 (2018) (Ginsburg, J., dissenting).

179. 72 F.4th 573 (4th Cir. 2023).

180. *See generally* Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323 (1988).

181. *Porter*, 72 F.4th at 577.

his opposition to diversity policies at the school.[182] The case focused on three areas of expression: (1) comments at a faculty meeting, (2) an email to colleagues, and (3) a post on his personal blog.[183] The faculty discussion involved a proposal to add a diversity question to the student evaluations for courses.[184] Porter raised "validity" concerns over the lack of research that went into the proposal.[185] The second incident occurred when Porter forwarded a news article about a colleague, Professor Alyssa Rockenbach, and her search for a new faculty member.[186] The article was critical of the "unusual secrecy" used in the consideration of a professor who had reportedly been terminated at another university for alleged professional misconduct involving a relationship with a student.[187] Porter felt that Rockenbach "cut corners" out of a "desire to hire a Black scholar whose work focused on racial issues."[188] He forwarded the article with sarcastic comments, including "Did you all see this? . . . This kind of publicity will make sure we rocket to number 1 in the rankings. Keep up the good work, Alyssa!"[189] Finally, Porter continued his criticism of diversity efforts in a blog column on an upcoming conference of the Association for the Study of Higher Education (ASHE) in September 2018 titled "ASHE Has Become a Woke Joke."[190] He objected to how "the focus of the conference had shifted from general post-secondary research to a focus on social justice," and he specifically criticized a colleague's research.[191] Porter voiced his contempt for what he viewed as woke academic policies by declaring "I prefer conferences where 1) the attendees and presenters are smarter than me and 2) I constantly learn new things. That's why I stopped attending ASHE several years ago."[192]

Porter alleged that he was faced with a series of retaliatory actions, including his removal from graduate supervision, negative reviews referring to him as a "bully," and being pushed out of his program area.[193] In the meetings following the blog publication, matters got heated, as Porter said that he was being targeted due to his views and used profanity in the

182. *Id.*
183. *Id.*
184. *Id.* at 578.
185. *Id.* at 583.
186. *Id.* at 578.
187. *Id.* at 586 (Richardson, J., dissenting).
188. *Id.* at 578 (majority opinion).
189. *Id.*
190. *Id.*; *see also* Stephen Porter, *ASHE Has Become a Woke Joke*, STEPHEN PORTER BLOG (Sept. 3, 2018), https://stephenporter.org/ashe-has-become-a-woke-joke/.
191. *Porter*, 72 F.4th at 578–79.
192. *Id.* at 580.
193. *Id.* at 578.

exchange.[194] His department head, Dr. Penny Pasque, reprimanded him for a lack of collegiality. This included Pasque ordering a "community conversation" over Porter's views and telling Porter that he should respond publicly to student objections about his criticisms.[195] (It was later revealed that Pasque had heard from only two of sixty doctoral students.) Porter agreed to speak with the students but declined a public event. Pasque later "repeatedly expressed her frustration that [he] had not proactively addressed student and faculty concerns about 'what happened at ASHE'" and raised his "'lack of proactive action as a further example of' the 'lack of collegiality.'"[196]

After filing suit for retaliation in the U.S. District Court for the Eastern District of North Carolina, Porter fared poorly in his arguments before Judge Boyle, who dismissed the case as failing to raise protected speech claims. Before the Fourth Circuit, Judge Thacker was joined by Judge Wynn in affirming that decision. Judge Richardson dissented.

Judge Thacker dismissed the claims of protected speech by treating the matter as an issue of conduct in Porter's lack of collegiality, not speech. In taking this tack, the Fourth Circuit followed a highly cabined view of the Supreme Court's precedent protecting academic speech. The Supreme Court laid out a highly protective standard for extramural speech under *Pickering v. Board of Education*,[197] where a teacher wrote a letter to local newspaper criticizing a school bond. In "commenting upon matters of public concern," such public employees have protection so long as their speech is not impeding the "duties in the classroom" or the "regular operation" of the school.[198] In cases of intramural speech, concerning internal matters to the school or personnel matters, the Court was more deferential.[199] The current intramural standard was articulated in *Garcetti v. Ceballos*,[200] where the Supreme Court addressed internal speech within a district attorney's office. The Court ruled that speech by government employees is not protected when they are speaking "pursuant to their official duties."[201] Public employees needed to show not only that they were speaking of a matter of public concern but also speaking as a citizen as opposed to a public employee.

While *Garcetti* was a blow to free speech for public employees, there was an important reservation. The Court did not decide "whether the analysis

194. *Id.* at 579.
195. *Id.*
196. *Id.* at 587.
197. 391 U.S. 563 (1968).
198. *Id.* at 568, 572–73.
199. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 149 (1983).
200. 547 U.S. 410 (2006).
201. *Id.* at 421.

we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[202] While lower courts have typically read *Garcetti* in combination with *Pickering* to maintain robust protections over academic speech,[203] the Fourth Circuit adopted a narrow *Garcetti* approach to deny free speech protections to Porter. Rather than read Porter's views as an extension of academic freedom or as protected speech made as a private person, the court implausibly characterized the entire discussion as purely concerning "complaints over internal office affairs."[204]

In narrowly construing the academic freedom exception under *Garcetti*, the Fourth Circuit discarded the continuing application of *Pickering*. For the majority, it was enough that Porter could not show that he was "teaching a class [or] . . . discussing topics he may teach or write about as part of his employment."[205] This is a rejection of free speech protections beyond the confines of even the narrowest view of academic freedom. It also ignores the long recognition by the Supreme Court that academic freedom is closely tied to free speech. In *Sweezy v. New Hampshire*,[206] the Supreme Court amplified this connection in discussing how:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.[207]

The language supporting academic speech is often strikingly functionalist, even more than other free speech areas. Yet, the Court has adopted the most sweeping, even religious, language to describe the centrality of academic speech in the protection of democratic values and ideas. In *Wieman v. Updegraff*,[208] the Court declared:

> The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards. To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole.[209]

202. *Id.* at 425.
203. *See, e.g.*, Demers v. Austin, 746 F.3d 402, 411–12 (9th Cir. 2014).
204. Porter v. Bd. of Trs. of N.C. State Univ., 72 F.4th 573, 584 (4th Cir. 2023).
205. *Id*. at 583.
206. 354 U.S. 234 (1957).
207. *Id.* at 250.
208. 344 U.S. 183 (1952).
209. *Id.* at 225.

While rooted in functionalist rationales, even Justice Felix Frankfurter (who often expressed a narrower view of free speech) maintained that the First Amendment was implicated since "thought and action are presumptively immune from inquisition by political authority."[210] The Court has repeatedly emphasized that academic freedom is protected under the First Amendment as a form of free speech, but it often ties this protection to the "marketplace of ideas" rationale. Thus, in *Keyishian v. Board of Regents*,[211] the Court stressed that "safeguarding academic freedom . . . is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment."[212]

However, the Fourth Circuit in *Porter* adopted an interpretation of *Garcetti* that would make the exception for academic speech practically meaningless. Judge Thacker found that Porter was not speaking as an academic, but rather was expressing views "in his capacity as an employee."[213] Thus, it was not protected as "a product of his teaching or scholarship."[214] It is a chilling position that would strip faculty of both free speech and academic freedom protections. Porter was clearly voicing his views in a national debate over the impact of diversity policies on academia, as well as speaking as a member of the faculty. The dissent sought to recognize that Porter was discussing a matter of public importance but did so outside of his official duties.[215] He was speaking as a private party within the academic community. As such, Judge Richardson aimed to thread the difficult needle hole left in the aftermath *Garcetti*.[216] Yet, this was both an exercise of academic freedom and the expression of free speech. These are issues that directly impacted Porter's work as an academic in the classroom, but also matters that extended more broadly to the ongoing national debate over diversity policies. My preference would be a broader protection afforded to intramural free speech on campus. However, it could be defended on either academic freedom ground under *Garcetti* or the free speech ground of *Pickering*.[217]

Instead, the court combined an artificially narrow view of the *Garcetti* exception with an even more artificial view of the facts to deny the obvious content of this speech. That became even more problematic with the court's dismissal of the relevance of the blog and declaration that it played no role in

210. *Id.* at 266 (Frankfurter, J., concurring in result).
211. 385 U.S. 589 (1967).
212. *Id.* at 603.
213. Porter v. Bd. of Trs. of N.C. State Univ., 72 F.4th 573, 583 (4th Cir. 2023).
214. *Id.*
215. *Id.* at 590–93.
216. *See id.* at 590–91.
217. *See supra* notes 197–202 and accompanying text.

the university's adverse actions.[218] That is a clearly contested fact and, given the pre-trial motion, it is hard to square with the appellate standard. The majority does not contest that the blog is clearly political speech, but instead, conclusory declares that it was not an impetus for the hostile treatment at the school despite contrary factual assertions of the nonmoving party.[219]

Much like the Tenth Circuit opinion in *303 Creative*, the Fourth Circuit opinion shows the dangers of adopting a speech-as-conduct rationale.[220] Porter was participating in a public debate and raising issues with his colleagues as part of his long opposition to diversity policies. It was not just a matter of public concern, but one that Porter voiced both externally and internally at the school. In response, the court adopts the framing of the school that it was not his views but his conduct in making "an unprofessional attack on one of [his] colleagues."[221] There is no effort to explain how raising such difficult issues (where colleagues are deeply invested) would not be taken as insulting or hostile. As Judge Richardson noted in his dissent, most protected speech is considered unwarranted or unprofessional by those on the opposing side.[222] For that reason, the Supreme Court has ruled that "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[223]

The lack of collegiality and professionalism has long been shibboleth for those have sought to block minorities and women from appointments. Many objected to the claims of "lack of collegiality" and bad "temperament" raised against figures like Justice Sotomayor when she was nominated for the Court.[224] Indeed, the American Association of University Professors has stressed that collegiality is often a coded or biased basis for discrimination. It cautioned against this use since, "[i]n the heat of making important academic decisions regarding hiring, promotion, and tenure, it would be easy to confuse collegiality with the expectation that a faculty member display 'enthusiasm,' or evince 'a constructive attitude' that 'will foster harmony.'"[225] Indeed, collegiality is commonly defined as being

218. *Porter*, 72 F.4th at 584.

219. *Id.*

220. *See supra* Part II.B.

221. *Id.* at 583.

222. *Id.* at 592–93 (Richardson, J., dissenting).

223. Rankin v. McPherson, 483 U.S. 378, 387 (1987).

224. Jo Becker & Adam Liptak, *Sotomayor's Blunt Style Raises Issue of Temperament*, N.Y. TIMES (May 29, 2009), http://www.nytimes.com/2009/05/29/us/politics/29judge.html.

225. *On Collegiality as a Criterion for Faculty Evaluation*, AM. ASS'N OF UNIV. PROFESSORS, https://www.aaup.org/report/collegiality-criterion-faculty-evaluation (updated 2016).

"cooperative," a virtue that is hard to display when you are a dissenting voice on a matter of intense and passionate debate with your colleagues.[226]

In the area of viewpoint intolerance, no law dean or faculty is likely to concede discrimination on the basis of intellectual or political disagreements. Many may not admit to such bias to themselves, rationalizing their own bias in the same way that others rationalized their racist or sexist or anti-Semitic views. *Porter*, however, allows the subjectivity of collegiality to be invoked as an enforceable condition. There were passions expressed on both sides of the diversity debate involving Porter. However, it was his viewpoints that were deemed as insufficiently collegial.

B. Autonomy and the Completion of a Free Speech Masterpiece

Porter is the *303 Creative* of academic speech. Smith was told that she could not post her opposing views on her own website because they "promote[d] unlawful activity, including unlawful discrimination."[227] Porter was told that the expression of his views undermined rules of collegiality and proper decorum.[228] For academics, *Porter* may prove more damaging than the appellate decision in *303 Creative*, if left unchanged. The reach of *Porter* is arguably greater for faculty. Within a week of the Sotomayor dissent in *303 Creative*, the Fourth Circuit took the speech-as-conduct rationale to its natural and inimical conclusion. It is also another example of how functionalist theories lend themselves to tradeoffs and limitations on speech. What the *Porter* decision misses is any acknowledgement of the autonomous right of an academic to speak on these core issues of academic integrity and intellectual honesty.

While some Framers like Madison expressed an autonomous view of free speech as an inalienable right, the view was quickly set aside after the Revolution and dismissed by positivists like Justice Holmes.[229] The speech-as-conduct rationale is more difficult to maintain on an autonomous as opposed to a functionalist basis. The autonomous model emphasizes the right of individuals to not only voice their values but also to decline to voice the values of others.[230] Conversely, in functionalist opinions, the Court has used the democratic process not only to define a narrower function of free speech but, by extension, the range of relief for those contesting government speech

226. *See, e.g.*, *Collegiality*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/collegiality; *see also* Leonard Pertnoy, *The "C" Word: Collegiality Real or Imaginary, and Should It Matter in the Tenure Process*, 17 ST. THOMAS L. REV. 201 (2004).

227. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1182 (10th Cir. 2021), *rev'd*, 143 S. Ct. 2298 (2023).

228. Porter v. Bd. of Trs. of N.C. State Univ., 72 F.4th 573, 583 (4th Cir. 2023).

229. *See generally* TURLEY, *supra* note 167.

230. *See supra* notes 171–173 and accompanying text.

regulations.[231] Nevertheless, the functionalist rationale can protect speech for minorities in many cases, even when faced with an overwhelming and hostile majority.

In *West Virginia State Board of Education v. Barnette*,[232] the Court ruled that it was unconstitutional to compel students to salute the flag and say the Pledge of Allegiance. The Court notably overturned the earlier decision in *Minersville School District v. Gobitis*[233] after only three years, where it had upheld such compelled speech on the theory of serving what Justice Felix Frankfurter referred to as the objective of "national unity."[234] For Frankfurter, those aggrieved by the compelled speech should work to change the law through the democratic process, and the Court washed its hands of the entire matter: "It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances."[235] Justice Stone was the sole dissenter and articulated the principle that would frame the later decision:

> The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. . . . [T]he very essence of the liberty which they guarantee is the freedom of the individual from compulsion as to what he shall think and what he shall say . . . .[236]

The Court revisited the issue and reached a diametrically different result in *Barnette*, where Justice Jackson wrote "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in matters of politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."[237] Frankfurter was back in the dissent, dismissing any free speech right to not be forced to speak proscribed words from the government. Notably, this chilling dissent insists that being compelled to speak in class does not prevent the exercise of free speech elsewhere:

> It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to

231. *See supra* notes 168–170 and accompanying text.
232. 319 U.S. 624 (1943).
233. 310 U.S. 586 (1940).
234. *Id.* at 596.
235. *Id.* at 598.
236. *Id.* at 604 (Stone, J., dissenting).
237. *Barnette*, 319 U.S. at 642.

> disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute.[238]

Frankfurter is nothing if not consistent in the categorical failure to recognize the core value defining free speech.

The *Barnette* opinion captures the right to free speech as a matter of individual autonomy, the right of the speaker to stand alone in expressing one's values or viewpoints. Indeed, the Court makes clear that this principle of individual autonomy is the ultimate bulwark from tyranny: "[T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."[239] Notably, the protection from compelled speech does not depend on how the speech conflicts with one's personal view. It is the compulsion that is the determinative factor and not the conflict with particular values. The speaker can object to being coerced to saying things that they might agree with as much as objecting to those with which they have vehement disagreement. That line avoids the type of slippery slope seen in cases like *Roberts*, where the Court weighs how serious or central a belief is to an organization.

The right to refrain from speech has been repeatedly emphasized by the Court. For example, in 1977, in *Wooley v. Maynard*,[240] the Court struck down New Hampshire's required showing of the state motto "Live Free or Die" on its license plates after a couple who were Jehovah's Witnesses challenged the law. Chief Justice Warren Burger relied on *Barnette*, noting this element in finding that the compelled message violated the First Amendment:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.[241]

Of course, both functionalist and autonomous views support the strong constitutional aversion to compelled speech. That was evident in 2018 in *Janus v. American Federation of State, County & Municipal Employees, Council 31*,[242] when the Court struck down mandatory union dues from public employees as compelled speech. Again, the Court referred obliquely to an array of interests served by free speech. Justice Alito wrote:

> Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved

238. *Id.* at 664 (Frankfurter, J., dissenting).
239. *Id.* at 641 (majority opinion).
240. 430 U.S. 705 (1977).
241. *Id.* at 714.
242. 138 S. Ct. 2448 (2018).

> restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.
>
> Free speech serves many ends. It is essential to our democratic form of government . . . . Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.[243]

Despite the mix of rationales, the view of free speech based on a natural right or personal autonomy offers the most complete and coherent basis for opposing speech compulsion. Compulsion robs individuals of the essential element of individuality in reaching and voicing their own conclusions and values. Justice Kennedy, author of the *Masterpiece Cakeshop* decision, captured that broader rationale in his concurrence in *National Institute of Family & Life Advocates v. Becerra*.[244] Justice Kennedy, joined by Roberts, Alito, and Gorsuch, wrote to amplify the points of the majority in rejecting the law requiring doctors to give patients approved statements or notices from the government: "Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties."[245]

The Court has resisted compelled speech in a variety of different contexts. In *Barnette* and *Wooley*, the messages were a pledge and a patriotic slogan, respectively. Cases like *Miami Herald v. Tornillo*[246] turned on a state law requiring newspapers to run responses from politicians they had criticized and *Pacific Gas & Electric Company v. Public Utilities Commission of California*[247] addressed a statement from an environmental group. The Court again held the compelled speech to be unconstitutional. Now, in *303 Creative*, the Court has rejected compelling speech through creative or expressive products.

The Court has also sought to distinguish between compelled speech and incidental measures related to speech. For example, the majority rejected free speech arguments in its decision that law schools could be compelled to allow military recruiters as a condition for the receipt of federal funds in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*.[248] In that case, the Court held that allowing access to law school "neither limits what law schools may say nor requires them to say anything."[249] However, the basis for the claim by the law schools was that they would be required to speak in the form of

243. *Id.* at 2464.
244. 138 S. Ct. 2361, 2378 (2018) (Kennedy, J., concurring).
245. *Id.* at 2379.
246. 418 U.S. 241 (1974).
247. 475 U.S. 1 (1986).
248. 547 U.S. 47 (2006).
249. *Id.* at 60.

"sending e-mails and distributing flyers."[250] It is certainly true that allowing military recruiters on campus can be viewed as saying something by association, but there is no truly expressive component.[251] The claim is as weak as arguing that allowing same-sex couples to buy pre-made cakes is expressive speech. Moreover, law schools have the ability to refuse such access if they are willing to forego federal funding. Thus, the majority in *303 Creative* distinguished *Forum for Academic and Institutional Rights* as precisely the "incidental" limitation that the dissent was raising since "the only expressive activity required of the law schools, the Court found, involved the posting of logistical notices along these lines: 'The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m.'"[252]

The *303 Creative* majority honed close to the line on expressive products to protect anti-discrimination laws. Owners like Smith will still be required (as she has done) to offer general services to customers without discrimination.[253] Yet, the opinion moves away from the balancing standards evident in cases like *Elane Photography, LLC v. Willock*,[254] a post-*Masterpiece Cakeshop* ruling of the New Mexico Supreme Court against a photographer who declined work with same-sex weddings. In his concurrence, Judge Bosson laid out this tradeoff and simply declared that citizens should accept that they must yield some religious freedom as a "price of citizenship."[255] Judge Bosson accepted the loss in religious speech but said that society benefits more from protecting the anti-discrimination laws from exemptions. After noting this need to yield to the greater good, he stated:

> All of which, I assume, is little comfort to the Huguenins, who now are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a tangible mark on the Huguenins and others of similar views.
>
> On a larger scale, this case provokes reflection on what this nation is all about, its promise of fairness, liberty, equality of opportunity, and justice. At its heart, this case teaches that at some

250. *Id.*

251. *Id.* at 62 ("This sort of recruiting assistance . . . is a far cry from the compelled speech in *Barnette* and *Wooley*. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.").

252. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2317 (2023) (quoting Rumsfeld v. F. for Acad. & Inst. Rts, 547 U.S. 47, 61–62 (2006)) .

253. *See id.* at 2314–15.

254. 309 P.3d 53 (N.M. 2013).

255. *Id.* at 80 (Bosson, J., concurring).

> point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others.[256]

Elane Photography is a vivid example of how speech is easily subordinated to greater interests under the free exercise framework. Obviously, these conflicts can also be resolved by simply treating all of these creative acts as non-expressive speech, but that categorical exclusion ignores the fact that these products are sought to reflect the specific underlying ceremony. Otherwise, the couples would simply buy a standard, non-specific product. To its credit, the Tenth Circuit not only acknowledged that the designs and website statement constituted "pure speech," but also that the couple did not want just any web designer—they specifically sought the designs of Smith. Under its monopoly theory, Tenth Circuit simply declared that, while "LGBT consumers may be able to obtain wedding-website design services from other businesses," designs are "inherently not fungible."[257]

A free speech model based on autonomous rights offers the brightest line for protection in such cases. It is clearly reinforced by democratic theories on the importance of protecting the marketplace of ideas, but it is not dependent on that functionalist value.[258] This is foundation that reflect the strong Lockean influence on the Framers in articulating the role of government in protecting liberty, including free thinking.[259] Locke tied the very purpose of government to guaranteeing "the *Idea* of a Power in any Agent to do or forbear any particular Action, according to the determination or thought of the mind."[260] It was that guarantee that prompted citizens to give up the freedom of the state of nature. Likewise, figures like Milton referred to the choice to speak "according to conscience" as the most essential part of liberty.[261] The Tenth Circuit's admission that Colorado law seeks to "eliminate certain ideas" runs counter to those foundational theories. When the Court previously noted that holding the line against compelled speech would "avoid these [authoritarian] ends by avoiding these beginnings,"[262] this is precisely the danger that it envisioned. By simply declaring such views

256. *Id.* at 79.

257. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1180 (10th Cir. 2021), *rev'd* 143 S. Ct. 2298 (2023).

258. *See generally* Turley, *supra* note 175.

259. *Id.* at 582; *see also* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 353 (Peter H. Nidditch ed., Clarendon Press 1975) (1689) ("[T]hough Men uniting into politick Societies, have resigned up to the publick the disposing of all their Force . . . yet they retain still the power of Thinking.").

260. LOCKE, *supra* note 259, at 237.

261. JOHN MILTON, AREOPAGITICA 57 (Richard C. Jebb ed., Cambridge Univ. Press 1918) (1644) ("Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.").

262. W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 641 (1943).

as harmful to society and inimical to the goal of combatting discrimination, Colorado sought to both compel speech and censor speech.

303 Creative adds significantly to prior precedent in capturing the essence of speech as an individual liberty right: "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[263] Even if Smith were supportive of same-sex marriages but held libertarian views against compelled speech, she should be afforded the same protections. So should those with views on other orders requiring expression deemed offensive. For example, if a Jewish baker were asked to make a Mein Kampf cake or an African American baker a KKK cake, they should both have the same ability to decline. Indeed, as discussed above, *Masterpiece Cakeshop* involved such claims in the three challenges filed by William Jack, but Colorado simply declared his request anti-same sex messages to be offensive speech.[264] Colorado was right in those cases, but wrong in denying the same discretion to Smith. They all found the underlying message to be offensive as might some bakers presented with orders for pro-life or anti-gun messaging.

In addressing the glaring conflict in handling the different cakes, the lower courts simply ratified the biased judgment of the state. When presented with the refusal to make a cake espousing opposition to homosexuality, Colorado simply declared that such messages were not protected due to the fact that the orders would have required the bakers to use offensive words. However, in cases like *Masterpiece Cakeshop*, Colorado treated the message as purely the customer's views, not the baker's.[265]

That contorted logic prevailed not only with the Commission, but with the federal courts until the Supreme Court decision. However, others have readily embraced the same rationale. Indeed, some critics objected to Gorsuch raising the different treatment between the cake orders as clearly unsustainable:

> Would Justice Gorsuch say that a baker's refusal to write a racist epithet on a cake was just like Phillips's refusal to make a cake for a same-sex couple? It seems doubtful, because in this hypothetical, the customer's animus would not be grounded in religion, and

263. Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994).

264. *See supra* notes 85–91 and accompanying text.

265. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 n.8 (Colo. App. 2015), *rev'd sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) ("The Division found that the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message.").

> presumably would not, in Justice Gorsuch's view, implicate constitutional protection.[266]

The answer is most easily answered in free speech, rather than free exercise. Courts will continue to struggle with how the exercise of religion is impacted by the denial of the expression of beliefs in different forums under neutral, generally defined statutes.[267] However, the First Amendment stands in direct opposition to the censoring or compelling express viewpoints. Of course, all of these creators would have equal constitutional objections to being coerced to speak regardless of whether the speech contravenes religious or secular mores. For many, the obvious conflict presented by unique products like cakes are resolved by categorically dismissing a cake as expression. Professor Tobias Barrington Wolff insists:

> A business is not acting as a street-corner speaker when it sells goods and services to the general public. When a customer hires a merchant, it is not paying for the privilege of disseminating the merchant's personal message. To be sure, some merchants provide a good or service that involves creative or artistic skill. But any message they produce as a consequence is a message chosen by their customers.[268]

However, this ignores that the product (whether a portfolio of photographs or a cake or a website) is designed to capture a specific celebration. While Professor Wolff is correct that a photographer does not stage a wedding and dictate elements like wedding vows, the photographer does frame how the wedding is depicted. The same is true for specially made cakes. The objection would be more compelling if these businesses refused pre-made cakes, but they did not. They were willing to serve all customers when it came to cakes or products that do not reference or depict the specific celebration.

The use of an autonomy-based right to free speech would allow for a bright-line rule in a wide array of conflicts.[269] That line should be strengthened by emphasizing the element previously discussed in *Barnette*—individuals' fundamental freedom from compelled speech—and not replicating the uncertain lines in the free exercise and expressive association

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266. Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in the Post-Kennedy World*, 82 ALB. L. REV. 121, 136 (2018).

267. *See supra* Section I.A.

268. Tobias Barrington Wolff, *Anti-discrimination Laws Do Not Compel Commercial-Merchant Speech*, SCOTUSBLOG (Sept. 14, 2017, 10:25 AM), https://www.scotusblog.com/2017/09/symposium-anti-discrimination-laws-not-compel-commercial-merchant-speech/.

269. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) ("Autonomy is the foundation of all basic liberties, including liberty of expression.").

cases.[270] It should remain the compulsion, and not the showing of genuine opposition to a value, that should trigger the protections of the First Amendment.

CONCLUSION

In *Georgia v. Randolph*,[271] Justice Breyer wrote a concurrence in a search warrant case in which he explained that the Fourth Amendment shows the perils of bright-line rules since "no single set of legal rules can capture the ever-changing complexity of human life."[272] He explained that this logic was the reason for the use of ambiguous terms like "unreasonable."[273] The First Amendment is in comparison a model of clarity. When it comes to free speech, indeterminant standards fuel a chilling effect which in turn reduces the exercise of free speech. Free speech dies with ambiguity. Uncertainty creates a type of anaerobic condition for speech; denying the sense of freedom to speak deters the inclination to speak. *303 Creative* is a major step toward establishing a bright-line rule that will afford all citizens speech protections regardless of whether they are motivated by religious, social, political, or idiosyncratic values.

For those of us who view free speech as a human right or at least a right based on individual autonomy, the lower court rulings in *303 Creative* were a long-building nightmare of the judicial embrace of both censorship and compelled speech. CADA is a neutral generally applied statute that clearly seeks to achieve the compelling state purpose of guaranteeing equal access to public accommodations. However, the state used the law to compel expression in unique forms like cakes or websites. Indeed, it asserted that forcing Smith to speak as an individual was part of a compelling state interest. Past free speech cases belie such a claim that speech itself can be the compelling state interest to satisfy strict scrutiny.

The past use of rationales under the Religion Clauses forces these conflicts into questions of discrimination between faiths (and non-faiths) or whether neutral, generally applicable laws target a given religion. The balancing and cooperative elements have removed these cases from the autonomous rights of the faithful—and the non-faithful—to decide when and what to express on issues of politics, faith, and other values. In the end, it does not matter how important compelled speech is to the government or society. It is the act of compulsion (or the act of censorship) that denies the individual or personal right of free speech. Anti-discrimination laws can be

270. *See supra* notes 232–241.
271. 547 U.S. 103 (2006).
272. *Id.* at 125 (Breyer, J., concurring).
273. *Id.*

fully enforced to compel equal access and treatment in public accommodation, except for unique or personal expression. If businesses create standard cakes or arrangements, they must sell such items without discrimination. Refusing such sales is based on the status of the customers. The exception applies to actual compelled speech but also expression in specially designed cakes, photography, web designs, floral arrangements, and other creative acts. Citizens are then free to use the market to address abhorrent or unpopular policies. They may boycott businesses that do not serve all customers equally in the creation of such unique products. That is also the exercise of free speech.

In *Barnette*, the Court correctly declared that the government cannot "prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein."[274] The Court's exploration of free exercise and expressive association doctrines to protect against that danger has been mired in confusing and conflicting standards. *303 Creative* places the Court on the right path toward the protection of dissenting views. However, the decision in *Porter* shows that it still has a distance to go in its free-speech jurisprudence. For now, *303 Creative* shows how the Supreme Court can protect religious speech, first and foremost, as speech.

274. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).