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Do Public Accommodations Laws Compel "What Shall be Orthodox"?: The Role of Barnette in 303 Creative LLC v. Elenis

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DO PUBLIC ACCOMMODATIONS LAWS COMPEL "WHAT SHALL BE ORTHODOX"?: THE ROLE OF *BARNETTE* IN *303 CREATIVE LLC V. ELENIS*

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ABSTRACT

This article addresses the U.S. Supreme Court's embrace, in 303 Creative LLC v. Elenis*, of a First Amendment objection to state public accommodations laws that the Court avoided in* Masterpiece Cakeshop v. Colorado Civil Rights Commission*: such laws compel governmental orthodoxy. These objections invoke* West Virginia Board of Education v. Barnette*'s celebrated language: "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 politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." They also cite Barnette's progeny, including* Wooley v. Maynard *and* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*. Business owners, their lawyers, and judges who have invoked these cases argue that state public accommodations laws requiring that businesses not discriminate based on sexual orientation in providing goods and services compel both speech and silence. In* 303 Creative*, Justice Gorsuch's majority (6-3) opinion quotes the beginning of Barnette's "fixed star" passage but adapts it: the fixed star becomes "the principle that the government may not interfere with 'an uninhibited marketplace of ideas.'" Gorsuch moves from the public school room—in which a state law compelled Jehovah's Witness children to salute the flag, despite their religious beliefs—to the commercial marketplace, but gives little guidance about how broadly the protection of creative expression*

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in this "marketplace of ideas" will extend. While Justice Gorsuch situates the Court's protection of website designer Lorie Smith against compelled speech—and orthodoxy—in the commercial marketplace as the latest in a series of courageous First Amendment decisions by the Court protecting individuals against an encroaching state, Justice Sotomayor's dissent excoriates the majority for departing from the long history of the Court courageously defending citizenship-expanding antidiscrimination laws against backlash and repeated First Amendment challenges. This article argues that 303 Creative's use of Barnette *extracts it from its wartime, antitotalitarian context, ignores crucial distinctions drawn in* Barnette*, and (as Justice Sotomayor's* 303 Creative *dissent warns) "'trivializes the freedom protected in* Barnette*,'" while also undermining public accommodations laws. The article also considers the recent invocation of Barnette and its progeny to challenge other forms of governmental regulation, including state regulation of crisis pregnancy centers and state bans on conversion therapy.*

> 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," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), it is the principle that the government may not interfere with "an uninhibited marketplace of ideas," *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).
>
> —303 Creative LLC v. Elenis, 600 U.S. 570, 584-85 (2023)

> [I]t is dispiriting to read the majority suggest that this case resembles [*Barnette*]. A content-neutral equal-access policy is "a far cry" from a mandate to "endorse" a pledge chosen by the Government. *FAIR*, 547 U.S. 47, 62 (2006). This Court has said "it trivializes the freedom protected in *Barnette*" to equate the two. Requiring Smith's company to abide by a law against invidious discrimination in commercial sales to the public does not conscript her into espousing the government's message. It does not "invad[e]" her "sphere of intellect" or violate her constitutional "right to differ." All it does is require her to stick to her bargain [to offer her services to the public, not] "retreat from the promise of open service."
>
> —303 Creative LLC v. Elenis, 600 U.S. 570, 636 (2023)
> (Sotomayor, J., dissenting)

INTRODUCTION

Public accommodations laws are an example of positive federal and state governmental action undertaken to prevent the denial of—as such laws typically express it—the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."[1] Such laws prohibit discrimination on the basis of certain categories or characteristics: race, color, religion, or national origin in Title II of the landmark Civil Rights Act of 1964 and, in most states, a broader set of protected classifications, including not only sex, but also—in about half the states—sexual orientation and gender identity.[2] These laws have been the target of "unrelenting" objections, including libertarian arguments that they intrude on private choice and violate constitutional "rights of contract, association, or freedom from involuntary servitude"[3] as well as objections grounded in freedom

1. *See, e.g.*, COLO. REV. STAT., § 24-34-601 (2) (a) (2024); Elizabeth Sepper, *The Original Meaning of "Full and Equal Enjoyment" of Public Accommodations*, 11 CAL. L. REV. ONLINE 572, 573-77 (2021) (explaining that Congress chose the "full and equal enjoyment" text of Title II of Civil Rights Act of 1964 "against the background of state courts' interpretation of identical, and near-identical, language in state civil rights acts").

2. Nat'l Conference of State Legislatures, *State Public Accommodations Laws*, NCSL (June 25, 2021), https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws [https://perma.cc/222R-3EAS] (reporting that 25 states protect on the basis of sexual orientation and 24 on the basis of gender identity).

3. *See* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Laws*, 66 STAN. L. REV. 1205, 1217 (2014); *see also* Linda C. McClain,

of religion and speech. This article concentrates on First Amendment objections that the U.S. Supreme Court avoided in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[4] but embraced (6-3) in *303 Creative LLC v. Elenis*[5]: public accommodations laws compel governmental orthodoxy.

These objections invoke *West Virginia Board of Education v. Barnette's* celebrated language: "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 politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[6] They also cite subsequent Supreme Court cases that drew on *Barnette* to conclude that a state law compelled speech or expression, including *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[7]—which involved the application of Massachusetts' public accommodations law to a privately organized St. Patrick's Day parade—and *Wooley v. Maynard*—which involved a New Hampshire law making it a crime to obscure the words "Live Free or Die" on state license plates.[8]

Business owners, their lawyers, and judges who have invoked *Barnette* and its progeny argue that state public accommodations laws requiring that businesses not discriminate based on sexual orientation in providing goods and services compel both speech and silence.[9] In *303 Creative*, website designer Lorie Smith argued that Colorado's antidiscrimination law ("CADA") *compelled her speech* by requiring that, if she expanded her business to offer website design for weddings, she must offer those services to same-sex couples on the same terms as different-sex couples, and *compelled her not to speak* by prohibiting her from posting a statement on her website explaining why she will not design websites for same-sex marriages.[10] Echoing claims made in earlier cases, she argued that if business owners are not exempted from such laws, they are forced to express a governmental orthodoxy at odds with their sincere religious beliefs about marriage.

Along with *Barnette*'s "fixed star" passage, other famous passages from the opinion also feature in these cases. One is Justice Jackson's declaration that "the test" of the substance of freedom is "the right to differ as to things that touch the

Involuntary Servitude, Public Accommodations Laws, and the Legacy of Heart of Atlanta Motel v. United States, 71 U. Md. L. Rev. 83 (2011) (analyzing arguments made in opposition to Title II of the Civil Right Act of 1964).

4. 584 U.S. 617 (2018).

5. 600 U.S. 570 (2023).

6. 319 U.S. 624, 642 (1943).

7. 515 U.S. 557 (1995).

8. 430 U.S. 705 (1977).

9. *See, e.g.*, Brief for Petitioners, at 28-29, Masterpiece Cakeshop. Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018) (No. 16-111).

10. Complaint at 5-8, 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907 (D. Colo. 2019), *aff'd*, 6 F.4th 1160 (10th Cir. 2021), *rev'd,* 600 U.S. 570 (2023) (No. 1:16-cv-02372).

heart of the existing order."[11] Others include references to enforcing rights as preserving the "individual freedom of mind" over "officially disciplined uniformity" and to the First Amendment's purpose as reserving "from all official control" the "sphere of intellect and spirit."[12] Still another is his dire warning that "compulsory unification of opinion achieves only the unanimity of the graveyard."[13] Also quoted is his eloquent conclusion, "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."[14]

In *303 Creative*, Justice Gorsuch, writing for the 6-3 conservative majority, found persuasive the analogy between business owners being forced to speak and violate conscience and the Jehovah's Witness public elementary school students in *Barnette* being compelled to salute the flag. As Carlos Ball observes in this symposium, "[a]ccording to *303 Creative*, there is no constitutional difference" between these two contexts; prioritizing Smith's "right to set restrictions on the expressive services she offered for sale over the equality right of LGBTQ customers," the majority treated as "constitutionally irrelevant" the fact that Colorado's antidiscrimination law "became applicable only after the designer chose to sell her services to the general public."[15] Before *303 Creative*, other business owners had analogized between a forced flag salute and being required to provide various wedding-related goods and services to same-sex couples, including wedding cakes, photography, videorecording, floral arrangements, and invitations. Several state courts rejected the analogy,[16] but some accepted it.[17]

This article charts the triumph of the *Barnette*–inspired compelled speech objections to public accommodations law, with the *303 Creative* majority opinion as a primary text. There, Justice Gorsuch quotes the beginning of *Barnette*'s celebrated "fixed star" passage, "[i]f there is any fixed star in our constitutional constellation," but adapts the rest of the passage. That fixed star becomes "the principle that the government may not interfere with 'an

11. *Barnette*, 319 U.S. at 642.

12. *Id.* at 637, 642. For citations, see *303 Creative*, 600 U.S. at 585.

13. *Barnette,* 319 U.S. at 641. For citations to this passage, see, e.g., Brush & Nib Studio, LC v. City of Phoenix*,* 448 P.3d 890, 896-97 (Ariz. 2019); Brief of Amici Curiae Prof. Dale Carpenter, Prof. Eugene Volokh, Ilya Shapiro, American Unity Fund, and Hamilton Lincoln Law Institute in Support of Petitioners at 8, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

14. *See* Brief of Amici Curiae Prof. Dale Carpenter et al., *supra* note 13, at 8 (quoting *Barnette*, 319 U.S. at 641).

15. Carlos Ball, *Progressive Constitutionalism and Its Libertarian Discontents: The Case of LGBTQ Rights*, 68 ST. LOUIS U. L.J. (forthcoming 2024), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4651650 [https://perma.cc/PRP8-7EGJ].

16. *See, e.g.*, Elane Photography, LLC. v. Willock, 309 P.3d 53, 64 (N.M. 2013).

17. *See* Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 896-97 (Ariz. 2019); Telescope Media Grp. v. Lucero, 936 F.3d 740, 754 (8th Cir. 2019).

uninhibited marketplace of ideas.'"[18] Gorsuch moves from the public school room to the commercial marketplace, which he recasts as *a marketplace of ideas*. However, his opinion gives little guidance about how broadly the Court's protection of creative expression in this "marketplace of ideas" will extend. He admits possible future "difficult questions" about "what qualifies as expressive activity protected by the First Amendment," yet he dismisses as a "sea of hypotheticals" the concerns raised by Justice Sotomayor's dissent.[19]

303 Creative's embrace of the *Barnette* analogy also invokes the powerful symbolism of constitutional protection of an unpopular, disfavored, persecuted, even hated, religious minority. In that case and other recent First Amendment cases, the Court "has clutched to a recurring story of persecuted religious minorities standing fast in the face of domineering and ideologically majoritarian regulators," invoking the Jehovah's Witness schoolchildren in *Barnette*—"forced to affirm the Pledge of Allegiance by a public school"—as a "touchstone."[20] In *303 Creative*, Justice Gorsuch situates the Court's protection of Smith against compelled speech—and orthodoxy—in the commercial marketplace as the latest in a series of courageous First Amendment decisions by the Court: "Eighty years ago in *Barnette,* this Court affirmed that 'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,'" even though "the speech rights it defended were deeply unpopular; at the time, the world was at war and many thought respect for the flag and the pledge 'essential for the welfare of the state.'"[21] In most of the recent public accommodations cases, however, the business owners drawing the analogy belong to Christian majority traditions that (at least until recent decades) enjoyed considerable political success in arguing that the majority had a right to enforce its moral views (if you will, an orthodoxy) upon nonconforming dissenters through civil and even criminal law.[22]

18. *303 Creative*, 600 U.S. at 584-85.

19. *Id*. at 599; for Justice Sotomayor's concerns, see *id.* at 638-40 (Sotomayor, J., dissenting).

20. Rebecca Aviel et al., *From Gods to Google*, 134 YALE L.J. __ (forthcoming 2024) (Feb. 28, 2024 manuscript at 6), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id =4742179 [https://perma.cc/NPX3-FX5J]. The authors argue that this narrative has been "driven largely but not solely by Justice Thomas." *Id.* For discussion of Thomas's use of *Barnette*, see *infra* Parts IV and VI.

21. *303 Creative*, 600 U.S. at 601-02.

22. *See* LINDA C. MCCLAIN, WHO'S THE BIGOT: LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 183, 192-93 (2020) (discussing the evolution of the culture wars in Colorado from *Romer v. Evans* to *Masterpiece Cakeshop*). In a forthcoming article, Kate Redburn charts how certain groups within the "New Christian Right" pursued a political strategy of "attack[ing] gay rights at the ballot box" in the name of protecting morality while the Christian Legal Society and the subsequent Alliance Defending Freedom (ADF) "portrayed Christians as a disfavored minority group in court." Redburn discusses how, in *Hurley*, the ADF relied on *Barnette* to deploy "speech egalitarianism" in advancing the compelled speech argument and laying the foundation for an "equal right to exclude" in public accommodations that bore fruit in *303 Creative*.

The expansion of antidiscrimination laws to prohibit discrimination based on sexual orientation, together with *Obergefell v. Hodges*'s extension of the fundamental constitutional right to marry to same-sex couples, have spurred this shift to rhetoric about hitherto dominant religions being an embattled and unpopular minority at risk.[23] Therefore, additional potent sources for claims that public accommodations laws compel orthodoxy are the *Obergefell* dissents. Most dramatically, Justice Alito's dissent echoes *Barnette* through his warning that the Court's decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy."[24] At the same time, Smith and others cite to the *Obergefell* majority opinion for its "promise" to religious believers of their continuing freedom to express their views. The *303 Creative* litigation illustrates the intertwining of compelled orthodoxy claims from the *Obergefell* dissents with invocations of *Barnette*.

In explicating the role of *Barnette* and its progeny in recent public accommodations law cases, culminating in *303 Creative*, this article's contribution is primarily descriptive and explanatory. Nonetheless, I offer some critical evaluation of this use of *Barnette* and of these prescribed orthodoxy claims. I argue that *303 Creative*'s use of *Barnette* extracts it from its wartime antitotalitarian context and (as Justice Sotomayor's *303 Creative* dissent warns) "'trivializes the freedom protected in *Barnette*'" while also undermining public accommodations laws.[25] Such invocations of *Barnette* also fail to heed Justice Jackson's call (in his famous dissent in *Terminiello v. City of Chicago*) for "practical wisdom" rather than doctrinaire absolutism in applying the First Amendment.[26] The problems with this absolutist approach to the First Amendment, at the expense of antidiscrimination laws and other governmental regulations, are exacerbated by Justice Gorsuch's intertwining of *Barnette* with rhetoric about the "uninhibited marketplace of ideas" to justify First Amendment rights not to comply with public accommodations laws regulating the commercial marketplace.

See Kate Redburn, *The Equal Right to Exclude: Compelled Expressive Commercial Conduct and the Road to* 303 Creative v. Elenis, 111 CALIF. L. REV. (forthcoming 2024) (draft on file with author). The ADF represented Jack Phillips as well as Lorie Smith. *See also* Melissa Murray, *The Geography of Bigotry*, 99 B.U. L. REV. 2611, 2624 (2019) (arguing that assertions of religious exemptions to antidiscrimination laws are a way of shrinking the public sphere and recreating an "earlier epoch" when "sex was confined to heterosexual marriage and homosexuality was condemned").

23. As Dale Carpenter has argued: "By definition, only groups that are unpopular—in the sense that they are acting contrary to the legislative majority's demands—will need to defend themselves." Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1547 (2001).

24. Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J. dissenting).

25. *303 Creative*, 600 U.S. at 636 (Sotomayor, J., dissenting) (quoting Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), 547 U.S. 47, 62 (2006)).

26. 337 U.S. 1, 37 (1948) (Jackson, J., dissenting).

Part I offers a brief explication of *Barnette*'s status in the constitutional law canon. I discuss two of *Barnette*'s progeny, *Wooley* and *Hurley*, which feature prominently in arguments that public accommodations laws compel speech and impose a governmental orthodoxy. Part II explains how *Barnette* and *Obergefell* intertwine in such claims. To put *303 Creative* in context, Part III looks back to one significant case in which business owners unsuccessfully asserted that public accommodations laws prescribed or compelled orthodoxy, *Elane Photography LLC. v. Willock*. In this pre-*Obergefell* case, the Supreme Court of New Mexico rejected a photographer's analogy to *Barnette.* The majority's reasoning shaped later state court rulings (including that of the Colorado appellate court in *Masterpiece Cakeshop*). Of particular interest are the concurring opinion's explanations of (1) why the analogy between students and business owners fails in light of important civil rights cases concerning race discrimination and (2) why business owners' participation in the commercial marketplace requires certain limits on their freedom in order to secure the status of equal citizenship for all. Part IV discusses how Justice Kennedy, writing for the Court in *Masterpiece Cakeshop,* avoided the compelled speech issue (over the objection of Justice Thomas's concurrence, joined by Justice Gorsuch). Finally, Part V turns to the *303 Creative* litigation, highlighting the role of *Barnette* initially in the Tenth Circuit appeal and ultimately in the Supreme Court's review. Part VI briefly discusses some post-*303 Creative* developments in which some justices on the Supreme Court would extend further *Barnette* and arguments about prescribed orthodoxy (for example, to challenge state bans on conversion therapy). In light of the likely continuing appeal to such arguments, I consider how to evaluate warnings of an authoritarian or totalitarian government skewing the marketplace of ideas.

I. *BARNETTE* IN THE CANON AND IN CONTEXT

A. Barnette

In *West Virginia State Board of Education v. Barnette*, the Supreme Court struck down a compulsory flag salute in public schools.[27] Jehovah's Witness children had refused to salute the flag, on the ground that doing so would violate their religious convictions, and had been expelled from school.[28] Under the West Virginia law, expelled children could be "proceeded against as a delinquent," and their parents or guardians were "liable to prosecution."[29] Justice Jackson's majority opinion protecting their First Amendment right not to be compelled to affirm a belief may be the most eloquent, stirring, and revered opinion in

27. 319 U.S. 624 (1943) (overruling Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940)).
28. *Id.* at 629-30.
29. *Id*. at 629.

constitutional law.[30] Perhaps the most famous passage is Jackson's declaration quoted above, "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 politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[31]

In recent decades, *Barnette*'s "fixed star" seems at risk of becoming an exploding star in various culture war battles. In addition to its prominent role in constitutional challenges to public accommodations law, this passage features in culture war controversies over school curriculum, both in opposition to state laws banning schools teaching so-called "divisive concepts" about racism (especially critical race theory) and sexism, as well as in opposition to school district efforts to engage in culturally responsive teaching.[32] Gender identity issues are also a site of claims of government compelling orthodoxy, ranging from teachers invoking *Barnette* to object to having to call students by their preferred pronouns to disputes over laws banning or protecting gender affirming care.[33]

The historical context of *Barnette*, decided in 1943 just after the United States entered World War II, is important. Only three years earlier, in *Minersville v. Gobitis*, the Court (in an opinion written by Justice Frankfurter) upheld a compulsory flag salute against challenge by Jehovah's Witness school children.[34] Indeed, the language of the West Virginia law challenged in *Barnette* "consisted largely of quotations drawn from Justice Frankfurter's opinion in *Gobiti*s."[35] For example, the statute quoted Frankfurter's assertions in *Gobitis* that "[n]ational unity is the basis for national security;" and while "one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law," "conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from

30. As Justin Driver observes: "No less an authority than Judge Richard Posner has contended that Justice Jackson's work in *Barnette* 'may be the most eloquent majority opinion in the history of the Supreme Court.'" JUSTIN DRIVER, THE SCHOOL HOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 65 (2018). Driver adds: "whatever Supreme Court majority opinion might claim the runner-up spot in eloquence lags so far behind *Barnette* as to render the event no contest at all." *Id.*

31. *Barnette*, 319 U.S. at 642.

32. For further discussion of these conflicts, see Linda C. McClain & James E. Fleming, A "Fixed" or Exploding Star in our Constitutional Constellation? *West Virginia v. Barnette* and Battles over "What Shall be Orthodox" (2022 McGlinchey Lecture, Tulane Law School, Mar. 21, 2022) (unpublished manuscript on file with author).

33. *Id.* In the Conclusion, *infra,* I mention Justice Thomas's invocation of the "fixed star" passage in his dissent from the Court's denial of certiorari in a challenge to the state of Washington's ban on conversion therapy.

34. 310 U.S. 586 (1940).

35. DRIVER, *supra* note 30, at 62.

obedience to the general law not aimed at the promotion or restriction of the religious beliefs."[36]

Justice Jackson's "disgust" for *Gobitis* was "well documented before his appointment to the Supreme Court" in 1941;[37] he had published a book that "derided" the decision.[38] As Attorney General, Jackson, like some other prominent members of the Roosevelt Administration, perceived that *Gobitis* had spurred a rise in violence against Jehovah's Witnesses.[39] Further, some speeches by those in the Administration expressly drew parallels between "mob violence" and "mob punishment" "meted out" against Jehovah's Witnesses and Nazism, warning: "We shall not defeat the Nazi evil by emulating its methods."[40] As Robert Tsai observes, "[u]rging a reconceptualization of the coerced flag salute as a tyrannical act, the administration invited others to make the right of conscience a wartime imperative."[41]

The dramatic passages in Justice Jackson's opinion about the unanimity of the graveyard must be read in the context of World War II and the Supreme Court's recognition of the threats posed by the rise of "nationalism" and "our present totalitarian enemies."[42] As Justin Driver points out, the Court's "willingness to issue *Barnette* in the midst of the nation's involvement in World War II struck many observers as adding to the decision's luster."[43] *The Wall Street Journal* described *Barnette* as arriving at a time when "[w]e are in a war for our very life," and argued that it was crucial to "reject the view that minority rights are 'privileges or acts of grace by an omnipotent state which can be withdrawn at any time when the majority which happens to exercise the State's power chooses to do so.'"[44]

Three features of Justice Jackson's opinion bear mention in considering the *Barnette* analogy in challenges to public accommodations laws. First, Jackson emphasized that *Barnette* did not involve a clash of rights; rather, it involved a clash between the Jehovah's Witnesses' rights and the authority of the state.[45] Today's antidiscrimination cases, by contrast, *do* involve a clash of rights: between the rights of persons covered by such laws to access goods and services

36. *Barnette,* 319 U.S. at 626-27 n.1 (quoting the West Virginia law); *see Gobitis*, 310 U.S. at 593-94, 595.

37. *See* Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 397 (2008).

38. DRIVER, *supra* note 30, at 64.

39. *See* Tsai, *supra* note 37, at 397; *see also* DRIVER, *supra* note 30, at 64 ("Many observers, including the U.S. Department of Justice, drew a direct causal link between *Gobitis* and the surging violence against Jehovah's Witnesses.").

40. Tsai, *supra* note 37, at 406 (quoting speech by Solicitor General Francis Biddle).

41. *Id.* at 373.

42. *Barnette*, 319 U.S. at 640-41.

43. DRIVER, *supra* note 30, at 69.

44. *Id*. (quoting *The Wall Street Journal*).

45. *Barnette*, 319 U.S. at 630.

and be treated with equal dignity and respect in the marketplace, and the First Amendment rights of religious business people who object to providing goods and services to them.[46] Second, Jackson argued that the Jehovah's Witness children's disobedience was harmless to other students and posed no danger to the state's pursuit of its end, national unity.[47] Today's antidiscrimination cases, by contrast, if they permit religious business people to discriminate, *do* harm other people, e.g., LGBTQ persons, and *do* significantly undermine the state's pursuit of its end, ensuring "full and equal enjoyment" as part of securing the status of equal citizenship for all. Third, the dissenting Jehovah's Witnesses were a small and widely despised minority who had been subject to nationwide attacks for their views and actions.[48] As mentioned above, in today's antidiscrimination cases, by contrast, the dissenting business people typically are from historically majority and politically prominent religious traditions. The declarations by conservatives like Justices Scalia, Thomas, and Alito that religious opponents of LGBTQ rights are being subjected to animosity and charges of bigotry[49] should not distract us from these distinguishing facts.

Finally, a caveat is in order about the "fixed star" passage. Despite its "facially absolutist language" against governmental orthodoxy, as Toni Massaro observes, "[a] moment's reflection on the wide range of circumstances in which government can, and does, prescribe what shall be orthodox in matters of public opinion and compel individual speech makes clear that even this most cherished liberal right to resist orthodoxy bows *often* to democratic reality."[50] There is "no across-the-board constitutional mandate against government-compelled expression."[51] With respect to education itself, *Barnette* affirmed that states could require teaching in civics and history, even as it invalidated the

46. On this point, see Part III for discussion of *Elane Photography, LLC. v. Willock*, 309 P.3d 53, 64 (N.M. 2013) (quoting *Barnette*, 319 U.S. at 630).

47. *Barnette*, 319 U.S. at 640-42.

48. Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409, 419-22 (Michael C. Dorf ed., 2d ed. 2009).

49. For examples, see MCCLAIN, WHO'S THE BIGOT?, *supra* note 22, at 154-55, 168, 208; Davis v. Ermold, 141 S. Ct. 3, 4 (2020) (Thomas, J., joined by Alito, J., respecting denial of certiorari) (stating that "*Obergefell* enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss").

50. Toni M. Massaro, *Tread on Me*!, 17 J. CONST. L. 365, 407 (2014). *See also* Steven D. Smith, Barnette's *Big Blunder*, University of San Diego School of Law, Public Law and Legal Theory Research Paper No. 53, Spring 2003, at 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=417480 (critiquing Justice Jackson's use of "or" instead of "and" in the "fixed star" passage and arguing that *Barnette*'s "no orthodoxy" position is "practically untenable" and "wholly inconsistent with the way government has operated, does operate, and will continue to operate in this and any other country").

51. *Id.* at 368. Of course, the Roberts Court has ratcheted up First Amendment protection since Professor Massaro made that observation.

compulsory Pledge of Allegiance.[52] As Robert Post similarly observes, "education in the United States would grind to a halt" if *Barnette* (as Gorsuch suggests in *303 Creative*) entails that "persons cannot [be] compelled to 'speak as the State demands or face sanctions.'"[53]

B. Barnette*'s Progeny:* Wooley *and* Hurley

Barnette's prominence in recent challenges to public accommodations laws cannot be measured simply by counting citations to it. Some Supreme Court decisions that have drawn on *Barnette* themselves have become crucial citations for certain points in that case. Here I briefly discuss two, *Wooley* and *Hurley.*

In *Wooley,* the Court considered whether "the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs."[54] Like *Barnette*, *Wooley* involved Jehovah's Witnesses, in this case, a husband and wife; the husband, who covered up the motto with tape and took other measures to avoid displaying it, served a 15-day jail sentence.[55] In an opinion written by Chief Justice Burger, the Court began its analysis, citing *Barnette,* 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."[56] These rights "are complementary components of the broader concept of 'individual freedom of mind'" referenced in *Barnette.*[57] While a compulsory flag salute was a "more serious infringement upon personal liberties" than "the passive act of carrying the state motto on a license plate," a common element is a "state measure" that "forces an individual, as part of his daily life…to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[58] As in *Barnette*, the state "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'"[59]

52. *Barnette,* 319 U.S. at 631.

53. *See* Robert Post, *Public Accommodations and the First Amendment:* 303 Creative *and "Pure Speech,"* Yale Law School, Public Law Research Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4571196 [https://perma.cc/YNT8-T6G7] (posted Sept. 13, 2023), at 27. As Post elaborates: "Every day throughout the country students are required simply to speak. They are compelled to recite multiplication tables or the Gettysburg Address; they are required to explain their opinions about controversial matters in mandatory examinations." *Id.* Post argues that a state's requiring students to speak in these ways is "far different" from compelling the Jehovah's Witness children in *Barnette* to pledge allegiance to the flag. *Id.*

54. Wooley v. Maynard, 430 U.S. 705, 706-07 (1977).

55. *Id.* at 706-08.

56. *Id.* at 714.

57. *Id.* (citing *Barnette*, 319 U.S. at 637).

58. *Id.* at 715.

59. *Id.* (quoting *Barnette*, 319 U.S. at 642).

Wooley featured prominently in arguments made on behalf of Jack Phillips in *Masterpiece Cakeshop*,[60] as well as in *Elane Photography* (as discussed below in Part III). The "tables of authorities" in the briefs filed by Smith and her amici in *303 Creative* reveal frequent citations to *Wooley*, including the *Barnette*-inspired passages quoted above.[61] As discussed below, Smith's attorney also alluded to *Wooley* in her oral argument.

Another *Barnette*-influenced case even more central to the compelled orthodoxy challenge to public accommodations laws is *Hurley*, extensively cited on both sides in the *303 Creative* litigation.[62] In *Hurley,* the South Boston Allied War Veterans Council, an unincorporated private association that organized the annual St. Patrick's Day-Evacuation Day Parade in Boston, successfully argued that applying Massachusetts's public accommodations law to require it to allow GLIB (a group of gay, lesbian, and bisexual descendants of Irish immigrants) to march in the parade violated its First Amendment rights. GLIB sought to march for various expressive purposes, including "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals" and to demonstrate that such individuals existed.[63] When the Council denied GLIB's application, GLIB marched in the 1992 parade after obtaining a state-court order.[64] The next year, when the Council again denied GLIB's application, GLIB filed a lawsuit and prevailed in state court (including the Supreme Judicial Court) on its claim that the denial violated Massachusetts's public accommodations law.[65]

The U.S. Supreme Court granted the Council's petition for certiorari "to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment."[66] In an opinion authored by Justice Souter, the Court unanimously held that it did.[67] Souter quoted *Barnette's* statement that "symbolism [as in a flag salute or refusal] is a primitive but effective way of communicating ideas"

60. On *Masterpiece Cakeshop*, see Lauren Chooljian, *Live Free? Die? Decades-Old Fight Over N.H. Motto to Get Supreme Court Shout-Out*, N.H. PUB. RADIO (Nov. 1, 2017), https://www.nhpr.org/news/2017-11-01/live-free-die-decades-old-fight-over-n-h-motto-to-get-supreme-court-shout-out [https://perma.cc/7V9E-SMN5].

61. *See, e.g.*, Brief for the Petitioners at 17, 23, 29, 40, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476); Brief of Amici Curiae Prof. Dale Carpenter et al., *supra* note 13, at vi (citing references to *Wooley* as "passim").

62. Whether *Hurley* was a "defeat for the LGBT movement" or consistent with First Amendment principles that supported the movement has been the subject of extensive commentary, which I do not engage here. *See, e.g.*, CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 197-205 (2017).

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

64. *Id*.

65. *Id.* at 563-65.

66. *Id.* at 566.

67. *Id.*

to address "[t]he protected expression that inheres in a parade" under the First Amendment.[68]

Importantly, Souter affirmed the basic legitimacy and constitutionality of public accommodations laws. Massachusetts's public accommodations law has a "venerable history" and the expansion of its scope to include more protected categories falls "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination;" public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendment."[69] He referred to *Barnette*'s "fixed star" language in discussing the "peculiar way" in which Massachusetts's public accommodation law had been applied to the Council.[70] Souter distinguished the permissibility of a state "at times" prescribing "what shall be orthodox in commercial advertising"—for example, by prohibiting false advertising—from *Barnette*'s "general rule" that the state "may not compel affirmance of a belief with which the speaker disagrees."[71] He further articulated that the general rule that speakers have "the right to tailor the speech"—whether they are "ordinary people" or "business corporations"—reflects "the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."[72]

Mirroring the Council's brief, which drew heavily on *Barnette*,[73] the *Hurley* opinion cited *Barnette* in support of the proposition that "[t]he very idea that noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression."[74] Justice Souter elaborated a distinction between regulating conduct and speech: "While 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."[75] Souter fortified his conclusion that the state court's application of Massachusetts's public accommodations law to the parade fell into the latter category by stressing that the parade took place in public streets, places where a speaker's speech should be free from content-based "interference" by the state.[76]

68. *Id.* at 569 (citing *Barnette*, 319 U.S. at 632).

69. *Id.* at 571-72.

70. *See id.* at 572-73.

71. *Id*. at 573 (citing Zauderer v. Off. of Disciplinary Couns. of Supreme Court of Ohio, 471 U.S. 626, 651 (1973); *Barnette*, 319 U.S. at 642).

72. *Id.* at 575.

73. See Redburn, *supra* note 22, at 49.

74. *Hurley*, 515 U.S. at 579.

75. *Id.*

76. *Id.*

In *303 Creative*, Colorado and its amici distinguished *Hurley* as an "unusual" or (in *Hurley*'s words) "peculiar" application of a state public accommodations law to a nonprofit association's parade, not relevant to a for-profit business like Smith's.[77] Smith and her amici, however, argued for *Hurley*'s direct relevance.[78] The majority of the Supreme Court agreed with her, describing *Hurley* as an example of the First Amendment protecting a right to present a "message" even if it is "unpopular."[79] As Kate Redburn observes, the Alliance Defending Freedom ("ADF") (which both aided the Council's attorney in *Hurley* and represented Smith in *303 Creative*) "and other movement organizations spent nearly thirty years trying to extend" the Court's analysis in *Hurley*—that "enforcement of some public accommodations laws" violated the Free Speech Clause—from "the 'peculiar' situation in *Hurley* to public accommodations enforcement in general." They "finally succeeded" in *303 Creative*, at least with respect to "arguably expressive products."[80]

II. TWIN PILLARS FOR COMPELLED ORTHODOXY CLAIMS: *BARNETTE* AND *OBERGEFELL*

In addition to invoking *Barnette* and its progeny, arguments against antidiscrimination laws as compelling orthodoxy draw on the majority and dissenting opinions in *Obergefell*. While business owners liken themselves, on the one hand, to the vulnerable religious dissenters in *Barnette*, they sharply distinguish themselves, on the other, from racial segregationists unwilling to serve Black customers or to accept interracial marriages. They contend that their refusals to provide wedding goods and services to same-sex couples due to their sincere religious beliefs are wrongly analogized to refusals by "odious" racists and bigots to serve Black persons. In support, they cite Justice Kennedy's statements in *Obergefell* that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises" and that the Court was not "disparag[ing]" them or their beliefs.[81] Jack Phillips and his amici in *Masterpiece Cakeshop* provide abundant illustrations of this move.[82]

Notably, the only *explicit* reference to *Barnette* in *Obergefell* is in Justice Kennedy's majority opinion, when he rejects the argument (voiced by the dissenters) that the Court should wait for further "legislation, litigation, and

77. Brief for the United States as Amicus Curiae Supporting Respondents at 13-14, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (*Hurley* involved "unusual" application of public accommodations laws).

78. Brief of Amici Curiae Prof. Dale Carpenter et al., *supra* note 13, at 4-6, 12-15 (urging Court to "reaffirm *Hurley*").

79. *303 Creative*, 600 U.S. at 585, 586 (quoting Snyder v. Phelps, 562 U.S. 443, 456 (2011)).

80. Redburn, *supra* note 22, at 50-51.

81. *Obergefell*, 576 U.S. at 672.

82. MCCLAIN, *supra* note 22, at 194-99.

debate" rather than rule immediately in favor of the same-sex couples seeking recognition of their right to marry.[83] Kennedy references Justice Jackson's famous language about the "very purpose" of the Bill of Rights—or, as Kennedy puts it, "[t]he idea of the Constitution"—as being "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[84] This reference illustrates that *Barnette* sometimes features in the expansion of constitutional rights to previously excluded groups.

As noted above, Justice Alito's dissenting opinion in *Obergefell* echoed *Barnette* in his prediction that the Court's decision "will be used to vilify Americans who are unwilling to assent to the new orthodoxy."[85] Alito dramatically argued that those who cling to old beliefs about marriage might whisper them in their homes, but "risk being labeled" as bigots if they utter them in public and risk being "treated as such by governments, employers, and schools."[86] He objected to Kennedy's comparison between now-repudiated forms of race and sex discrimination in marriage laws and state laws restricting same-sex couples from marrying, contending that "[t]he implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent."[87] This fiery rhetoric helped fuel objections to public accommodations laws.

Despite vehement conservative criticisms of Justice Kennedy's majority opinion in *Obergefell,* business owners who object to providing wedding goods and services to same-sex couples have invoked certain language from it. In addition to the "decent" and "honorable" language quoted above, they also cite his statement that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned" and may continue to engage with those who disagree "in an open and searching debate."[88] These business owners argue that not exempting them from antidiscrimination laws will violate *Obergefell*'s "promise."

In *303 Creative*, website designer Lorie Smith rested her successful challenge to Colorado's public accommodations law on these twin pillars of the

83. *Obergefell,* 576 U.S. at 676.

84. *Id.* at 677 (quoting *Barnette*, 319 U.S. at 638).

85. *Id*. at 741 (Alito, J. dissenting).

86. *Id.*

87. *Id*. The dissents by Chief Justice Roberts and Justice Scalia also argued that the majority opinion portrayed those who adhered to the one man-one woman definition of marriage as bigoted. *See Obergefell*, 576 U.S. at 712 (Roberts, C.J., dissenting); *id*. at 719 (Scalia, J., dissenting). The rhetoric of bigotry also featured in the dissents by Chief Justice Roberts and by Justice Alito (joined by Justice Thomas) in *United States v. Windsor*, 570 U.S 744 (2013). *See* MCCLAIN, *supra* note 22, at 174-77.

88. *Obergefell*, 576 U.S. at 679-80.

compelled orthodoxy claim. She both appealed to *Obergefell*'s "promise" and compared herself to the students in *Barnette.* At the oral argument, her lawyer Kristen Waggoner opened and closed with analogies to *Barnette* and its progeny: "If the government may not force motorists to display a motto, school children to say a pledge, or parades to include banners, Colorado may not force Ms. Smith to create and speak messages on pain of investigation, fine, and re-education."[89] Waggoner also invoked the *Obergefell* majority and dissent, asserting: "Colorado asks this Court for the power to drive views like Ms. Smith's from the public square, views about marriage that this Court has held are honorable and decent, promises that it has provided that the government would not mandate orthodoxy."[90] In such arguments, business owners' refusals of service or selective offering of service become the expression of views, a premise embraced by Justice Gorsuch's reference to the commercial marketplace as a "marketplace of ideas."

III. A ROAD NOT TAKEN: *ELANE PHOTOGRAPHY* ON WHY BUSINESS OWNERS ARE NOT LIKE THE SCHOOL CHILDREN IN *BARNETTE*

In *Elane Photography, LLC. v. Willock*,[91] a photographer, Elaine Huguenin, declined to photograph a commitment ceremony between two women because of her religious beliefs about marriage. At the time, New Mexico did not permit same-sex couples to marry but its Human Rights Act (NMHRA) prohibited discrimination based on sexual orientation in businesses considered "public accommodations."[92] After Willock, one of the women, filed a discrimination complaint, the New Mexico Human Rights Commission concluded that Elane Photography had discriminated on the basis of sexual orientation.[93] The photographer appealed, but the district, appellate, and highest court of New Mexico all affirmed.[94] Some subsequent state court decisions (including the Colorado court in *Masterpiece Cakeshop*) cited the New Mexico Supreme Court's doctrinal analysis as persuasive as to why *Barnette*'s prohibition against compelled expression—and similar prohibitions in cases like *Wooley*—did not apply to businesses operating as public accommodations.[95] In reaching the opposite conclusion, *303 Creative* implicitly overrules *Elane Photography*, but it is still instructive as a constitutional road not taken by the U.S. Supreme Court.

89. Transcript of Oral Argument at 4-5, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

90. *Id.* at 153-54.

91. 309 P.3d 53 (N.M. 2013).

92. *Id*. at 58.

93. *Id*. at 60.

94. *Id*.

95. *See, e.g.*, Craig v. Masterpiece Cakeshop, 370 P.3d 272, 286-87 (Colo. App. 2015), *rev'd*, Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617 (2018); State of Washington v. Arlene's Flowers, 441 P.3d 1203, 1226-27 (Wash. 2019) (reconsidered and affirmed).

The case is especially instructive to revisit the concurring opinion's approach to *Barnette*.

A. The Majority Opinion

In her appeal, Huguenin cited *Barnette* and *Wooley* to argue that the NMHRA compelled speech because she was forced to "speak the government's message" and "engage in unwanted expression."[96] In support, amici The Cato Institute, joined by Professors Dale Carpenter, Eugene Volokh, and others, argued that *Wooley* (which "heavily relied" on *Barnette*) was controlling and that it, along with *Barnette* and *Hurley,* afforded photographers and others "engaged in expression" a right to refuse to engage in "First Amendment-protected expression."[97] Quoting *Wooley* (which, in turn, quoted *Barnette*), the brief argued, "the right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[98] "Democracy and liberty" themselves rested on protecting such "individual freedom of mind."[99] To illustrate the high stakes, the brief quoted Alexander Solzhenitsyn's admonition to "his fellow Russians" to "'live not by lies,'" that is, "to refuse to endorse speech that they believe to be false."[100]

The Supreme Court of New Mexico's majority opinion disagreed that *Barnette* and *Wooley* controlled. It held that *Barnette's* prohibition on government prescribing orthodoxy was inapt because the NMHRA "does not require Elane Photography to recite or display any message" or even to take photographs.[101] Instead, it "only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation."[102] Therefore, the majority concluded, requiring a business to offer goods and services to a same-sex couple on the same basis as they would to a different-sex couple does not "compel[] speech" as the law in *Barnette* did—and as had the laws in other compelled speech cases (such as in *Wooley*, where the New Hampshire law required residents to display "Live Free or Die" on their license plates).[103]

96. *Elane Photography*, 309 P.3d at 64.

97. Brief of Amici Curiae the Cato Institute, Prof. Dale Carpenter, and Prof. Eugene Volokh at 3-5, 8-21, Elane Photography, LLC v. Willock, 309 P.3d 53, 64 (N.M. 2013) (Case No. 33, 687), https://www.cato.org/sites/cato.org/files/pubs/pdf/Elane-Photog-filed-brief.pdf [https://perma.cc/645M-UVG5].

98. *Id.* at 5. The brief also quoted the passage from *Wooley* (quoting *Barnette*) on prohibiting compelled expression because it "invades the sphere of intellect and spirit . . . ." *Id.* at 6.

99. *Id.* at 7.

100. *Id.*

101. *Elane Photography*, 309 P.3d at 64.

102. *Id.*

103. *Id.* at 65.

Further, the majority observed that while West Virginia's statute in *Barnette* "had little purpose other than to promote the government-sanctioned message" of "national unity," antidiscrimination laws "have important purposes that go beyond expressing government values: they ensure that services are freely available in the market and protect individuals from humiliation and dignitary harm."[104] The court found a more apt analogy in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*,[105] where the Supreme Court concluded that a requirement that universities receiving federal funding had to allow military recruiters access to university facilities and services on the same basis as non-military recruiters did not compel speech.[106] In that case, the Court had found there was nothing "approaching a Government-mandated pledge or motto" that the universities had to endorse.[107] Notably, in *FAIR* the Court declared that it "trivializes the freedom protected in *Barnette* and *Wooley*" to suggest that "[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter" is the same as "forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'"[108]

Similarly, the New Mexico Supreme Court concluded that NMHRA did not require businesses that came within the public accommodations law to make "any affirmation of belief," but simply required them to offer their services to the public without discriminating based on protected classifications.[109] The majority also distinguished *Barnette* because of the impact of refusals on third parties. The "dissenting students' choice not to salute the flag '[did] not bring them into collision with rights asserted by any other individual,'" while a business's asserted right to refuse service "directly conflicts" with the right of a potential customer to obtain goods and services "from a public accommodation without discrimination on the basis of her sexual orientation."[110]

Finally, the court rejected Elane Photography's argument that, because photographing same-sex ceremonies is an expressive event, NMHRA compelled it to communicate messages it did not wish to convey: "that such ceremonies exist" and that they "deserve celebration and approval."[111] The court observed that Elane Photography "sells its expressive services to the public" and it "expresses its clients' messages in its photographs" only because it is "hired to do so."[112]

104. *Id.*
105. *FAIR*, 547 U.S. at 70.
106. *Elane Photography*, 309 P.3d at 65.
107. *FAIR*, 547 U.S. at 62.
108. *Id.*
109. *Elane Photography*, 309 P.3d at 65.
110. *Id.* at 64 (quoting *Barnette*, 319 U.S. at 630).
111. *Id.* at 65.
112. *Id.* at 67 (distinguishing *Hurley*, 515 U.S. 557).

B. The Concurrence: The "Price of Citizenship" in the "Marketplace of Commerce"

In *Masterpiece Cakeshop*, Justice Kennedy directed that future disputes over constitutional challenges to antidiscrimination laws "must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[113] A good model for such an approach is Justice Bosson's concurring opinion in *Elane Photography*. Bosson speaks more directly than the majority did to the owners of Elane Photography, Elaine and Jonathan Huguenin, acknowledging that they viewed themselves "in much the same position as the students in *Barnette*," since they believe that "certain commands of the Bible . . . must be obeyed."[114] He stated that "their religious convictions deserve our respect" as well as an answer to the question, how can "the state of New Mexico compel them to 'disobey God' in this case?"[115] Bosson answered by invoking two additional landmark cases: *Loving v. Virginia* and *Heart of Atlanta Motel v. United States*.[116] As did the majority opinion, Justice Bosson observed that the refusal of the students in *Barnette* to salute the flag did not, as Justice Jackson put it, collide with the rights of others.[117] By contrast, refusing to serve customers because of their sexual orientation, like refusing to serve customers because of their race (as in *Heart of Atlanta Motel*), would conflict with their rights, even if motivated by a religious belief in segregation.[118] *Loving*, he argued, illustrates that the appeal to religious beliefs—e.g., a belief that God separated the races—cannot justify unconstitutional laws (or, by implication, not complying with public accommodations laws).[119]

Justice Bosson also reasoned from the legitimacy of the Civil Rights Act of 1964 upheld in *Heart of Atlanta Motel* to that of present-day state antidiscrimination laws, which have evolved over time to include more protected groups.[120] He interpreted New Mexico's law as expressing the position that "to discriminate in business on the basis of sexual orientation is just as intolerable as discrimination directed toward race, color, national origin, or religion."[121] He concluded that complying with antidiscrimination laws in the "marketplace of commerce" is a necessary accommodation that persons like the Huguenins must

113. Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n, 584 U.S. 617, 640 (2018).

114. *Elane Photography*, 309 P.3d at 78 (Bosson, J., concurring); *see also* MCCLAIN, *supra* note 22, at 186-91.

115. *Elane Photography*, 309 P.3d at 78.

116. *Id.* at 78-79 (citing Loving v. Virginia, 388 U.S. 1 (1967); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)).

117. *Id.* at 78.

118. *Id.* at 79.

119. *Id.* at 78-79.

120. *Id.* at 79.

121. *Id.*

make, while remaining free to "think, to say, to believe, as they wish."[122] Bosson called this the "price of citizenship" that all people pay in "our civic life."[123]

This "price," some critics protested, is higher than religious believers should have to pay. The rhetoric in the *Obergefell* dissents about the perils faced by such believers if they dissent from the new "orthodoxy" about marriage amplified these criticisms.

IV. AVOIDING THE COMPELLED SPEECH ISSUE IN *MASTERPIECE CAKESHOP*

Masterpiece Cakeshop owner Jack Phillips's challenge to Colorado's public accommodations law (CADA) asked the U.S. Supreme Court to hold that the failure to allow him an exemption from preparing a wedding cake for same-sex couples violated both his free speech and his free exercise of religion. Along with *Obergefell* (as discussed above), Phillips and his many amici cited *Barnette* and other compelled speech cases that have drawn on it, like *Wooley*[124] and *Hurley*.[125] Quoting *Barnette,* Phillips argued: "The Commission dismisses the First Amendment when it is most needed—to help people in a pluralistic society navigate through sincere differences on matters 'that touch the heart of the existing order.'"[126] He also compared the symbolism of a wedding cake to that of a flag, "as a short cut from mind to mind."[127]

A. The Majority Opinion's Analysis

Writing for the Court, Justice Kennedy did not reach the merits of Phillips's compelled speech claim. He called it "difficult" since few persons viewing a "beautiful wedding cake" might regard its "creation" as "an exercise of protected speech."[128] He did not foreclose the argument, observing that it could be an instance in which "application[s] of constitutional freedoms in new contexts can deepen our understanding of their meaning."[129] In addressing Phillips's First Amendment free exercise claim, however, Kennedy quoted *Barnette*'s caveat against any official prescribing "what shall be orthodox." The context is important. The majority did *not* rule that, under *Barnette*, CADA as such impermissibly compelled a governmental orthodoxy. Instead, Kennedy quoted *Barnette*'s "fixed star" language in the context of ruling that the Commission's treatment of Phillips's claim showed "hostility" toward his belief. He stated, "Just as 'no official, high or petty, can prescribe what shall be orthodox in

122. *Id.* at 79-80.
123. *Id.* at 80.
124. Brief for Petitioners, *supra* note 9, at 17, 25, 29-30, 46.
125. *Id.* at *passim*.
126. *Id.* at 3 (citing *Barnette*, 319 U.S. at 642).
127. *Id.* at 15 (citing *Barnette*, 319 U.S. at 632), 24 (discussing flag language).
128. *Masterpiece Cakeshop*, 584 U.S. at 624.
129. *Id.*

politics, nationalism, religion, or other matters of opinion,' . . . it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive."[130]

In *Masterpiece Cakeshop*, the Court concluded that there was not a "principled rationale" for the Colorado Civil Rights Commissioners charged with enforcing CADA to allow three bakeries to decline to create anti-same-sex marriage cakes because of "the offensive nature of the message," while rejecting Phillips's appeal to offensiveness—of same-sex marriage to his religious beliefs about marriage—as a reason to decline to create wedding cakes for same-sex marriages.[131]

B. Justice Thomas's Concurrence: CADA Does Compel Speech, Contrary to Barnette

Justice Thomas (joined by Justice Gorsuch) would have reached and accepted Phillips's compelled speech claim.[132] He invoked *Barnette* to explain why.[133] Thomas argued that the Colorado Supreme Court was wrong in concluding that Phillips's conduct in creating wedding cakes was not expressive and not protected speech.[134] He quoted *Barnette* for the point that "symbolism is a primitive but effective way of communicating ideas."[135] On his view, *Barnette*'s protection of "refusing to salute the American flag" illustrates that "a wide array of conduct" can be expressive, including creating a wedding cake.[136] Thomas favorably quoted Phillips's view about the inherently communicative nature of his wedding cakes: that "a wedding has occurred, a marriage has begun, and the couple should be celebrated."[137] Thus, forcing Phillips to create a wedding cake would force him to "acknowledge" a message he believes his faith forbids.[138] Thomas also cited *Barnette* for the proposition that the Court's

130. *Id.* at 638 (citing *Barnette*, 319 U.S. at 642; Matal v. Tam, 582 U.S. 218, 243-44 (2017) (Alito, J., concurring)).

131. *Masterpiece Cakeshop*, 584 U.S. at 638 (quoting *Barnette*, 318 U.S. at 642). Both the concurrence by Justices Kagan and Breyer and the dissent by Justices Ginsburg and Sotomayor strenuously disagree with Justice Kennedy on whether there were principled distinctions between the cases. *Id.* at 642-43 (Kagan, J., concurring); *id.* at 670-71, 673 (Ginsburg, J., dissenting). In his concurrence, Justice Gorsuch vehemently disagreed with Justices Kagan and Ginsburg on this point. *Id.* at 644 (Gorsuch, J., concurring).

132. *Id*. at 654-55 (Thomas, J., concurring).

133. *Id*. at 656.

134. *Id.* at 654-55.

135. *Id*. at 656 (quoting *Barnette*, 319 U.S. at 632). Similarly, in his concurrence, Justice Gorsuch wrote: "Like 'an emblem or flag,' a cake for a same-sex wedding is a symbol that serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution.'" *Id.* at 650 (Gorsuch, J., concurring) (quoting *Barnette*, 319 U.S. at 632).

136. *Id.* at 657 (Thomas, J., concurring).

137. *Id.* at 659.

138. *Id.* at 660-61.

compelled speech precedents have "rejected arguments that 'would resolve every issue of power in favor of those in authority.'"[139]

Because Justice Thomas deemed both Phillips's cake-creation and his refusal to create cakes as expressive speech, not simply conduct, he argued that CADA implicated the strict scrutiny test required when governmental regulation burdens speech and is not simply doing so incidental to regulating conduct. [140] Thomas's transformation of conduct into speech anticipates Justice Gorsuch's move in *303 Creative*. Thomas concluded that Colorado failed the strict scrutiny test because the state does not have a compelling interest in applying CADA to Phillips—to "compel Phillips' speech"—to prevent dignitary harm to same-sex couples and avoid subjecting them to "humiliation, frustration, and embarrassment."[141] While the couple denied service, Craig and Mullins, cited *Heart of Atlanta Motel* to support their harm argument, Thomas asserted that such a rationale is "completely foreign to our free-speech jurisprudence."[142] Instead, he quoted from *Texas v. Johnson*, in which the Court struck down a law restricting flag burning:

> States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, undignified, or unreasonable. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." A contrary rule would allow the government to stamp out virtually any speech at will.[143]

After transforming a refusal of service into a speech act, Thomas argues that the very fact that the speaker's "opinion" gives "offense" is a reason that it warrants constitutional protection against a governmental "orthodoxy."[144]

In invoking *Barnette* as well as First Amendment cases protecting unpopular, offensive, or even hateful speech, both Justice Thomas's and Justice Gorsuch's concurring opinions cast Phillips as a religious minority. For example, Gorsuch suggests a parallel between free speech and free exercise:

139. *Id.* at 661 (citing *Barnette*, 319 U.S. at 636).

140. *Id.* at 663-64. As discussed below, the Tenth Circuit ruled that Smith's website design was "pure speech."

141. *Id.* at 664.

142. *Id.* Respondents cited to Justice Goldberg's concurring opinion in *Heart of Atlanta Motel*. *See id.* at 664 (citing Brief for Respondents Craig et al. at 39 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 242 (1994); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (1964)).

143. *Masterpiece Cakeshop*, 584 U.S. at 664-65 (citing Texas v Johnson, 491 U.S. 397, 414 (1989)). Not so long ago, conservatives were joining Chief Justice Rehnquist in dissent in the flag burning case, Texas v. Johnson, 419 U.S. at 436, arguing that "[s]urely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people, including flag burning."

144. *Masterpiece Cakeshop*, 584 U.S. at 665 (Thomas, J., concurring) (citing *Hurley*, 515 U.S. at 578-79).

"Just as it is the 'proudest boast of our free speech jurisprudence' that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive."[145] Arguing that the Commissioners viewed Phillips's religious beliefs as "irrational" or "offensive," he added: "It is in protecting unpopular religious beliefs that we prove this country's commitment to serve as a refuge for religious freedom."[146] This emphasis on the First Amendment protecting what is "unpopular" recurs in his majority opinion in *303 Creative*.

Justice Thomas reinforces this picture of Phillips as a dissenter in need of protection by envisioning him as (through his business decisions) rightfully using his free speech rights to criticize *Obergefell*: "This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized."[147] Quoting Justice Alito's *Obergefell* dissent, Thomas concludes that, "in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to 'stamp out every vestige of dissent' and 'vilify Americans who are unwilling to assent to the new orthodoxy.'"[148]

V. *303 CREATIVE LLC V. ELENIS*: APPLYING *BARNETTE* TO THE MARKETPLACE (OF IDEAS)

> Colorado asks this Court to do something it has never done before—bless government-mandated orthodoxy and require an artist to speak or stay silent contrary to her beliefs.
>
> —Brief for the Petitioners, at 18, 303 Creative LLC v. Elenis

The Supreme Court agreed to address the compelled artistic speech argument that the majority in *Masterpiece Cakeshop* declined to reach when it granted certiorari in *303 Creative LLC v. Elenis*[149] on the question: "[w]ether applying a public accommodations law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment."[150] By that time, the Arizona Supreme Court and the Eighth Circuit Court of Appeals had favorably ruled on free speech challenges to the public accommodations laws of, respectively, the City of Phoenix and Minnesota brought by the ADF on behalf

145. *Id*. at 649 (Gorsuch, J., concurring). *Matal*'s "proudest boast" language, in turn, comes from a dissent by Justice Oliver Wendell Holmes, Jr. in the 1929 case, United States v. Schwimmer, 279 U.S. 644, 655 (1929).

146. *Masterpiece Cakeshop*, 584 U.S. at 649.

147. *Id.* at 666. Indeed, in his concurrence in *Dobbs,* Justice Thomas openly called for the Court to overrule *Obergefell. See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332-33 (2022) (Thomas, J., concurring).

148. *Masterpiece Cakeshop*, 584 U.S. at 667.

149. 6 F.4th 1160 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022).

150. U.S. Supreme Court, Orders in Pending Cases 4 (Feb. 22, 2022).

of stationers (in Phoenix)[151] and wedding videographers (in Minnesota).[152] *Barnette* and its progeny featured prominently in both opinions, providing a prequel to *303 Creative*. For example, in *Brush & Nib Studio, LC v. City of Phoenix*, the Supreme Court of Arizona described the business owners, Joanna Duka and Breonna Koski, as holding unpopular views about marriage, deemed "old-fashioned or even offensive to some," but invoked *Barnette* to state that "'[w]e can have intellectual individualism' and 'rich cultural diversities' only at the price of allowing others to express beliefs that we may find offensive and irrational."[153] The court also invoked *Barnette's* "fixed star" language and, more dramatically, its warning about how history reveals that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."[154] By comparison, the three dissenting judges found the *Barnette* analogy inapt—"requiring businesses to treat customers equally is in no way comparable to compelling public school children to salute the flag"—and warned that allowing exemptions would risk "resurrecting the old Jim Crow laws of the South."[155] In their respective emphases, the majority and dissent anticipate Justices Gorsuch and Sotomayor in *303 Creative*.

In *303 Creative*, as noted above, website designer Lorie Smith argued that Colorado's antidiscrimination law (CADA) *compels her speech* by requiring that, if she expands her business to offer website design for weddings, she must offer those services to same-sex couples on the same terms as to different-sex couples, and *compels her not to speak* by prohibiting her from posting a statement on her website explaining why she will not design websites for same-sex weddings.

Barnette featured repeatedly not only in the arguments made by Smith and her amici, but also in Justice Gorsuch's majority opinion ruling in her favor. Further, in the proceedings below, in which the Tenth Circuit ruled against Smith, the dissent by Chief Judge Tymkovich cited *Barnette* 13 times, quoting nine different passages.[156] Tymkovich linked *Barnette*'s warnings about coercing unity by measures of "ever-increasing severity" to George Orwell's writings about liberty, cautioning, "[s]tifling minority speech is the prototypical 'slippery slope' toward authoritarianism."[157] Notably, Gorsuch works Tymkovich's reference to Orwell into the majority opinion.

151. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).

152. Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).

153. *Brush & Nib Studio*, 448 P.3d at 896 (citing *Barnette*, 319 U.S. at 641-42).

154. *Id*. at 897 (citing *Barnette,* 319 U.S. at 641).

155. *Id.* at 930 (Bales, J., dissenting).

156. *See 303 Creative*, 6 F.4th at 1192-1215 (Tymkovich, J., dissenting).

157. *Id.* at 1196 (quoting *Barnette*, 319 U.S. at 640). Chief Judge Tymkovich quotes *Barnette*'s "fixed star" passage, saying "those words are as true now as they were then." *Id.* at 1205 (quoting *Barnette*, 319 U.S. at 642).

In the following analysis of the role of *Barnette* in the *303 Creative* litigation, I do not attempt to predict the future of public accommodations laws or the full implications of the Supreme Court's ruling. As some commentators have observed, doing so is difficult both because of the Tenth Circuit's ruling that Smith's website design was "pure speech"[158] and because of Justice Gorsuch's emphasis upon how the Court's holding followed from the parties' stipulated facts.[159] What I do stress is how *Barnette* features in his narrative of the need for constant vigilance on the part of the Court to affirm the First Amendment's protection of individuals, their beliefs, and their speech against an encroaching government.

A. The Tenth Circuit

Smith's website design business originally did not include websites for weddings. She wished to expand to include them. She also wanted to post on her own website a statement (1) that she feels called by God to do wedding website design to explain "His true story about marriage . . . as a lifelong union between one man and one woman" and (2) that those convictions prevent her from creating websites "promoting and celebrating ideas or messages that violate my beliefs," such as creating "websites for same-sex marriages or any other marriage that is not between one man and one woman."[160] Even before she offered wedding-related services, but while *Masterpiece Cakeshop* was pending, Smith brought a pre-enforcement challenge to CADA asserting Free Speech, Free Exercise, and Due Process violations.[161] In effect, she sought a declaratory judgment that CADA was unconstitutional.[162] She challenged both (1) CADA's requirement that she provide services without discrimination (what the Tenth Circuit called the Accommodation Clause) and (2) its requirement that she not post a public statement about why her beliefs lead her not to provide services for same-sex weddings (the Communication Clause).[163] Thus, as stated previously, she alleged that these two clauses simultaneously compel speech and compel silence.[164]

158. The Tenth Circuit concluded that Colorado's law survived the strict judicial scrutiny required because Colorado had no less restrictive alternative to advance its compelling governmental interest than to enforce its law against Smith. *Id.* at 1176.

159. *See* Post, *supra* note 53.

160. *303 Creative,* 6 F.4th at 1200 n.7.

161. *Id.* at 1170.

162. Complaint at 59, *303 Creative*, *supra* note 10.

163. *Id*.

164. *Id.* at 5.

1. The Majority Opinion

The Tenth Circuit affirmed the district court decision granting summary judgment in favor of Colorado.[165] However, the court differed from most prior courts rejecting challenges to state public accommodations laws because it concluded that Smith's "creation of wedding sites is pure speech" and that CADA would be compelling her to offer services to same-sex couples through websites that "express approval and celebration of the couple's marriage."[166]

The majority, nonetheless, reasoned that Colorado's law survived a strict scrutiny test under the First Amendment because the state had a "compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace."[167] Citing *Romer v. Evans*, the court observed that "Colorado has a unique interest in remedying its own discrimination against LBGT people."[168]

The court concluded that CADA was not narrowly tailored to the first interest, preventing dignitary harms.[169] Under precedents such as *Hurley*, the law could not "enforce that interest by limiting offensive speech:"[170] "[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."[171] But, the court found, the law *was* narrowly tailored to promoting the second interest, "ensuring equal access to publicly available goods and services."[172] The court cited the landmark civil rights case, *Heart of Atlanta Motel,* as illustrating the "commercial consequences of public accommodation laws,"[173] namely, prohibiting discriminatory practices to "help insure a free and open economy."[174]

2. The Dissent

While the majority cited *Barnette* only once, to distinguish it,[175] the dissent cited it 13 times.[176] After beginning with a quotation from George Orwell (subsequently quoted by Justice Gorsuch)—"[i] liberty means anything at all, it

165. *303 Creative*, 6 F.4th at 1190.

166. *Id.* at 1176. Citing *Obergefell*, the majority reasons that the wedding itself is often a particularly expressive event. *Id.* (citing *Obergefell*, 576 U.S. at 657).

167. *Id.* at 1178 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984)).

168. *Id.* (citing Romer v. Evans, 517 U.S. 620, 630 (1996)).

169. *Id*. at 1179.

170. *Id*.

171. *Id*. (quoting *Hurley,* 515 U.S. at 579).

172. *303 Creative,* 6 F.4th at 1182.

173. *Id.* at 1179 (citing *Heart of Atlanta Motel*, 379 U.S. 241 (1964)).

174. *Id.*

175. *Id.* at 1177.

176. *Id.* at 1192-1215 (Tymkovich, J., dissenting).

means the right to tell people what they do not want to hear"[177]—Chief Judge Tymkovich concludes with *Barnette*.[178] (Notably, as Solicitor General for Colorado, Tymkovich had unsuccessfully defended Amendment 2 to the state constitution in *Romer v. Evans*). While Justice Bosson's concurring opinion in *Elane Photography* distinguished (1) the historical context of *Barnette* from the contemporary landscape of state antidiscrimination laws and (2) the situation of the students refusing to salute the flag from a photographer refusing to serve a customer, Tymkovich found similarity in both respects.[179] On his view, the risk of authoritarian governmental overreach is nigh. For example, he wrote, "compelled speech is deeply suspect in our jurisprudence—and rightly so given the unique harms it presents."[180] He invoked Justice Alito quoting *Barnette* on how commanding "involuntary affirmation" coerces individuals into "betraying their convictions."[181]

Furthermore, Tymkovich wrote, "[t]he '[c]ompulsory unification of opinion' about which Justice Jackson cautioned in *Barnette* is not only a social harm but a personal one"[182] because diminishing the "field of permissible expression diminishes autonomy and free will."[183] He even linked *Barnette*'s warnings about coercing unity to Orwell, as he cautioned that "stifling minority speech is the prototypical 'slippery slope' toward authoritarianism."[184] He quoted Justice Jackson: "As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity."[185] Continuing to quote *Barnette*, he wrote, "It appears that the path to 'coercive elimination of dissent' is steep—and short."[186] On his view, Smith is a dissenter under threat.

Chief Judge Tymkovich also quoted *Barnette*'s "fixed star" passage, saying "those words are as true now as they were then."[187] He described as "misguided" the majority's supposed assurance that "Colorado has good reasons to violate Ms. Smith's conscience for the greater good," responding with *Barnette*'s language about the "very purpose of a Bill of Rights."[188] He emphasized pluralism and the need to accommodate diverse religious and other beliefs, quoting *Barnette*'s language about applying the "limitations of the Constitution"

177. *Id.* at 1190.
178. *Id.* at 1215.
179. *Id.* at 1195.
180. *Id.* at 1181.
181. *Id.* at 1195 (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2464 (2018) (quoting *Barnette*, 319 U.S. at 633)).
182. *Id.* (quoting *Barnette*, 319 U.S. at 641).
183. *Id.*
184. *Id.* at 1196.
185. *Id.* (quoting *Barnette*, 319 U.S. at 640).
186. *Id.* at 1182, 1200 (quoting *Barnette*, 319 U.S. at 641).
187. *Id.* at 1205 (quoting *Barnette*, 319 U.S. at 642).
188. *Id.* at 1202 (quoting *Barnette*, 319 U.S. at 638).

with no fear that "freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[189] He then opined, "When all is said and done, allowing business owners like Ms. Smith to operate in accordance with the tenets of their faiths does not damage society but enriches it."[190] Although Colorado fails to "respect this diversity," he argued, the First Amendment "protects" it by protecting Smith.[191]

Tymkovich concluded his dissent with *Barnette*'s admonition that "freedom to differ is not limited to things that do not matter much."[192] As applied to Smith, this means that the court must "presume" that she seeks to "live and speak by her faith," not to "discriminate against any particular person or group."[193] Thus, while Colorado viewed her intended refusal to design certain websites as discrimination, he argued that the state should instead accept that refusal as "freedom to differ" (as *Barnette* puts it) as to "things that touch the heart of the existing order."[194]

B. Arguments before the U.S. Supreme Court

> The First Amendment exists to make sure that the state may not use the machinery of government to compel uniformity of opinion. *See Barnette*, 319 U.S. at 640-41. To permit a state untrammeled access within the marketplace of ideas would grant the power to regulate and silence those views that the state disapproves. App 80a (Tymkovich, C.J., dissenting). . . .
>
> [Petitioners] are compelled by their faith to say, and to not say, certain things while participating in their craft. The First Amendment, and this Court's jurisprudence, afford Petitioners the space to create expression and market it while at the same time adhering to their faith.
>
> —Brief of Amici Curiae First Amendment Scholars in Support of Petitioners, at 24, 25, 303 Creative LLC v. Elenis

In her petition for certiorari, Lorie Smith contended that the Tenth Circuit's decision "dims the most 'fixed star in our constitutional constellation': government cannot compel citizens to speak against their conscience."[195] Her amici similarly argued that CADA "violates the Free Speech Clauses' fixed star"—"the very Polaris of this Nation's constellation of free speech jurisprudence"—and that, unless the Court corrected the Tenth Circuit decision, Colorado "is permitted to prescribe what is orthodox for public discourse and therefore compelling people, such as 303 Creative, to mouth support for views

189. *Id.* at 1212 (quoting *Barnette*, 319 U.S. at 641).
190. *Id.* at 1212.
191. *Id.*
192. *Id.* at 1215 (quoting *Barnette*, 319 U.S. at 642).
193. *Id.*
194. *Id.* (quoting *Barnette*, 319 U.S. at 642).
195. Petition for Writ of Certiorari at 19, 303 Creative, 600 U.S. 570 (No. 21-476).

they find objectionable."[196] Such briefs use terms like "public discourse" and "uninhibited marketplace of ideas" (a term also used in Gorsuch's majority opinion) to frame the issue as one of Colorado seeking to act as a "censor" or "guardian of the public's minds" and to prohibit or eliminate "unpopular speech."[197] These briefs conflate the commercial marketplace with the marketplace of ideas, e.g. (quoting Tymkovich), "[t]o permit a state untrammeled access within the marketplace of ideas would grant the power to regulate and silence those views that the state disapproves."[198]

By contrast, amici for Colorado argued that, when a person enters "the marketplace of commerce," they lose the "complete control" they enjoy in "the marketplace of ideas."[199] Echoing the late Justice Sandra Day O'Connor's words in *Roberts v. Jaycees*, they argued, "Going into business marks a qualitative change in the nature of a person's activity."[200]

Similar to Chief Judge Tymkovich's dissent (which they repeatedly quoted), Smith's amici invoked various passages from *Barnette*, including its warning of the risk of compelling "uniformity of opinion."[201] Legal scholars Dale Carpenter, Eugene Volokh, and others filed an amicus brief featuring *Barnette*'s dramatic warning about the risks of governmental efforts to bring about "unification of opinion":

> To compel speech is to conscript the individual's mind in the service of the state. . . . A society that strives for "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 641 (1943). Our First Amendment is "designed to avoid these ends by avoiding these beginnings." *Id*.[202]

Barnette's progeny, *Wooley* and *Hurley*, also proved important in the briefs and Gorsuch's opinion. Amici public accommodations scholars arguing in support of Colorado distinguished *Hurley* as, in the Supreme Court's words there, a "'peculiar'" application of public accommodations laws, which "'as a general matter'" do not "'violate the First or Fourteenth Amendments.'"[203] They argued that, under "history, tradition, and precedent," applying CADA to

196. Brief of Amici Curiae First Amendment Scholars in Support of Petitioners at 16, 18, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (in support of cert petition). This group of scholars filed a similar merits brief using the same language.

197. *Id.* at 7, 9, 16, 18.

198. *Id.* at 24.

199. Brief of Public Accommodations Laws Scholars as Amici Curiae in Support of Respondents at 18, 303 Creative v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (quoting *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment)).

200. *Id*.

201. Brief of Amici Curiae First Amendment Scholars in Support of Petitioners, *supra* note 196, at 24 (in support of cert petition).

202. Brief of Amici Curiae Prof. Dale Carpenter et al., *supra* note 13, at 8.

203. Brief of Public Accommodations Laws Scholars, *supra* note 199, at 2, 6.

Smith's website design business was *not* a similarly "peculiar" application or "rare" case.[204] They also argued for a crucial distinction between "content-neutral laws that incidentally impact speech," like CADA, and laws (such as those in *Barnette* and *Wooley*) that were "content based or facially aimed at speech."[205] To ignore that distinction, they argued (quoting *Hurley*), "trivializes the freedom protected in *Barnette* and *Wooley*."[206]

In contrast, the Carpenter and Volokh amicus brief argued that such freedom *was* at stake: "requiring Smith to personally create expressive works does interfere" with the "'individual freedom of mind'" protected by the First Amendment, as recognized in *Barnette* and *Wooley*.[207] Their brief also argued that *Hurley* squarely applied to Smith's website design ("pure speech") and urged the Court to "reaffirm *Hurley*" and "remind the lower courts that state antidiscrimination laws are subject to the First Amendment's protections, and clarify the circumstances in which heightened judicial scrutiny may be met."[208]

Smith's merits brief began with *Barnette's* "what shall be orthodox" passage.[209] Indeed, it asserted that the violation of her conscience by not being permitted an exemption from Colorado's law was more "severe" than those suffered in *Barnette*, *Wooley*, or any other cases in which the Court had ruled that government compelled speech.[210] Smith's brief stated: "Not even the Barnette children had to compose the words or knit the flag that violated their conscience. This Court should not countenance a violation of conscience so severe that it eclipses . . . all [its] compelled speech precedents . . . ." [211]

As discussed above, Smith's attorney, Kristen Waggoner (from the ADF), opened and closed her oral argument before the Supreme Court by appealing to *Barnette* and other compelled speech cases, concluding, "Colorado may not force Ms. Smith to create and speak messages on pain of investigation, fine and re-education."[212] Waggoner also invoked *Obergefell's* "promise" that *"*government would not mandate orthodoxy" in arguing that Colorado should not be allowed "to drive views like Ms. Smith's from the public square, views about marriage that this Court has held are honorable and decent."[213]

While Smith evoked an image of being driven from the public square, Colorado's brief opens with imagery of Coloradans who, "[e]very day," "buy the goods and services they need from businesses that open their doors to the

204. *Id*. at 2, 5, 6.
205. *Id.* at 7.
206. *Id*.
207. Brief of Amici Curiae Prof. Dale Carpenter et al., *supra* note 13, at 11.
208. *Id*. at 15.
209. Brief for the Petitioners, *supra* note 61, at 2.
210. *Id.* at 23.
211. *Id.*
212. Transcript of Oral Argument, *supra* note 89, at 4-5.
213. *Id.* at 153-54.

public," and how customers—however they differ in how they "look, love, or worship"—"all expect to participate in the public marketplace as equals."[214] While Smith argued that CADA posed an even worse imposition on conscience than was at issue in *Barnette,* Colorado stressed the absence of Supreme Court precedent for First Amendment exemptions from antidiscrimination laws for businesses open to the public: "As an unbroken line of this Court's decisions make clear, public accommodations laws permissibly regulate conduct when they require equal access to goods and services, even where the businesses engage in activities protected by the First Amendment."[215] The state cited cases rejecting First Amendment challenges to laws prohibiting sex discrimination (including *Roberts v. Jaycees*) as well as race discrimination (including *Newman v. Piggie Park Enterprises*[216] and *Heart of Atlanta Motel*[217]).[218] Colorado argued that reliance on *Barnette* and *Wooley* was wrong because CADA "does not require [Lorie Smith] to display or parrot state-sponsored ideologies."[219] Instead, it "requires businesses to offer their goods and services for sale on an equal basis."[220] In an amicus brief in support of Colorado, the United States similarly appealed to *Piggie Park* and *Heart of Atlanta Motel* in emphasizing the vital role played by public accommodations laws like CADA in guaranteeing "equal access to the Nation's commercial life."[221]

At oral argument, Colorado's attorney warned that the "sweeping" Free Speech Clause exemption that Smith sought—reaching far beyond "sincerely held religious beliefs"—would upend equal access to "our public marketplace."[222] As illustrated by Justice Ketanji Brown Jackson's hypothetical about a photographer seeking to recreate nostalgic "Scenes with Santa" (with white children only), one question was whether an exemption for creative expression would permit racial discrimination.[223] In response, Justice Alito brought up *Obergefell's* language about opposition to same-sex marriage resting on "decent" and "honorable" beliefs to imply that, because Justice Kennedy would not have said the same thing about race discrimination, the race analogy was not appropriate.[224] Smith's counsel, however, did not appear to have a

214. Brief on the Merits for Respondents at 1, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

215. *Id.* at 13.

216. 390 U.S. 400 (1968).

217. 379 U.S. 241 (1964).

218. Brief on the Merits for Respondents, *supra* note 214, at 14 (citing these three and other cases).

219. *Id.* at 19.

220. *Id.*

221. Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 77, at 1, 11.

222. Transcript of Oral Argument, *supra* note 89, at 59.

223. *Id.* at 26.

224. *Id.* at 81.

consistent or coherent answer about the race analogy or any limiting principle for a creative expression exemption.

C. The Supreme Court Embraces the Compelled Orthodoxy Claim

My analysis of the Supreme Court's opinion in *303 Creative* will highlight the role *Barnette* and its progeny play in Justice Gorsuch's majority opinion. It then will compare Justice Sotomayor's dissent. While the majority situates its decision as the latest example of a courageous Court standing up for the individual against an encroaching state, the dissent excoriates the majority for departing from the long history of the Court courageously defending citizenship-expanding antidiscrimination laws against backlash and repeated First Amendment challenges. Similarly, the majority, focusing on business owners, characterizes the marketplace for goods and services as one of "ideas," such that a refusal of services expresses a significant idea; the dissent emphasizes customers and the laudatory ends furthered by requiring that the marketplace for goods and services be free from discrimination.

1. The Majority Opinion

a. The Commercial Marketplace as a Marketplace of Ideas

Justice Gorsuch's majority opinion invokes *Barnette* at several points to frame his argument that, like the students in *Barnette,* website designer Lorie Smith confronted unconstitutional governmental compulsion. *Hurley* (one of *Barnette*'s progeny) and *Boy Scouts of America v. Dale* feature in his opinion as leading examples where the Court stopped similar compulsion through state antidiscrimination laws. Early in the opinion, Gorsuch cites *Dale* for the proposition that "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.'"[225] They saw these freedoms as being both an *end* and a *means*—an end because "freedom of thought and speech" are "among our inalienable human rights" and a means because they are "'indispensable to the spread and discovery of political truth.'"[226]

Justice Gorsuch then quotes the beginning of *Barnette'*s most famous passage, "if there is any fixed star in our constitutional constellation," but adapts the rest of the passage so that the fixed star becomes "the principle that the government may not interfere with 'an uninhibited *marketplace of ideas*.'"[227] Thus, Gorsuch moves from the public elementary school room to the commercial marketplace, which becomes a marketplace of ideas, without acknowledging any differences. Notably, though, the case from which Gorsuch

225. *303 Creative*, 600 U.S. at 584 (quoting *Dale*, 530 U.S. at 660-61).
226. *Id.* (quoting Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring)).
227. *Id*. at 585.

quotes, *McCullen v. Coakley*, was not about the commercial marketplace. Instead, it involved a First Amendment challenge by pro-life "sidewalk counselors" to a Massachusetts law creating a buffer zone around medical clinics that performed abortions.[228] Because the law prohibited standing on a "public way or sidewalk" within "35 feet of an entrance, exit or driveway of a reproductive health care facility," the petitioners contended that it had "considerably hampered" their efforts to persuade pregnant women against abortion.[229] Chief Justice Roberts, writing for the majority, concluded that, while the law was "neutral" rather than "content-based," it still violated the First Amendment because it was not "narrowly tailored": the legislature could have adopted "alternative measures that burdened substantially less speech" yet still achieved the government's interest in public safety, patient access to healthcare, and unobstructed use of public sidewalks and roads.[230]

The *McCullen* majority, in striking down the law, stressed the historical and continuing importance of "public streets and sidewalks" as "venues for the exchange of ideas."[231] By comparison with "other means of communication," a listener on a public street or sidewalk "confronted with an uncomfortable message" cannot simply avoid it by turning a page, changing a channel, or leaving a website. Just as a speaker "can be confident he is not simply preaching to the choir," a listener may encounter speech they "might otherwise tune out."[232] In summing up, Chief Justice Roberts observed, "[i]n light of the First Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,' . . . this aspect of traditional public fora is a virtue, not a vice."[233] He added, "[p]etitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history."[234]

In *303 Creative*, Gorsuch similarly envisions Smith and similar business owners as having First Amendment protection *not* to be forced by government to "create speech on weighty issues with which she disagrees" and to be able to express messages others do not want to hear.[235] *McCullen* stressed the importance of being free to speak in "traditional public fora," while Gorsuch stresses being free *not* to speak in websites. However, a for-profit website design

228. McCullen v. Coakley, 573 U.S. 464, 476 (2014).

229. *Id.* at 471, 474.

230. *Id.* at 485-95.

231. *Id.* at 476.

232. *Id.*

233. *Id.* Roberts quotes the "uninhibited marketplace of ideas" passage from FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984), in which the Court struck down, on First Amendment grounds, a portion of the Public Broadcasting Act that prohibited noncommercial television and radio stations receiving federal funding "to engage in editorializing."

234. *McCullen*, 573 U.S. at 496.

235. *303 Creative*, 600 U.S. at 599.

business seems a far cry from a *public forum* with respect to creating a marketplace of ideas, whether popular or unpopular. Are Smith's website designs and refusals to design actually contributing to vital public discourse?[236]

b. CADA as the Latest Example of Governmental Overreach

The West Virginia statute struck down in *Barnette*, Gorsuch argues, is an example of how "governments in this country have sought to test" the "foundational principles" of freedom of speech and thought.[237] He offers *Hurley* and *Dale* as examples of the First Amendment protecting a right to present speech or a "message" even if it is "unpopular" (*Hurley*), the government considers it "deeply 'misguided'" (*Dale*), or it is "likely to cause 'anguish' or 'incalculable grief.'"[238]

"Generally," Gorsuch continues, "the government may not compel a person to speak its own preferred messages."[239] He enlists *Barnette* to address where the Tenth Circuit went wrong: it "thought Colorado could compel speech from Ms. Smith consistent with the Constitution," contrary to the teaching of *Barnette, Hurley*, and *Dale*. In *Barnette,* "this Court found impermissible coercion when West Virginia required school children to recite a pledge that contravened their convictions on threat of punishment or expulsion."[240] The state's "dictates," he continues (quoting *Barnette*), "invaded the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control."[241]

Gorsuch views the plight of Smith as "similar" to the "choice" put to the school children: "If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs," such as "compulsory participation in remedial training," filing compliance reports, and "paying monetary fines."[242] He again turns to *Barnette* in rejecting Colorado's argument (and that of Justice Sotomayor's dissent) that CADA imposed only an "incidental burden on speech" and was consistent with other precedents (such as *Rumsfield v. FAIR*).[243] Instead, Colorado "seeks to force an individual to 'utter

236. Robert Post argues that the key issue in *303 Creative* is not whether Smith's website design was "pure speech," which can be regulated in various contexts, but whether it was "public discourse," subject to stricter protection. *See* Post, *supra* note 53, at 29-30.

237. *303 Creative*, 600 U.S. at 585.

238. *Id*. at 585-86 (quoting Snyder v. Phelps, 562 U.S. 443, 456 (2011)).

239. *Id.* at 586. In support, Gorsuch cites *Tinker v. Des Moines,* 393 U.S. 503 (1969), in which the Court upheld students' First Amendment right to wear armbands as a form of political protest, as well as *Wooley*, where the Court held that New Hampshire could not require citizens to display the state motto on their license plates.

240. *303 Creative*, 600 U.S. at 589.

241. *Id.* at 585.

242. *Id.* at 589.

243. *Id.* at 596.

what is not in [her] mind' [quoting *Barnette*] about a question of political and religious significance."[244]

Justice Gorsuch insists that the First Amendment extends to "all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists, and website designers)."[245] The dissent (as discussed below) argued that because *Barnette, Hurley*, and *Dale* involved school children or nonprofit organizations, it was "dispiriting" to apply them to commercial activity. Justice Gorsuch retorted, "If anything is truly dispiriting here, it is the dissent's failure to take seriously this Court's enduring commitment to protecting the speech rights of all comers, no matter how controversial—or even repugnant—many may find the message at hand."[246] Here, Gorsuch shifted the relevant frame from (1) the aim of public accommodations law to secure "the rights of all comers"—potential customers protected by the law—against discrimination when they seek goods and services to (2) the imperative to protect the "speech rights" of business owners. Gorsuch did this by characterizing Smith's refusal of service to certain customers and publicizing of the reason for that refusal as protected, if "repugnant," "speech."

c. The Court as Protector Against Compelled Speech (or Silence)

In closing dramatically, Justice Gorsuch treats the Court's protection of Smith against compelled speech—and orthodoxy—as the latest in a series of courageous First Amendment decisions. As stated above, he writes, "Eighty years ago in *Barnette,* this Court affirmed that 'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,'" even though "the speech rights it defended were deeply unpopular; at the time, the world was at war and many thought respect for the flag and the pledge 'essential for the welfare of the state.'"[247] The Court, fifty years ago, "protected the right of Nazis to march through a town home to many Holocaust survivors and along the way espouse ideas antithetical to those for which this Nation stands."[248] He continues the chronology with *Masterpiece Cakeshop*, "five years ago," in which Justice Kennedy, invoking *Barnette*'s "fixed star" passage, stated that "it is not . . . the role of the State or its officials to prescribe what shall be offensive."[249]

244. *Id.* (citing *Barnette*, 319 U.S. at 634).

245. *Id.* at 600.

246. *Id.* at 600-01.

247. *Id.* at 601-02.

248. *Id.* at 602.

249. *Id.* (quoting *Masterpiece Cakeshop*, 584 U.S at 638). Kennedy quotes from *Matal*, 582 U.S. at 243-44 (2017) (Alito, J., concurring). Gorsuch also cites Counterman v. Colorado, 600 U.S. 66, 68, 73-74 (2023), in which the Court recognized limits on how states may prosecute stalkers "despite the 'harmful,' 'low value,' and 'upsetting' nature of their speech." *303 Creative*, 600 U.S.

Justice Gorsuch charges the *303 Creative* dissenting justices with abandoning the Court's recognition in all these cases that "[a] commitment to speech for only *some* messages and *some* persons is no commitment at all."[250] Contending that the dissent is "emblematic of an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic," he favorably quotes the dissent of Chief Judge Tymkovich (quoting Orwell): "If liberty means anything at all, it means the right to tell people what they do not want to hear."[251] Just as Chief Judge Tymkovich recast Lorie Smith's planned denial of service as protected expression that must be tolerated (rather than discriminatory conduct), Justice Gorsuch emphasizes too that to enforce CADA against Smith is a form of speech-based discrimination. As some commentators observe, by treating CADA "as a coercion of thought and expression that is intrinsically wrongful," the Court brings about "an extraordinary refashioning of public accommodation law."[252]

In his final paragraph, Justice Gorsuch continues the comparison of past to present, mentioning *Barnette, Hurley,* and *Dale* as instances in which states have "tested the First Amendment's boundaries by seeking to compel speech they thought vital at the time."[253] Similarly, Colorado "seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance."[254] In this battle, framed as pitting government against individual speech and conscience, the individual must win. Just as the opinion began with why the founders valued free speech, it concludes with an appeal to the "cherished liberty" of "the opportunity to think for ourselves and to express those thoughts freely" as "part of what keeps our Republic strong."[255]

Because of this constitutional commitment to freedom of speech, "all of us will encounter ideas we consider 'unattractive,' . . . 'misguided, or even hurtful.'"[256] Gorsuch concludes:

> But tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all people are free to think and speak as they wish, not as the government demands.[257]

Throughout, Gorsuch characterizes Colorado as seeking to compel speech in order to "excis[e] certain ideas or viewpoints from the public dialogue,"[258] again

at 602. Gorsuch also cites to Sotomayor's opinion partially concurring and concurring in the judgment in *Counterman*. *Id*.

250. *303 Creative*, 600 U.S. at 602.
251. *Id.*
252. Aviel et al., *supra* note 20, at 30.
253. *303 Creative*, 600 U.S. at 603.
254. *Id.* at 602-03.
255. *Id.* at 603.
256. *Id.*
257. *Id.*
258. *Id.* at 588.

suggesting that commercial website design is a form of public discourse. Quoting cautionary hypotheticals used in Chief Judge Tymkovich's dissent, Gorsuch contends that Justice Sotomayor's dissent "refuses to acknowledge where its reasoning leads": unless the Court limits CADA, "countless other creative professionals" will be forced to choose between "remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so."[259]

d. The Protection of Freedom of Speech to the Exclusion of Antidiscrimination Law

Justice Gorsuch frames the conflict between freedom of speech and antidiscrimination law in hierarchical terms: if public accommodations laws conflict with the First Amendment by stifling the "marketplace of ideas," the Constitution must prevail. Justice Sotomayor's dissent frames the issue very differently: the Court has recognized the constitutionality of antidiscrimination law and defended it against constitutional challenges brought by business owners—persons active in the marketplace—until *303 Creative*. Because Gorsuch's primary framing is the Court's proud history of protecting the First Amendment to thwart governmental compulsion of speech, he gives comparatively little attention to the proud history of protecting antidiscrimination laws against First Amendment challenges. He includes a scant three paragraphs acknowledging "the vital role public accommodations laws play in realizing the civil rights of all Americans"—quoting *Masterpiece Cakeshop*'s recognition that such laws further compelling governmental interests—before asserting, "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail."[260]

Notably, unlike Justice Sotomayor, Justice Gorsuch does not include Justice Kennedy's statement in *Masterpiece Cakeshop* that, although religious and philosophical objections to marriage equality are protected views, there is a general obligation to comply with antidiscrimination laws.[261] While Sotomayor stresses that *Hurley* and *Dale* involved "peculiar" applications of public accommodations laws—because of the type of entity they reached (a parade and a Boy Scout troop), Gorsuch contends that they show that public

259. *Id.* at 590, 601. His hypotheticals involve an "unwilling" Muslim movie director compelled to make a film "with a Zionist message," an "atheist muralist" having to "accept a commission celebrating Evangelical zeal" or "a gay website designer" required to "create websites" for an organization "advocating against same-sex marriage." *Id.* at 601 (citing 6 F.4th at 1199 (Tymkovich, C.J., dissenting)).

260. *Id.* at 590-92.

261. *Masterpiece Cakeshop*, 584 U.S. at 631.

accommodations laws "can sweep too broadly when deployed to compel speech"[262] in attempting to "coopt an individual's voice for its own purposes."[263]

e. The Scope of the Ruling?

Justice Gorsuch does not give a clear statement of the scope of the Court's ruling with respect to First Amendment protection of creative professionals other than Smith. As discussed above, he waves aside the dissent's "sea of hypotheticals."[264] He grants that, "[d]oubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions," but maintains that there was no such complication in the present case because the parties had stipulated that Smith sought to engage in expressive activity and the Tenth Circuit concluded that her websites were "pure speech."[265]

Notably absent from Justice Gorsuch's opinion are any disclaimers stating that the Court's ruling would not apply to beliefs about interracial marriage, the inferiority of women, or—to take another of Justice Sotomayor's hypotheticals—a belief that persons with disabilities should not have children.[266] Also notable is that, aside from the opinion's acknowledgment that Smith's views are rooted in her sincere religious beliefs, it contains little discussion of religious liberty.[267] This may be strategic, since the Court accepted review of Smiths' free speech argument, not her free exercise one. However, by not distinguishing objections to civil marriage equality for same-sex couples from other "ideas" about marriage or matters of political or moral significance, Gorsuch seems to leave the door open for broad-based exemption of any business owners whose work includes a creative or expressive element and who claim that serving a particular customer would require expression of ideas—including racial equality—with which they do not agree.[268] The Court indeed states that the First Amendment requires us to tolerate unattractive, misguided, and hurtful ideas. As observed above, when denial of services is recast as

262. *303 Creative*, 600 U.S. at 592.

263. *Id.*

264. *Id*. at 599.

265. *Id.*

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

267. *Id*. at 603.

268. For commentary offering this interpretation, see Kenji Yoshino, *The Supreme Court, 2022 Term—Comment: Rights of First Refusal*, 137 HARV. L. REV. 244, 262 (2023). By comparison, Carlos Ball argues that, by emphasizing Lorie Smith's sincere and reasonable religious beliefs, the Court implicitly contrasts her from business owners who seek exemptions grounded in "bigoted and prejudiced views," as in the Court's earlier racial discrimination cases cited in Justice Sotomayor's dissent. Carlos Ball, *First Amendment Exemptions for Some*, 137 HARV. L. REV. F. 46, 46-47 (2023).

expression of ideas, the commercial marketplace becomes the marketplace of ideas.

2. The Dissent

While Justice Gorsuch's majority opinion begins with a long history of the protection of free speech and the reasons for that protection, Justice Sotomayor's dissent begins with the long history of public accommodations laws and the reasons for such laws. In fact, Sotomayor opens with *Masterpiece Cakeshop*'s recognition, "five years ago," of the "'general rule' that religious and philosophical objections to gay marriage 'do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.'"[269] She offers several powerful stories of denials of service—spanning several decades—to illustrate how public accommodations laws ensure "*equal dignity* in the common market."[270]

Justice Sotomayor stresses the Court's courage in its "unwavering" rejection of First Amendment and other constitutional challenges by businesses to public accommodations laws protecting against discrimination on the basis of race and sex.[271] She even notes the unsuccessful invocation of *Barnette* in the brief filed by Ollie's Barbeque in *Katzenbach v. McClung*.[272] Sotomayor writes: "Time and again, business and other commercial entities have claimed constitutional rights to discriminate. And time and again, this Court has courageously stood up to those claims—until today. Today, the Court shrinks."[273]

Justice Sotomayor distinguishes *Barnette* and its progeny as inapplicable to whether Smith may offer her wedding websites only to different-sex customers. While Justice Gorsuch states that public accommodations laws must yield to the Constitution, Sotomayor states that constitutional values are antithetical to discrimination in public accommodations. "The refusal to deal with or serve a class of people is not an expressive interest protected by the First Amendment."[274] She quotes cases involving private schools unsuccessfully

269. *Id.* 603.

270. *Id.* at 607. As historical examples, the dissent mentions Ruth Bader Ginsburg's experience, as a young girl, of seeing a sign, "No dogs or Jews allowed," and Jackie Robinson not being able to stay in the same hotel as his white teammates. As a recent example, Sotomayor mentions a family not being to obtain funeral home services in rural Mississippi for an elderly man once the home learns his surviving spouse is a man. *Id.* at 607-08. Kenji Yoshino argues that the "deep informality" of Justice Sotomayor's introducing to readers the stories about LGBTQ+ persons denied goods and services or subjected to violence (Matthew Shepard)—using their first names—makes a "direct, plain-throated address to the reader." Yoshino, *supra* note 268, at 287.

271. *303 Creative*, 600 U.S. at 619 (Sotomayor, J., dissenting).

272. *Id.* at 620.

273. *Id.* at 623.

274. *Id.* at 619.

seeking to keep out Black students: "invidious discrimination 'has never been accorded affirmative constitutional protections.'"[275] Her narrative marshals the Court's many precedents upholding public accommodations laws as constitutionally prohibiting "'*acts* of invidious discrimination, in the distribution of *publicly available* goods, services, and other advantages.'"[276] She quotes Justice O'Connor in *Roberts v. Jaycees*: "A shopkeeper . . . has no constitutional right to deal only with persons of one sex."[277]

Justice Sotomayor also situates the present conflict in the context of prior battles over public accommodations laws: while "[b]acklashes to race and sex equality gave rise to legal claims of rights to discriminate, including claims based on First Amendment freedoms of expression and association," the Supreme Court "was unwavering in its rejection of those claims."[278] Whereas Justice Gorsuch situates Smith as one in an historical series of individuals threatened by governmental compulsion, Sotomayor's narrative stresses the human costs of the Court "for the first time in its history" granting a "new license to discriminate" to businesses open to the public—a right to refuse to serve members of a protected class.[279] She portrays the Court's decision as a step "backward" at a time when some states have passed "a slew of anti-LGBT laws."[280] "In this pivotal moment, the Court had an opportunity to reaffirm its commitment to equality on behalf of all members of society, including LGBT people."[281] But it did not do so. Instead, "[t]he decision threatens to balkanize the market and to allow the exclusion of other groups from many services:"[282]

> A website designer could equally refuse to create a wedding website for an interracial couple, for example. How quickly we forget that opposition to interracial marriage was often because "'Almighty God . . . did not intend for the races to mix.'" [*Loving v. Virginia*.] Yet the reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for "traditional" families. And so on.[283]

Justice Gorsuch dismisses these and other examples of the possible effects of the majority opinion as "[p]ure fiction all."[284] However, it is not at all clear why they are fiction. He makes no effort to distinguish many of the cases cited

275. *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).
276. *Id.* at 631 (quoting *Jaycees*, 468 U.S. at 628-29).
277. *Id*. at 622 (quoting *Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring)).
278. *Id.* at 619.
279. *Id.* at 636-37.
280. *Id*. at 638.
281. *Id.*
282. *Id.*
283. *Id.*at 638-639.
284. *Id.* at 598 (majority opinion).

by Justice Sotomayor in which there was undoubtedly an expressive element in an organization's or business's activities and yet the Court upheld a state public accommodations law or a federal one. How the creative expression holding of *303 Creative* will apply in the marketplace of goods and services, conceived as an "uninhibited marketplace of ideas," remains to be seen.[285]

To return to this article's earlier caveats about the extension of *Barnette's* protection of schoolchildren to business owners operating in the commercial marketplace, Justice Gorsuch's rights analysis gives scant attention to the rights that public accommodations laws establish and the purposes for those protections. Second, by contrast to Justice Sotomayor's dissent, he fails to reckon with the harms that public accommodations laws aim to prevent for persons seeking goods and services in that marketplace or to the harms that the Court's broad First Amendment ruling likely will have.[286] Indeed, some commentators argue that *303 Creative* seems to have bypassed a strict scrutiny analysis for "categorical invalidity" of compelled speech, which "pushes third-party harms even further out of the frame."[287] Third, while the Court did not limit its ruling to religious dissenters or minorities, the central role that the protection that *Barnette* and its progeny afford to those with "unpopular" or disfavored views plays in its analysis continues the Court's use of the "oppressed speaker paradigm," in which the First Amendment must ward off majoritarian governmental regulation.[288] At the same time, because the Court offered no clear limits to its ruling, *303 Creative* may have broad application to a wide range of governmental regulations trying to advance public welfare and the common good as well as to secure liberty and equality but that may be characterized as "impermissible speech compulsion."[289]

VI. CONCLUSION: THE FUTURE AND PRESCRIBED ORTHODOXY CLAIMS

On December 11, 2023, the Supreme Court denied a petition for certiorari in *Tingley v. Ferguson*, in which the Ninth Circuit rejected a challenge by Brian Tingley, a licensed therapist, to a 2018 Washington law making "[p]erforming conversion therapy on a patient under the age of eighteen a 'form of unprofessional conduct subject to discipline.'"[290] Justice Thomas dissented from the denial, concluding his five-page dissent with a quotation of *Barnette*'s "fixed star" passage. He continued:

285. *Id.* at 585 (quoting *McCullen*, 573 U.S. at 476).

286. Ball, *supra* note 268, at 61.

287. Aviel et al., *supra* note 20, at 46-49.

288. *Id.*

289. *Id.* at 20. The authors quip: "We are all Jehovah's Witnesses now."

290. Tingley v. Ferguson, 47 F.4th 1055 (9th Cir. 2022), *reh'g denied*, 57 F.4th 1072, 1074 (9th Cir. 2023), *cert denied*, 601 U.S. (Dec. 11, 2023).

> Yet, under SB 5722 [Washington's law], licensed counselors cannot voice anything other than the state-approved opinion on minors with gender dysphoria without facing punishment. The Ninth Circuit set a troubling precedent by condoning this regime. Although the Court declines to take this particular case, I have no doubt that the issue it presents will come before the Court again. When it does, the Court should do what it should have done here: grant certiorari to consider what the First Amendment requires.[291]

"What the First Amendment requires." In *303 Creative*, the conservative majority and the three justices in dissent differed sharply in their answer to that question in assessing First Amendment objections to public accommodations laws. *Tingley* presents a different context, a state law intended to protect the health and well-being of minors. Yet Justice Thomas viewed it through the frame of an overweening state silencing "one side" of a "fierce public debate over how best to help minors with gender dysphoria" and compelling counselors to convey an orthodoxy, a "state-approved message of encouraging minors to explore their gender identities."[292] Justice Thomas positioned the state of Washington, with its "view" that minors should be protected from "'exposure to serious harms'" caused by counseling to "change a minor's gender identity," as standing on "the other side of the divide" from Tingley, who "believes that a person's sex is a 'gift from God, integral to our very being,'" and employs "talk therapy" to help minors with gender dysphoria who "'want to become comfortable with their biological sex.'"[293] Thomas argued that Washington's law was "presumptively unconstitutional" because it was "viewpoint-based" and "content-based," and should be subject to strict scrutiny review.[294]

Tingley and several amici urging the Court to grant certiorari likewise quoted *Barnette*'s "fixed star" language; they also argued that Washington was imposing a "gender ideology" or governmental "orthodoxy" about gender. For example, the brief filed by Idaho and eleven other states opens with *Barnette's* fixed star passage and later asserts, quoting *Barnette*: "Laws like Washington's that "invade[] the sphere of intellect and spirit" are anathema to the First Amendment."[295] Some amici quoted *Barnette*'s dramatic warning that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters" to claim that this was the "precise goal" of Washington's law in threatening the "license and livelihood" of a therapist who conveys a "viewpoint

291. Tingley v. Ferguson, 601 U.S. ___, 35 (2023), slip op. at 5 (Thomas, J., dissenting). Justice Kavanaugh would have granted the petition, but did not write a dissent. Justice Alito wrote a brief dissent from the denial of certiorari, indicating that the Ninth Circuit's holding rested on a prior Ninth Circuit case disapproved by the Supreme Court in NIFLA v. Becerra, 585 U.S. 755 (2018).

292. *Tingley,* 601 U.S. at 34, slip op. at 1, 4 (Thomas, J., dissenting).

293. *Id.* at 1.

294. *Id.* at 4.

295. Brief of Idaho and 11 Other States as Amici Curiae in Support of Petitioner, 2023 WL 3235258, at *5.

contrary to the State."[296] Notably, although amici did not expressly cite *303 Creative*, some echoed Justice Gorsuch's marketplace rhetoric from that decision. Idaho's brief argued that, through the First Amendment, "the people" have refused to give government "the power of censorship," and have instead created a "market for ideas" where "each man sifts, judges, and decides for himself what is true."[297] Another amici argued: "No matter how politically popular it is to promote LGBT ideology, the government must nevertheless 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'"[298]

This "uninhibited marketplace" rhetoric in which truth will prevail seems especially troubling given that Washington legislators "relied on the fact that '[e]very major medical and mental health organization' has uniformly rejected aversive and non-aversive conversion therapy as unsafe and inefficacious," in addition to hearing "qualitative evidence of harm from Washington residents who were exposed to non-aversive conversion 'talk' therapy and urged them to enact legislation prohibiting the practice."[299]

"What the First Amendment requires" also led a conservative majority, pre-*303 Creative*, to hold unconstitutional California's efforts to require crisis pregnancy centers to post truthful information about the scope of their services and the availability of reproductive health care, including abortion, elsewhere. That case, *National Institute of Family and Life Advocates (NIFLA) v. Becerra*,[300] authored by Justice Thomas, has become a vital building block for arguments that state legislation—like Washington's conversion therapy ban—is (in Thomas's words) a content-based regulation that "'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'"[301] Justice Gorsuch cited *NIFLA* in *303 Creative*, along with *Barnette*'s progeny, *Wooley*, for the proposition that: "Generally, too, the government may not compel a person to speak its own preferred messages."[302] Like Gorsuch in *303 Creative*, Thomas cites to *McCullen v. Coakley*, cautioning that "when the government polices the content of professional speech," it can fail to "'preserve an uninhibited marketplace of

296. Brief of the Liberty Justice Center as Amicus Curiae in Support of Petitioner, 2023 WL 3147810, at *5 (quoting *Barnette*, 319 U.S. at 641).

297. Brief of Idaho and 11 Other States, *supra* note 295, at 6 (citing Leathers v. Medlock, 499 U.S. 439, 448-49 (1991)).

298. Brief of Amici Curiae Institute for Faith and Family and Advocates for Faith & Freedom in Support of Petitioner, Tingley v. Ferguson, at 4 (citing McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

299. *Tingley*, 47 F.4th at 1078.

300. 585 U.S. 755 (2018).

301. *Id.* at 771 (citation omitted).

302. *303 Creative*, 600 U.S. at 586.

ideas in which truth will ultimately prevail.'"[303] Governmental efforts to exercise the police power to promote the health, safety, and welfare of the people fare poorly when recast as a governmental "orthodoxy" that stifles this "uninhibited marketplace."

Barnette is by no means the only precedent that features in these framings of state laws as impermissible impositions of an orthodoxy. But a common thread is an appeal to the threat of authoritarian or totalitarian government, with alarming historical examples deployed to indict present-day legislative efforts that suppress "unpopular ideas or information" or hinder the "marketplace of ideas." For example, in *NIFLA*, Thomas offers examples "throughout history" of how governments have "'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities."[304] These include the Cultural Revolution in China, Nazi Germany's Third Reich, the Soviet government, and Nicolae Ceausescu's strategies to "increase the Romanian birth rate."[305]

In his concurring opinion in *NIFLA*, Justice Kennedy enlists one of *Barnette*'s progeny, *Wooley*, in chiding the California legislature for characterizing the law under challenge as "part of California's legacy of 'forward thinking.'"[306] Quoting *Wooley*, he retorts: "But it is not forward thinking to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'"[307] Kennedy offers a different model of "forward thinking":

> to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. 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.[308]

This dramatic prose about "relentless authoritarian regimes" stifling speech seems mismatched with a law that, among other things, sought to inform pregnant persons that the facility they were visiting was not a licensed facility.

As Carlos Ball observes in this symposium, "we do not know, of course, how Justice Kennedy would have voted in *303 Creative* had he still been on the Court when it was decided."[309] However, despite Kennedy's attempt in *Masterpiece Cakeshop* to find a way forward in First Amendment challenges to

303. *NIFLA*, 585 U.S. at 772.
304. *Id.* at 771.
305. *Id.* at 771-72.
306. *Id.* at 780 (Kennedy, J., concurring).
307. *Id.* (citing *Wooley*, 430 U.S. at 715).
308. *Id.*
309. Ball, *supra* note 15, at 54.

antidiscrimination laws—both "without undue disrespect to sincere religious beliefs" and "without subjecting gay persons to indignities when they seek goods and services in an open market"[310]—his rhetoric in *NIFLA*—about the state impermissibly compelling individuals to "contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these"[311]—might have signaled a readiness to accept compelled speech claims like Lorie Smith's as prevailing over Colorado's interests in enforcing its law.

Whatever Justice Kennedy might have done, the current landscape presents a growing number of contexts in which governmental efforts to promote full and equal citizenship as well as to advance the common good encounter objections of unconstitutional imposition of a governmental orthodoxy. These objections, and the dramatic historical cautionary tales on which they rely, warrant very careful evaluation lest they unduly thwart the very possibility of an active government seeking to carry out its functions. A pressing future task in evaluating appeals to *Barnette* and claims of impermissible governmental orthodoxy should be considering the role of the "politics of constitutional memory" in such appeals to constitutional history.[312]

Of course, claims of a governmental orthodoxy are not always sounded in conservative objections to liberal or progressive governmental efforts. Liberals and progressives also can make warnings about an authoritarian state imposing an orthodoxy when challenging conservative measures seeking to hinder efforts to promote equality and remedy forms of structural injustice. Liberals and progressives likewise can invoke George Orwell for those purposes. For example, in *Pernell v. Florida Board of Governors of the State University System*, a federal district court issued an injunction against Florida's Individual Freedom Act (the so-called Stop W.O.K.E. Act)—modeled on President Trump's executive order banning "divisive concepts" about racism, sexism, and the like in governmental trainings—in response to a First Amendment challenge brought by students and professors.[313] Judge Mark E. Walker began his opinion by quoting from Orwell's *1984.* In describing the "positively dystopian" world the Florida law created for professors—in which they "enjoy 'academic freedom' so long as they express only those viewpoints of which the State approves"—he quoted the very passage that Justice Gorsuch would invoke subsequently in *303 Creative*, "It should go without saying that '[i]f liberty means anything at all, it means the right to tell people what they do not want to

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

311. *NIFLA*, 585 U.S. at 779.

312. Reva Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022).

313. 641 F. Supp. 3d 1218, 1230 (N.D. Fla. 2022). On March 16, 2023, the Eleventh Circuit denied the appellants' motion to stay the injunction pending appeal. Motion for Stay of Injunction Denied, Parnell v. Lamb, No. 22-13992 (11th Cir. March 16, 2023), EFC No. 42.

hear.'"[314] The judge criticized the state defendants' praise for the "marketplace of ideas" in a parallel case, pointing out the state's "doublespeak" when faculty had only "freedom" to express state-approved viewpoints.[315] He observed that the college students and university professors challenging the Florida law were appealing to the Supreme Court's "long history of shielding academic freedom from government encroachment and the First Amendment's intolerance toward government attempts to 'cast a pall of orthodoxy over the classroom.'"[316]

In its use of *Barnette*, the *303 Creative* majority "yielded once again to the temptation to address difficult First Amendment problems with simple rules,"[317] with insufficient attention to context and to the complexity of the constitutional and political values at stake.

314. *Pernell*, 641 F. Supp. 3d at 1230. On the right-wing appropriation of Orwell in recent culture-war controversies, *see* Sandra Newman, *Now Right-Wing, Anti-"Woke" Doublethink Has Come for George Orwell*, WASH. POST (Dec. 12, 2023), https://www.washingtonpost.com/opinions/2023/12/12/orwellian-criticism-right-wing/ [https://perma.cc/TLT2-4CUA].

315. 641 F. Supp. 3d at 1230 n.4.

316. *Id.* at 1233 (citing Keyishian v. Bd. of Regents of Univ. of State of New York, 385 U.S.589, 683 (1967)).

317. Post, *supra* note 53, at 1.