DISCRIMINATION DENIALS: ARE SAME-SEX WEDDING SERVICE REFUSALS DISCRIMINATORY?

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Are refusals to provide services for same-sex weddings anti-gay discrimination? The answer, the Supreme Court seems to say, is "no." Last Term in 303 Creative LLC v. Elenis*, the Court held that the Constitution's Free Speech Clause granted a web designer the right to refuse same-sex wedding services. In so doing, the Court also appeared to opine that the refusal involved no anti-gay discrimination.*

Scholarship has yet to explore the stakes of these denials regarding the existence of discrimination. The claim—if accepted—makes it harder for states to argue that compelling equality interests justify infringing on refusers' putative speech rights. Further, if state courts agree that anti-marriage discrimination is not anti-gay discrimination, then public accommodations will be free to deny a whole swath of marriage-related services to gay people. Beyond its doctrinal implications, any claim that no discrimination has occurred harms LGBTQ+ groups by diminishing and dismissing the burdens gay people face.

This Article examines the validity of these discrimination denials. Historically, they turned on the distinction between "conduct" and "status." That is, litigants claimed that discrimination against gay conduct (like same-sex marriage) was not discrimination against gay people. As that distinction has proved unviable, the Court has moved away from the status–conduct binary toward a new distinction between access and content. Thus, as long as there is access to a resource, there is no discrimination—after all, a store cannot be forced to stock content that appeals to all groups. The Article explains why this new justification for discrimination denials also fails.

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INTRODUCTION

The clash between free speech and minority interests, specifically those of gay people,[1] has reached fever pitch. For decades, the Court has

1. The cases this Article examines primarily involve refusals directed at gay people, and thus, usually refers to the affected group as such. That is not to say that other members of the LGBTQ+ community will not be affected, or indeed, other minorities. For example, President Donald Trump's Administration justified its ban on certain transgender individuals serving in the military by arguing that its policy "draws lines on the basis of a medical condition (gender dysphoria) and its treatment (gender transition) . . . and not transgender status." Appellants' Opening Brief at 23, Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019) (No. 18-35347), 2018 WL 2981765. The Ninth Circuit held that there was discrimination against transgender people and so did "not address whether it constitutes discrimination against transgender persons on the . . . ground that gender dysphoria and transition are closely correlated with being transgender." *Karnoski*, 926 F.3d at 1201 n.18 (citing Supreme Court precedent, discussed infra, that rejected the status–conduct distinction). See generally Kenji Yoshino, Covering, 111 Yale L.J. 769 (2002) [hereinafter Yoshino, Covering] (discussing cases involving race and sex in which courts accepted

played referee in this fight. In 1995, the Court unanimously held in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (GLIB) that the Free Speech Clause granted the Boston St. Patrick's Day Parade organizers the right to exclude a gay and lesbian group in violation of state antidiscrimination law.[2] In 2000, in *Boy Scouts of America v. Dale*, a bare majority of the Court similarly held that the Boy Scouts could expel an openly gay scoutmaster.[3] In the 2010 case of *Christian Legal Society v. Martinez*, another bare majority of the Court pulled back, holding on narrow grounds that California could prohibit a Christian law student group at a public school from excluding gay and lesbian students.[4]

The last few years have seen an intensification of this battle. In 2017, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* a Colorado baker refused to bake a cake for a same-sex wedding.[5] Members of the Court sparred with each other in anticipation of a subsequent showdown; the case was ultimately resolved on narrow grounds but produced three concurrences and a dissent.[6] The showdown arrived last Term in *303 Creative LLC v. Elenis*, another Colorado case.[7] There, a majority of the Court held that graphic designer Lori Smith could refuse to build websites for same-sex weddings.[8]

The reasoning in these cases generally proceeds in two steps. When approving service refusals, the Court first identifies and magnifies the refuser's expressive interest.[9] It then goes on to diminish the interests of the gay people experiencing the refusal, holding that gay people do not experience discrimination.[10] This reasoning packs a one-two punch—the refusers have a speech interest in their message, and the gay person lacks a countervailing equality interest as (according to the Court's majority in these cases) no discrimination has occurred.

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arguments that the discrimination at issue targeted certain characteristics of individuals, rather than a protected status).

2. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 581 (1995).

3. Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

4. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 672, 698 (2010).

5. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

6. Id. at 1732 (grounding the Court's analysis in the facts of the adjudication at issue and noting that "[t]he outcome of cases like this in other circumstances must await further elaboration in the courts"); see also Leslie Kendrick & Micah Schwartzman, The Etiquette of Animus, 132 Harv. L. Rev. 133, 134 (2018) ("But in *Masterpiece*, the Supreme Court avoided the main conflict between LGBT equality and religious liberty.").

7. 143 S. Ct. 2298 (2023).

8. Id. at 2312–13.

9. See infra notes 14–20 (discussing the Court's excavation of the speech rights in this line of cases); infra section III.B (discussing in detail how the Court minimizes the interests of the same-sex couples by claiming no discrimination has occurred).

10. See, e.g., *303 Creative*, 143 S. Ct. at 2316–18 (arguing that Ms. Smith is only refusing to create designs celebrating same-sex marriage message, not refusing to serve LGBTQ+ customers at all).

Take *303 Creative*, for example. There, the Court claimed, first, that Smith's service denial was expressive.[11] Second, it claimed there was no discrimination, a claim that this Article calls "discrimination denial." In other words, the Court suggested, gay people had no equality interest to weigh against Smith's speech interests. Smith's objection, the Court emphasized, is not to gay people, but (in this case) to same-sex *weddings*.[12] Thus, it noted, "the parties agree that Ms. Smith 'will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons so long as the custom graphics and websites' do not violate her beliefs."[13]

Both the Court and commentators dwell in greater detail on the refuser's speech right, interrogating whether the claimed interest constitutes speech,[14] the nature of the speech if any,[15] its importance, and whether the speech

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11. Id. at 2316 ("Ms. Smith does not seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple." (emphasis omitted)).

12. Id. at 2339 (Sotomayor, J., dissenting).

13. Id. at 2317 (quoting Petition for a Writ of Certiorari at app. 184a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), 2021 WL 4459045). One might deny that the Court claims there is discrimination. This Article discusses and rejects that possibility infra note 205.

14. In *303 Creative*, it was fairly apparent to the Court that speech was involved. "[T]he wedding websites Ms. Smith seeks to create qualify as 'pure speech' under this Court's precedents." Id. at 2312 (citing 303 Creative LLC v. Elenis, 6 F.4th 1160, 1176 (10th Cir. 2021)). In other cases, however, the Court has justified at greater length its finding that the conduct at issue involved protected expression. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., concurring in part and concurring in the judgment) ("The use of . . . artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage [that is, a wedding cake,] clearly communicates a message . . . ."); Boy Scouts of Am. v. Dale, 530 U.S. 640, 649–50 (2000) ("[T]he scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values . . . . [A]n association that seeks to transmit such a system of values engages in expressive activity."); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568 (1995) ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches."). For academic commentary, see Steven J. Heyman, A Struggle for Recognition: The Controversy Over Religious Liberty, Civil Rights, and Same-Sex Marriage, 14 First Amend. L. Rev. 1, 88 (2015) ("[A]n enterprise that offers to serve the public becomes part of the social realm of commerce. Such an enterprise properly can be regarded as a place of public accommodation with a duty to serve everyone."); Amy J. Sepinwall, Conscience in Commerce: Conceptualizing Discrimination in Public Accommodations, 53 Conn. L. Rev. 1, 53 (2021) ("[T]here is in fact no conflict between equality and refusing service to those who seek a vendor's products for hateful ends. Those ends are themselves equality-undermining, so, if anything, vendors vindicate equality when they refuse to contribute to them."); Elizabeth Sepper, Free Speech and the "Unique Evils" of Public Accommodations Discrimination, 2020 U. Chi. Legal F. 273, 275 ("Because of social expectations of service, a business communicates little, if anything, when it provides a good or service to any particular customer. The wedding vendor signals no approval of the person or the use of the goods by its service.").

15. The Court in *303 Creative* emphasized that speech remains protected even if "offer[ed] . . . for pay" through a corporation. 143 S. Ct. at 2316. Others appear to disagree that speech rights lose some vitality in public accommodations contexts. See, e.g., Sepper supra note 14, at 292. In *Hurley* and *Dale*, similarly, the Court engaged in significant analysis

is the client's or the vendor's.[16] Less frequently foregrounded in today's academic commentary is the second set of rights—the antidiscrimination interests of the gay people experiencing service refusals,[17] and, in particular, the Court's claim that these refusals do not constitute discrimination.[18]

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to explain how conduct and association implicate expressive principles. See Dale Carpenter, Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach, 85 Minn. L. Rev. 1515, 1519–20 (2001) (noting that reviewing the history of suppression of expressive associations is instructive for analyzing the *Dale* case); Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 811 (2001) (noting in critiquing *Dale* that expressive association "protects organizations like the NAACP from being banned or persecuted because state actors do not like their First Amendment activity . . . [and also] protects an individual from being punished or harassed for being a member of an organization like the NAACP"); see also Jonathan Turley, The Unfinished Masterpiece: Compulsion and the Evolving Jurisprudence Over Free Speech, 83 Md. L. Rev. 145, 148 (2023) (examining the issue within the compelled-speech framework).

16. See *303 Creative*, 143 S. Ct. at 2313 ("We further agree with the Tenth Circuit that the wedding websites Ms. Smith seeks to create involve *her* speech." (citing *303 Creative*, 6 F.4th at 1181 & n.5)); see also *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgment) ("Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward."). But see Elane Photography, LLC v. Willock, 309 P.3d 53, 68–70 (N.M. 2013) (noting that because the speech in question was offered for hire, it may not be attributable to the vendor); Craig Konnoth, How the Supreme Court's LGBT Cases Fractured the First Amendment, Bloomberg L. (July 6, 2023), https://news.bloomberglaw.com/ip-law/how-the-supreme-courts-lgbt-cases-fractured-the-first-amendment (on file with the *Columbia Law Review*) (arguing that anti-gay speech receives greater protection under the current Court's jurisprudence than pro-gay speech).

17. There was plenty of such commentary in the aftermath of *Hurley* and *Dale*. See infra section I.A. But more recent cases have not attracted similar analysis, perhaps because, first, the Court did not explicitly indicate the role its discrimination denial played in its analysis, which may make it easier to overlook the matter. See infra note 155 and accompanying text. Second, the Court also diminished the rights at stake. See infra section II.B.2. Scholars might follow the Court's lead in focusing on the expressive interests it indicates are important. Third, given that *Masterpiece Cakeshop* was not decided on free speech grounds, and no gay people were actually denied services in *303 Creative*, the harm might seem attenuated. See infra note 173 and accompanying text. Fourth, because of the structure of constitutional analysis, the same-sex partners in *Masterpiece Cakeshop* "present to the Court not as rights-bearers but merely as the beneficiaries of a state 'interest' in nondiscrimination against gay people"; it is the refusers who claim the right and who therefore might appear more important to constitutional scholars. Jamal Greene, Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 72 (2018). Finally, the expressive claims described in the preceding footnotes might appear more novel than discrimination denial, which may be a holdover from the *Hurley* and *Dale* era.

18. The commentary that does exist—a blog post, an online-only forum piece, and a case comment—thus offers no new analysis of the Court's denial of discrimination. In his blog post, Dale Carpenter examines First Amendment doctrine and tallies the products that gay people might lose access to (a limited list according to him) but does not consider whether this loss of access constitutes discrimination. See Dale Carpenter, How to Read *303 Creative v. Elenis*, Reason: Volokh Conspiracy (July 3, 2023), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/M2A8-RCNL] [hereinafter Carpenter, How to Read *303 Creative*]. David Cole's online essay similarly focuses on First Amendment doctrine and is content to "take the Court at its word,"

And yet, denying the existence of discrimination carries both doctrinal and political significance.[19] Doctrinally, the question of whether

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accepting its denial that discrimination occurs if a vendor refuses to make certain products as long as they do not exclude individuals based on their characteristics. David D. Cole, "We Do No Such Thing": *303 Creative v. Elenis* and the Future of First Amendment Challenges to Public Accommodations Laws, 133 Yale L.J. Forum 499, 501, 502–03 (2024), https://www.yalelawjournal.org/pdf/ColeYLJForumEssay_hgfr3cxy.pdf [https://perma.cc/3ZL7-X29A]. Cole only criticizes the Court on the facts—he argues that the *303 Creative* petitioner *did* seek to exclude people based on their characteristics. Id. (noting that the "business sought a court order allowing it to turn away all gay couples seeking a wedding website, regardless of content").

Professor Kenji Yoshino's case comment offers the only contemporary scholarship that critiques the Court's characterization of when discrimination occurs. But Yoshino refers to the old status–conduct distinction; much of the rest of his discussion focuses on the *weight* of the harms gay people will experience, both material and dignitary. See Kenji Yoshino, Rights of First Refusal, 137 Harv. L. Rev. 244, 277 (2023) [hereinafter Yoshino, Rights]. In any case, Yoshino's consideration of the harms to gay people does not occupy the majority of his comment: His focus is on the Court's overall reasoning and centers on the refusal right rather than the nondiscrimination interest. Nonetheless, his discussion of the claim is the most prominent in the legal literature thus far.

One last distinction bears noting: Both John Corvino and Mark Satta argued in the wake of *Masterpiece Cakeshop* that the Court cannot allow discrimination based on how a customer might *use* a product, but that a shopkeeper might refuse to make a certain kind of product or a product that takes a certain form. John Corvino, "The Kind of Cake, Not the Kind of Customer": *Masterpiece*, Sexual-Orientation Discrimination, and the Metaphysics of Cakes, Phil. Topics, Fall 2018, at 1, 6–7 (arguing for a distinction between design-based refusals and user-based refusals); Mark Satta, Why You Can't Sell Your Cake and Control It Too: Distinguishing Use From Design in *Masterpiece Cakeshop v. Colorado*, Harv. C.R.-C.L. L. Rev. Amicus Blog (July 10, 2019), https://journals.law.harvard.edu/crcl/why-you-cant-sell-your-cake-and-control-it-too-distinguishing-use-from-design-in-masterpiece-cakeshop-v-colorado/ [https://perma.cc/NJ4E-4C3P] ("While the bakers in the other . . . cases were seeking only to have a say over which items they make, the baker in *Masterpiece* was seeking to control how his customers use the products he makes, and by extension, which messages the *customers* go on to create . . . ."). On their account, two cakes that have the identical form but that are sold for use in a same- and different-sex wedding respectively, are the "same" cake. That is, the identity of the cake is determined by its form, not its function. It is unclear whether that is the case, however. Consider, for example, birth control pills. The identity of the item is less its form, and more what it does. Cf. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127–28 (9th Cir. 2009) (finding against pharmacists arguing that law compelling them to dispense birth control violated their free exercise rights). With a wedding cake, the use of the cake again defines the item—as the term *wedding* cake indicates. This Article does not seek to fully critique the distinction (for example, one could argue that in the case of a pill, "form" should be defined by chemical composition rather than use, such that an off-label use should not brook objection) but simply to acknowledge it as a contribution to the literature.

19. It bears noting that the Court has made similar moves in other cases. For example, in Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), the Court held that Title VII could prohibit certain kinds of sexually harassing speech "without so much as a word about free speech doctrine." Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark, 1994 Sup. Ct. Rev. 1, 20. In some ways, that Court took the inverse approach—focusing on antidiscrimination interests and ignoring speech interests. But unlike in that case, the Court explicitly denies the antidiscrimination interest at stake here.

there is discrimination can determine whether LGBTQ+ individuals' interests outweigh any expressive interests of refusers—if there is no discrimination, then gay people can hardly argue against the refusers' expressive rights.[20] The question can even delimit the reach of antidiscrimination statutes—if anti-*marriage* discrimination is not anti-*gay* discrimination, then no antidiscrimination statute has been violated.[21] And rhetorically, denying the existence of discrimination enables prioritizing refusers' interests while erasing those of gay people. Thus, exam-ining the Court's claim that no discrimination has occurred is the focus of this Article.[22]

While the Court does not always explicitly articulate its reasoning, two grounds best justify the discrimination denial: First, denying service based on the *conduct* of individuals does not constitute discrimination against their *status*. Scholars read the Court's cases from the late 1990s and early 2000s as relying on this status–conduct (also known as the act–identity) distinction.[23] In *Hurley*, *Dale*, and *Christian Legal Society*, refusers argued that gay people engaged in objectionable conduct. For example, the gay

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20. See infra section II.B.

21. See infra section II.A.

22. There are situations in which someone might, as the Court puts it, send a "message" without discriminating based on "status." See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2319 (2023). But those situations do not involve the actual denial of a service. For example, a seller might post a sign stating that they disapprove of marriage equality but *do* provide same-sex marriage-related services because the law demands it. A tougher case might involve a situation in which a shop posts a sign that says "gay people are unwelcome," but gay people also never seek a service from that store (and thus, never experience a denial). One might argue in these cases that while a message has been sent, no discrimination has actually occurred. But those situations are different. The cases at issue here *do* involve a denial of service. Indeed, the message is understood to inhere in the denial of service.

To be sure, sending a message of discrimination can still constitute discrimination. Language theory holds that statements have both a descriptive and performative aspect. Giving a promise, for example, does not simply describe an action; it constitutes the act of promising. See J.L. Austin, How to Do Things With Words 50–52 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) ("We must consider the total situation in which the utterance is issued . . . if we are to see the parallel between statements and performative utterances . . . . [T]he total speech act in the total speech situation is emerging from logic piecemeal . . . thus we are assimilating the supposed constative utterance to the performative."). A public accommodation is "open to the public." *303 Creative*, 143 S. Ct. at 2325, 2336–38 (Sotomayor, J., dissenting). Stating that it is closed to a certain segment of the public is a performative act that discriminates against that group of the public. This Article does not defend that view in detail.

23. See, e.g., Yoshino, Rights, supra note 18, at 251–52 (discussing the status–conduct distinction in the context of "Don't Ask, Don't Tell"). The original formulation by Michel Foucault refers to the identity–act distinction. See Michel Foucault, The History of Sexuality: An Introduction 43 (Robert Hurley trans., Pantheon Books 1978) (1976) ("Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.").

and lesbian group in *Hurley* sought to carry a banner,[24] and in *Christian Legal Society*, the excluded gay and lesbian students purportedly engaged in unsanctioned sexual activity.[25] But, the refusers argued, they objected to that *conduct*, not to gay *people* themselves. Gay people who did not engage in prohibited conduct would be permitted access.[26]

Some of today's litigants seek to revive such arguments. They have similarly argued that their objection is to providing services for same-sex *marriage*, not to gay *people*.[27] Yet, relying on now decades-old literature and jurisprudence, most of today's lower courts have roundly (and rightly) rejected the status–conduct binary.[28] Status does not exist in a vacuum but is constituted through conduct—including coming out, engaging in intimate conduct, marching in pride parades, and choosing whether to love and to whom to express that love.

Today's Court—primarily through Justice Neil Gorsuch, the author of *303 Creative*—also claims that service refusals are not discriminatory.[29] But rather than relying on the status–conduct distinction, his opinion inaugurates a new distinction between access and content. On this account, plaintiffs' stores offer a certain set of content—cakes or websites for different-sex weddings, or more generic items like cookies or brownies. They are willing to give gay people *access* to all this content. But they are not willing to alter the content they offer—they are not willing to make cakes for same-sex weddings, for example. And as long as the protected group is given access to any of the seller's content (whatever it is), there is no discrimination.

Although Justice Gorsuch presents his reasoning as original, similar distinctions have been made in other areas of antidiscrimination law. In disability discrimination law, defendants have invoked the access–content distinction in the courts of appeals.[30] To draw one example from these cases, a bookstore that does not carry books in Braille does not necessarily discriminate against blind people—that is, as long as blind people are allowed *access* to the books the store chooses to stock.[31] The fact that the

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24. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995); see also infra notes 71–75 and accompanying text.

25. See Christian Legal Soc'y v. Martinez, 561 U.S. 661, 702 (2010); see also infra notes 92–95 and accompanying text.

26. See infra notes 65–68 and accompanying text.

27. See infra notes 90–91, 117–118.

28. See infra notes 95–97and accompanying text.

29. See Yoshino, Rights, supra note 18, at 251 ("For the majority, this refusal is not status-based discrimination as Smith does not change the terms associated with the goods she offers based on the identity of the buyer.").

30. See infra section I.B.1.

31. Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 560 (7th Cir. 1999) ("The common sense of the [ADA] is that the content of the goods or services offered by a . . . public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons."). For

books the store stocks is of less use to members of a certain group is not relevant as long as that group is given equal access.

Both the status–conduct and access–content distinctions help justify the claim that the service denial is not discriminatory. They allow the Court to unlink the service denial from the protected *status* of the individual. Instead, these distinctions allow the Court to anchor the service denial to specific *conduct* (marriage) or to the nature of the product (services for different-sex couples). In this way, the Court can claim that the service denial does not discriminate against gay status.

Part I explores the status–conduct and access–content distinctions. Part II explores the implications of denying the existence of discrimination in general,[32] and of the access–content justification in particular. On one level, the Court does not simply hold that service refusers' First Amendment interests trump gay people's interests against discrimination. Rather, the Court feels the need to minimize gay people's interests to justify the service denial. Observers might take some comfort in the fact that the Court does not give the refusers an automatic win, with no regard to gay people's interests. But the story is more complex.

At the outset, the claim that the service denials are not discriminatory can present real doctrinal problems for litigants. First, if a service denial sometimes constitutes fully protected expression, a state must show at least that it advances a compelling interest in requiring services for same-sex weddings. In these cases, states argue that their application of the public accommodation laws serve the compelling interest of protecting gay people from discrimination.[33] Future courts may rely on the *303 Creative* Court's claim that under federal law, no discrimination against gay people has occurred, in which case the compelling interest disappears altogether.[34] Second, *303 Creative*'s definition of what counts as discrimination could affect how other courts interpret antidiscrimination statutes. Other courts could hold (and have held) that objections to same-sex marriage do not count as discrimination, limiting protections for gay rights.[35]

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commentary, see Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement 71 (2009) [hereinafter Bagenstos, Law and Contradictions].

32. That is, using both the identity–act and access–content justifications.

33. See State Public Accommodation Laws, Nat'l Conf. State Legislatures (June 25, 2021), https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws [https://perma.cc/2V8B-NHRY] (noting that only "[f]ive states—Alabama, Georgia, Mississippi, North Carolina and Texas—do not have a public accommodation law for nondisabled individuals").

34. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2316–18 (2023) (arguing that Ms. Smith only refuses to provide a wedding website to same-sex couples but does not necessarily refuse to serve same-sex couples entirely). Note that the denial of discrimination does not control the Court's analysis, so it is dicta. See id.

35. See, e.g., Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 896–97 (Ariz. 2019) ("The enduring strength of the First Amendment is that it allows people to speak their minds and express their beliefs without government interference. But here, the City

Beyond doctrine, the shift from the status–conduct binary to the access–content binary has stakes for both religious and LGBTQ+ identity. First, a close reading of Justice Gorsuch's *Masterpiece Cakeshop* concurrence suggests that the departure from the status–conduct distinction seeks to enable claims of religious discrimination.[36] If such cases become more prominent in the Court's docket, a sharp distinction between status and conduct could undermine arguments that the burdens on certain religious *conduct* constitute discrimination against religious *people*. Avoiding the status–conduct binary helps evade that problem.

Second, the access–content distinction shifts focus from the individuals involved to the services at issue, avoiding consideration of identity categories. This risks reifying a market-oriented view of the harm involved: The injury gay couples face is a supply-chain one—limited availability of certain goods—rather than a dignitary, identity-based one.[37]

At base, the claim that no discrimination has occurred denies the lived reality of gay people. Civil rights claims have historically depended on the building of consciousness among groups about the existence of oppression.[38] If the Court openly weighed the rights of First Amendment claimants against those of gay people and came out in favor of the former, it would be forced to reckon with the burdens that its ruling imposes on gay people. The Court's approach instead refuses to recognize gay individuals as having the agency, autonomy, and understanding to appreciate when they have experienced discrimination.[39] Thus it is essential to address the court's claim that discrimination has not occurred.

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effectively cuts off Plaintiffs' right to express their beliefs about same-sex marriage by telling them what they can and cannot say."); Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [47] ("The situation is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.").

36. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring); see also infra notes 139–142 and accompanying text.

37. But see Hila Keren, Beyond Discrimination: Market Humiliation and Private Law, 95 U. Colo. L. Rev. 87, 172 (2024) ("Market humiliation is a corrosive relational process . . . [in which] providers of market resources . . . use their powers to reject or mistreat other market users due to their identities. They humiliate users and harm their market citizenship by depriving them of dignified participation in the marketplace.").

38. See, e.g., Donald G. Nieman, From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction, 17 Cardozo L. Rev. 2115, 2117 (1995) ("Equally dramatic, and no less significant, was the change in consciousness that occurred among African-Americans, paralleling the constitutional revolution and helping to give it life."); Peter H. Schuck, Public Law Litigation and Social Reform, 102 Yale L.J. 1763, 1775 (1992) (reviewing Gerald P. Lopez, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992) and Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991))("*Brown*'s . . . contribution was to put civil rights on the liberal political agenda, force white politicians to respond, raise public consciousness of racial injustice, and inspire civil rights organizations and the black community to take to the streets . . . .").

39. This form of dignitary harm constitutes epistemic injury. See infra notes 209–215 and accompanying text.

Discrimination denial claims rely on status—conduct and access—conduct justifications. Decades-old literature already dismantles the status–conduct justification. The access–content justification, however, has not received similar critical treatment. Indeed, the disability literature which has historically reckoned with the access–content distinction appears to have given up grappling with the distinction on analytical terms.[40]

Part III offers two arguments to show that in cases like *303 Creative*, targeting content constitutes discrimination. First, certain items—yarmulkes, crosses, and other items—are identified strongly with specific groups of people: Jewish people, Christians, and so on. Targeting items infused with group identity can exhibit animus against those groups. Second, defining content in terms of a group as the Court appears to do (for example, distinguishing between same–sex and different–sex wedding cakes) to justify discrimination against that group is also illegitimate. In that way, this Article argues, the access–content distinction in these cases ultimately fails as an analytical matter.

Ultimately, the Court seeks to quarantine Smith's message from any claim of discrimination, making her putative expression a get-out-of-jail-free card. If there is no discrimination, there are no competing values that the Court must weigh—First Amendment values dictate the conclusion. But denials of service can have a serious and significant effect on gay people, limiting their access not only to wedding vendors but also to public accommodations that provide basic necessities like food and healthcare.[41] There should be no confusion: Same-sex wedding service refusals are

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40. That is, the literature argues that the statute and regulations are better read to prohibit the distinction; it does not suggest that the distinction does not make analytic sense on its own terms. See, e.g., Sharona Hoffman, AIDS Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes' Applicability to Health Insurance, 23 Cardozo L. Rev. 1332–33, nn.108–109 (2002) (citing cases in which circuit courts found that the ADA does not require protection against discriminatory content, only access to the content provided).

41. See Brief of Amici Curiae Colorado Organizations & Individuals in Support of Respondents at 3, 15, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5152969. Reciting those consequences here would be duplicative and unoriginal, so this Article does not do so, but they remain significant. There remains dispute as to how significant the burden on individuals will be. Carpenter argues that the Court's decision only applies to products that are customized and expressive, which is a rare combination; thus gay people will not be significantly affected. See Carpenter, How to Read *303 Creative*, supra note 18. But see Robert Post, What About the Free Speech Clause Issue in *Masterpiece*?, Take Care (June 13, 2018), https://takecareblog.com/blog/what-about-the-free-speech-clause-issue-in-masterpiece [https://perma.cc/2XZP-RYRX] (describing how, following *Masterpiece Cakeshop*, "every carpenter, dress-maker, chef, florist, jeweler, designer, decorator, tailor, chauffeur, architect, lawyer, physician, dentist, nurse, baker, or undertaker could claim that [their service] constituted their own personal expression, . . . [which] would cut the heart out of antidiscrimination laws"); Yoshino, Rights, supra note 18, at 277 ("While Carpenter is correct that only a fraction of the goods we buy are customized and expressive, the sheer number of commercial goods means that even that fraction will be a large number of cases." (footnote omitted)).

discriminatory. To be clear, *a finding of discrimination will not necessarily be enough to change outcomes*; the Court may still decide that First Amendment interests must prevail, and this Article does not purport to engage speech doctrine. But in weighing the interests involved, it is important to keep in mind gay people's injuries rather than writing them out of existence.

I. JUSTIFICATIONS FOR DISCRIMINATION DENIAL

In *303 Creative*, the Court's first claim—that Smith's speech is expressive—receives the bulk of its (and others') attention.[42] The Court's next claim—that Smith's service denial is not discriminatory—is also remarkable.[43] As justification, the Court's majority emphasizes the "distinction between status and message."[44] Smith does not seek to discriminate against gay *people*, but only against certain *messages*. Countering Colorado's claim that "Ms. Smith refuses" to offer her services "because she objects to the 'protected characteristics' of certain customers," the majority notes that Smith would "gladly" serve gay or lesbian customers.[45] The issue is the message: "Ms. Smith . . . will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments."[46] Quoting from the United Kingdom Supreme Court, the majority emphasizes "[t]he less favourable treatment was afforded to the message not to the man."[47] In other words, there is no discrimination based on status.

The Court does not articulate why a service denial here is not both expressive and discriminatory. The service denial does not cease to be conduct—possibly discriminatory conduct—merely because it might be expressive.[48] But under the Court's holdings, with a sufficiently weighty purpose, the state can sometimes prohibit such expressive conduct—

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42. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2311–12 (2023); see also Nicholas Almendares, Blunt Speech Rights, 32 Wm. & Mary Bill Rts. J. 919, 923 (2024) (discussing the limits of *303 Creative* as primarily that of requiring expression); Robert Post, Public Accommodations and the First Amendment: *303 Creative* and "Pure Speech", 2023 Sup. Ct. Rev. 251, 281–86 (same).

43. *303 Creative*, 143 S. Ct. at 2312–14.

44. Id. at 2317 n.3.

45. Id. at 2316–17.

46. Id. at 2317.

47. Id. at 2317 n.3 (citing Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [47]).

48. The test for expressive conduct asks, at least in part, whether there is "[a]n intent to convey a particularized message" and what the likelihood is "that the message would be understood by those who viewed it." See Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam). The test has received critique, but the Court has found marching, sitting in, nude dancing, playing music, wearing a black armband as a war protest, and burning, inverting, and saluting the United States flag to all be expressive. See, e.g., Richard P. Stillman, Comment, A Gricean Theory of Expressive Conduct, 90 U. Chi. L. Rev. 1239, 1240 (2023).

burning crosses to show racial animus, for example.[49] Thus, the service denial, and the message it expresses, may in fact be discriminatory and constitutionally proscribable.

The Court's "no-discrimination" claim is best read as relying on two possible justifications. An outpouring of scholarship explains the first justification. In early cases like *Hurley* and *Dale*, the Court claimed that refusers objected not to gay status but to the specific conduct of the gay people in those cases.[50] This Part first examines that scholarship.

As the "no-discrimination" claim reappears in the Court's most recent round of cases, the status–conduct explanation remains understood as the norm even today.[51] But scholars have not critically interrogated this claim as they did two decades ago.

This Article argues that today's Court has also turned to a new justification that focuses on the *product* the seller is offering, in which their putative message inheres. On the Court's account, as long as the seller offers everyone equal access to the product, it does not discriminate by not altering its content.[52] While this "access–content" distinction is familiar to scholars of disability discrimination, it has not been fully critiqued in the literature. Part III critiques the distinction, but for now, this Part simply situates that distinction in marriage service refusals.

A. *The Status–Conduct Justification*

To understand the novelty of the Court's access–content distinction, it is important to explore the earlier justifications ascribed to the Court's denials that discrimination has occurred. On these earlier accounts, the discrimination does not target *individuals* but rather their behavior. To understand how this so-called status–conduct distinction has become the standard justification for discrimination denial, this section explores the origins of the distinction in the 1970s and 1980s. When *Hurley* and *Dale*

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49. See, e.g., Virginia v. Black, 538 U.S. 343, 363 (2003) ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate . . . in light of cross burning's long and pernicious history as a signal of impending violence.").

50. See, e.g., Darren Lenard Hutchinson, Accommodating Outness: *Hurley*, Free Speech, and Gay and Lesbian Equality, 1 U. Pa. J. Const. L. 85, 87 n.13 (1998) ("[W]hile the criminalization of homosexual sodomy . . . may not violate notions of fundamental fairness, the oppression of . . . [LGBTQ+] persons by the state may violate notions of equality . . . . This reasoning, however, opens up a dangerous conduct–status distinction which ignores the role of sexual conduct in constructing sexual identity."); Andrew R. Varcoe, The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law, 9 Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues 163, 206 (1999) (situating the status–conduct distinction in the context of *Dale*).

51. Yoshino, Rights, supra note 18, at 252 ("[C]onduct (same-sex marriage) and the status (gay identity) . . . [are] linked.").

52. *303 Creative*, 143 S. Ct. at 2315 ("[T]his Court has also recognized that no public accommodations law is immune from the demands of the Constitution. In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech.").

were decided, scholars easily turned to the status–conduct critique to analyze these cases. Status–conduct thus became the standard justification for claims denying discrimination.

1. *Explaining the Status–Conduct Distinction.* — In the 1980s and early 1990s, the Court and Congress collapsed the distinction between status and conduct to justify denying rights to gay people. In 1986, the Supreme Court upheld Georgia's law that prohibited consensual sodomy in *Bowers v. Hardwick*, a case it overturned nearly two decades later in *Lawrence v. Texas*.[53] Georgia's law prohibited both same-sex and different-sex sodomy.[54] But the Court couched its holding in a way that linked the act of sodomy to homosexual identity. "The issue presented" intoned the Court, "is whether the Federal Constitution confers a fundamental right *upon homosexuals* to engage in *sodomy*."[55] Further in the opinion, the Court links sodomy with homosexual identity even more tightly—the case, it stated, was about the "fundamental right to engage in homosexual sodomy."[56] In this characterization, the conduct itself—sodomy—is inflected with gay identity.[57] The link between sodomy-as-act and homosexuality-as-identity is rendered complete later in the opinion where the Court admits that the question of whether sodomy is constitutionally protected turns on opinions regarding the "morality of homosexuality."[58]

Primed, in particular, by work published in the previous decade by prominent theorist Michel Foucault, the Court's opinion led to an outpouring of scholarship. In the 1970s, Foucault had argued that before the nineteenth century, the concept of a "homosexual," and of homosexual identity, did not exist—individuals engaged in certain sexual acts, which did not characterize the person, but which were "a temporary aberration."[59] Until that shift, individuals were not discriminated against as a "class"—there was no identifiable group that could be targeted.[60] By

53. Bowers v. Hardwick, 478 U.S. 186, 188–89 (1986), overruled by Lawrence v. Texas, 539 U.S. 558, 578 (2003).

54. Id. at 200–01 (Blackmun, J., dissenting).

55. Id. at 190 (majority opinion) (emphasis added).

56. Id. at 191.

57. Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After *Bowers v. Hardwick*, 79 Va. L. Rev. 1721, 1747 (1993) ("Sodomy can receive its definitive characteristic from the 'homosexuals' who do it, or can stand free of persons and be merely a 'bad act.' The majority Justices have enabled themselves to treat sodomy as a metonym for homosexual personhood—or not, as they wish.").

58. *Bowers*, 478 U.S. at 196.

59. See Foucault, supra note 23, at 46.

60. Id. ("Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny . . . ."). Foucault's historical account has been criticized. See, e.g., Carolyn J. Dean, The Productive Hypothesis: Foucault, Gender, and the History of Sexuality, 33 Hist. & Theory 271, 272 (1994) ("Foucault purports to be engaged in extending social justice through sociohistorical critique. Yet . . . he provides absolutely no grounds on which we might distinguish the powerful from the powerless, and he robs individual actors of agency and hence the power to create meaning." (citing Nancy Fraser, Unruly Practices: Power, Discourse and Gender in

the early twentieth century, however, homosexuality became an identity: The "homosexual" became "a species"—an identifiable group—subject to a broader set of controls.[61] Thus, argued Foucault, when it came to homosexuality, the rhetoric of acts had been displaced (but not necessarily eclipsed) by a rhetoric of identities.[62]

Hardwick and its aftermath appeared to confirm Foucault's claim that the abstraction of conduct into status enhanced discrimination and control. Although *Hardwick* was technically about whether certain *conduct*—consensual sodomy—was constitutionally protected, lower courts saw the case as a condemnation of homosexual *status*. Thus, lower courts declined to extend heightened equal protection scrutiny to homosexual identity on the grounds that sodomy is the behavior that "defines the class" seeking protection.[63] As Professor Janet Halley put it: "Sodomy in these formulations is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym."[64]

Even as the legal world came to grips with *Hardwick*, in 1993, Congress replaced the military's ban on homosexuals with a putative "Don't Ask, Don't Tell" Policy (DADT).[65] The policy purported to allow gay people to serve in the military as long as they were not *out*. But their outness—their *status* of being gay—was determined by their *conduct*. If the service member "engaged in . . . a homosexual act," they would be fired, unless, inter alia,

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Contemporary Social Theory 17–34 (1989))); George Huppert, Divinatio et Eruditio: Thoughts on Foucault, 13 Hist. & Theory 191, 191 (1974) ("Disregarding all his predecessors, Foucault wipes the slate clean: no one had ever understood anything about the origins of our culture. All the scholarship of the past century or two was wasted effort, for lack of the method which alone can supply the answers."); Allan Megill, The Reception of Foucault by Historians, 48 J. Hist. Ideas 117, 125 (1987) ("The reception of Foucault by historians also falls into three stages . . . of 'non-reception,' 'confrontation,' and 'assimilation' . . . .").

61. Foucault, supra note 23, at 43 ("The nineteenth-century homosexual became a personage . . . . The sodomite had been a temporary aberration; the homosexual was now a species.").

62. Halley, supra note 57, at 1739.

63. See Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (stating that the reasoning in *Hardwick* forecloses the argument that homosexuals should receive heightened scrutiny under the Equal Protection Clause because "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal").

64. Halley, supra note 57, at 1737. Halley was only one of numerous scholars to recognize the falsity of this distinction, as the citations below indicate.

65. 10 U.S.C. § 654 (2006), repealed by Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, § 2(f)(1)(A), 124 Stat. 3516. Interestingly, the military argued in several subsequent cases that its goal was to punish only the conduct, not status, even though status was the linchpin that determined the conduct. See, e.g., Cook v. Gates, 528 F.3d 42, 68 (1st Cir. 2008) (Saris, J., concurring in part and dissenting in part) ("Here, the government insists that the purpose of the Act is to target conduct, not status . . . ."); Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) ("The government argues that the Act in this case proscribes homosexual conduct and that, since any governmental differentiation is based on conduct, not status, no heightened scrutiny is required.").

"such conduct is a departure from the member's usual and customary behavior"; "is unlikely to recur"; or "the member does not have a propensity or intent to engage in homosexual acts."[66] Similarly, if the member "stated that he or she is a homosexual or bisexual," then again, they would be discharged unless they "demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[67]

In other words, the *conduct* of engaging in homosexual acts (whatever those are) or declaring one's homosexuality leads to a (rebuttable) presumption of one's homosexual *identity*.[68]

2. *The Status–Conduct Distinction in Public Accommodations Cases.* — Given the debates of the 1980s and early 1990s, by the time *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* was decided in 1995,[69] scholars were familiar with the status–conduct distinction. Yet, while *Hardwick* and DADT *collapsed* status and conduct, according to many scholars, *Hurley* and *Dale separated* status from conduct to undermine gay interests.[70]

Hurley inaugurated the line of cases in which the Court permitted anti-LGBTQ+ speech exemptions. The Court held that the speech rights of the organizers of the Boston St. Patrick's Day Parade allowed them to exclude a gay and lesbian group from marching.[71] Even though the state had found the exclusion to be discriminatory, the Court hastened to add its own gloss: "Petitioners disclaim any intent to exclude homosexuals as

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66. 10 U.S.C. § 654.

67. Id.

68. See, e.g., Judith Butler, Excitable Speech: A Politics of the Performative 107 (1997). Professor Judith Butler's book, *Excitable Speech*, argues that in DADT, "The words, 'I am a homosexual,' . . . perform[] what they describe, not only in the sense that they constitute the speaker as a homosexual, but that they constitute the speech as homosexual conduct." Id.

69. 515 U.S. 557 (1995).

70. Scholarship of the era was aware the Court's behavior necessitated contradictions in strategy and produced dilemmas. See, e.g., Toni M. Massaro, Gay Rights, Thick and Thin, 49 Stan. L. Rev. 45, 55 (1996) ("Disaggregating homosexual status and homosexual conduct might secure for gay people the dubious right to say 'I am a homosexual,' but *not* the right to engage in conduct that might give evidence of that identity . . . . [Disaggregation] may bifurcate the gay or lesbian individual in strange and undesirable ways."). On the dilemmas and double binds in the status–conduct distinction, see Eve Kosofsky Sedgwick, Epistemology of the Closet 70 (1990) ("The most obvious fact about this history of judicial formulations is that it codifies an excruciating system of double binds, systematically oppressing gay people, identities, and acts by undermining through contradictory constraints on discourse the grounds of their very being."); Diana Fuss, Inside/Out, *in* Inside/Out: Lesbian Theories, Gay Theories 1, 4 (Diana Fuss ed., 1991) ("To be out, in common gay parlance, is precisely to be no longer out; to be out is to be finally outside of exteriority and all the exclusions and deprivations such outsiderhood imposes."). The general point worth noting is that the status–conduct divide gives opponents of LGBTQ+ rights a dual strategy for attack—conflation or disaggregation—as the circumstances of the situation demand.

71. See *Hurley*, 515 U.S. at 581.

such, and no individual member of GLIB claims to have been excluded from parading as a member of any [approved] group."[72] The issue was the message that GLIB sought to send through admission "as its own parade unit carrying its own banner,"[73] "to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants."[74] GLIB's proclamation "that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals," would, the Court felt, conflict with the organizers' desired message.[75]

Five years after *Hurley*, the Court decided *Boy Scouts of America v. Dale*, in which the Boy Scouts successfully sought to exclude James Dale as an openly gay scoutmaster.[76] Dale's presence, the Scouts appeared to argue, would send a message that conflicted with the Scouts' desired message regarding homosexuality.[77] Dale was "open and honest about [his] sexual orientation," notes the Court.[78] In the Question Presented and in all its briefs, the Boy Scouts mentioned that Dale was an "avowed homosexual."[79]

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72. Id. at 572.

73. Id.

74. Id. at 570.

75. Id. at 574.

76. 530 U.S. 640 (2000).

77. There is some dispute as to the reason for the exclusion. Professor Mark Strasser argues that unlike in *Hurley*, in which the problem was GLIB's desire to carry a pro-gay banner, the Boy Scouts sought to exclude "Dale's very presence" itself. Mark Strasser, Leaving the *Dale* to Be More Fair: On *CLS v. Martinez* and First Amendment Jurisprudence, 11 First Amend. L. Rev. 235, 266 (2012); see also Randall P. Bezanson, Speaking Through Others' Voices: Authorship, Originality, and Free Speech, 38 Wake Forest L. Rev. 1023–24 (2003) (pointing out that the Court's decision in *Dale* was based on the "attribution to the Boy Scouts of a message constructed by an audience and attributed to Dale"); Arthur S. Leonard, *Boy Scouts of America v. Dale*: "The Gay Rights Activist" as Constitutional Pariah, 12 Stan. L. & Pol'y Rev. 27, 30 (2001) (arguing that "status and conduct are conflated" in *Dale*); James P. Madigan, Questioning the Coercive Effect of Self-Identifying Speech, 87 Iowa L. Rev. 75, 90–92 (2001) ("That Dale is gay does not mean that being gay is central either to his identity or to any message he exudes. . . . Even assuming . . . Dale's speech does amount to the . . . message that the GLIB banner advanced, . . . Dale has never sought to bring that banner into the Scouting 'parade.'").Thus, Justice John Paul Stevens observed in dissent: "Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message." *Dale*, 530 U.S. at 694–95 (Stevens, J., dissenting).

But scholars who take the opposite position seem to have the better of the argument. Thus, Knauer suggests that Dale was doing precisely what GLIB did in *Hurley*—just as GLIB put a banner up to send a message of normalization and inclusion to the observers of the Boston parade, Dale did the same for those who knew he was in the Boy Scouts and was gay: "Once his name appears in the paper, or he tells a co-worker, or he fails to deny a rumor of homosexuality, he has 'put a banner around his neck.'" Nancy J. Knauer, "Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After *Boy Scouts of America v. Dale*, 89 Ky. L.J. 997, 1037 (2001).

78. *Dale*, 530 U.S. at 653 (internal quotation marks omitted) (quoting Joint Appendix at 11, *Dale*, 530 U.S. 640 (No. 99-699)).

79. See, e.g., Petition for a Writ of Certiorari at i, 8, 22, *Dale*, 530 U.S. 640 (No. 99-699), 1999 WL 35238158.

This avowal, notes Professor Nancy Knauer, "helps normalize homosexuality, which in turn encourages others to come out and increases societal tolerance."[80] Such normalization went against the Scouts' desired message.

Indeed, the Boy Scouts was open to reinstating Dale—if he sent a message that conformed with theirs: "[T]he Boy Scouts' counsel acknowledged at oral argument that Dale could serve as an assistant Scoutmaster provided he said that homosexuality was 'morally wrong' and refrained from homosexual conduct."[81] In other words, the problem was Dale's message—conveyed simply by his being an out-and-proud homosexual—"of self-worth inherent in self-identification."[82] Thus, the Court notes:

> That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist.[83]

Thus, in both *Hurley* and *Dale*, the Court concluded that petitioners did not object to gay *people*, but that they objected to their *messages* as inconsistent with their own.

Primed by *Hardwick* and DADT, scholars immediately analyzed this argument using the status–conduct framework. Expression, they argued, was conduct that *constituted* gay identity. For example, drawing from *Hardwick*, DADT, *Hurley*, and *Dale*, Professor Nan Hunter argues that "representation or expression of identity is necessary for that identity to have a social existence."[84] Thus, in *Hurley*, the organizers of the parade and the Justices "read into the banner a message of the existence and celebration of gay identity, with its implicit claim of self-worth."[85] "But . . . [t]o

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80. Knauer, supra note 77, at 1052; see also Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting from the denial of certiorari) ("[O]nce spoken, [an acknowledgment of homosexuality] necessarily and ineluctably involve[s] [the individual] in [the] debate [that] . . . is currently ongoing regarding the rights of homosexuals."); Darren Lenard Hutchinson, "Closet Case": *Boy Scouts of America v. Dale* and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility, 76 Tul. L. Rev. 81, 107 (2001) ("[T]he Court legitimizes the Boy Scouts' discrimination against Dale on account of his 'outness,' which the Court treats as distinct from his mere 'membership' in a 'particular group' (gay males) or from his gay-male 'status' alone.").

81. Knauer, supra note 77, at 1038.

82. Nan D. Hunter, Expressive Identity: Recuperating Dissent for Equality, 35 Harv. C.R.-C.L. L. Rev. 1, 28 (2000).

83. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (quoting Joint Appendix, supra note 78, at 11).

84. Hunter, supra note 82, at 9.

85. Id. at 19.

exclude that message is to exclude that identity, as it is the full identity claim that makes equality a meaningful concept."[86]

Professor Darren Hutchinson similarly argued that "[o]utness . . . is a critical component of gay, lesbian, bisexual, and transgender identities."[87] "Dale's expression and association thus constituted the mechanics of identity formation; Dale's expression and his gayness were inseparable."[88] As yet others put it, "Status and expression . . . intersect when a gay person identifies himself or herself. . . . [G]ay or lesbian self-identification does not simply reveal identity, as if it were merely the communication of some pre-existing sexual identity that the communication leaves wholly unchanged, but . . . it realizes or constructs identity."[89] Nor were these insights restricted to scholars. As a concurring New Jersey Supreme Court Justice in *Dale v. Boy Scouts of America* noted, citing various scholars, including Hunter: "[W]hile Boy Scouts frames its expulsion of Dale as grounded on an objection to his expression of his homosexuality, that exclusion is tantamount to one based on Dale's status as a homosexual."[90]

The line that *Dale* appeared to draw between status and conduct was soon rendered unstable even in the Supreme Court. In *Lawrence v. Texas*, decided three years later, the Court overturned *Hardwick*, noting in dicta that "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."[91] In 2010, a majority of the Court signed onto an opinion that even more clearly recognized these deep links between status and conduct. In *Christian Legal Society*, a Christian law student group sought to exclude students who engaged in "unrepentant homosexual conduct," or who held "religious convictions different from those in the Statement of Faith."[92] Writing for the majority, Justice Ruth Bader Ginsburg held, in relevant part, that the exclusion survived because the stipulated facts showed that the law school required groups it supported to be open for all law students.[93]

Yet Ginsburg also went out of her way to emphasize the problems that arose when exclusions were made—as they were in *Hurley* and *Dale*—based on message. "[S]tatus exclusion" could be "cloaked"

> in belief-based garb[.] If a hypothetical Male-Superiority Club barred a female student from running for its presidency, for

86. Id. at 19–20.

87. Hutchinson, supra note 80, at 108.

88. Id. at 115.

89. Varcoe, supra note 50, at 231.

90. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1237–38 (N.J. 1999) (Handler, J., concurring), rev'd and remanded, 530 U.S. 640 (2000).

91. 539 U.S. 558, 575 (2003) (emphasis added).

92. Christian Legal Soc'y v. Martinez, 561 U.S. 661, 672 (2010) (internal quotation marks omitted) (quoting Joint Appendix Volume I at 226, *Christian Legal Soc'y*, 561 U.S. 661 (No. 08-1371), 2010 WL 372139).

93. Id. at 669.

> example, how could the Law School tell whether the group rejected her bid because of her sex or because, by seeking to lead the club, she manifested a lack of belief in its fundamental philosophy?[94]

Thus, Justice Ginsburg (incorrectly) claimed, the Court's "decisions *have declined to distinguish between status and conduct*."[95]

While the Court has increasingly turned to a different justification for denying the existence of discrimination, litigants in today's public accommodations cases do raise the status–conduct distinction. For example, in *Klein v. Oregon Bureau of Labor & Industries*, a baker seeking to refuse services for a same-sex wedding argued to the Oregon Court of Appeals that "the statute" prohibiting discrimination "is silent as to whether it encompasses 'gay conduct' as opposed to sexual orientation."[96] But the court held that even though the United States Supreme Court had sometimes distinguished between status and conduct, in the *Oregon* statute, "there is no reason to believe that the [state] legislature intended a 'status–conduct' distinction."[97]

B. *The Access–Content Justification*

Given how pervasive the status–conduct distinction was from the 1980s into the early 2000s, it is unsurprising that commentators have read the Court's "no-discrimination" claim today as disinterring the status–conduct chestnut. For example, in one of the first commentaries on *303 Creative*, Professor Kenji Yoshino alludes to the Court's claim that no status-based discrimination has occurred.[98] He notes that the status–conduct distinction arose during oral argument,[99] and criticizes it, citing DADT: "The LGBTQ+ community has encountered this distinction between status and conduct before," which "[o]ver time . . . has been rejected as untenable."[100]

While Yoshino is correct that the status–conduct distinction still carries force, the *303 Creative* opinion's denial of the existence of

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94. Id. at 688.

95. Id. at 689 (emphasis added); see also id. ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class." (alteration in original) (internal quotation marks omitted) (quoting Lawrence, 539 U.S. at 583 (O'Connor, J., concurring))).

96. 410 P.3d 1051, 1061 (Or. Ct. App. 2017), vacated, 139 S. Ct. 2713 (2019) (mem.).

97. Id. at 1062.

98. See supra note 18 (discussing Yoshino's treatment).

99. Yoshino, Rights, supra note 18, at 252 ("The Deputy Solicitor General . . . observed during the oral argument that '[t]here are certain rare contexts where status and conduct are inextricably intertwined, and I think the Court has rightly recognized that same-sex marriage is one of them.'" (alteration in original) (quoting Transcript of Oral Argument at 58, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476), 2022 WL 17980103)).

100. Id. at 251–52.

discrimination relies on a new logic—the access–content distinction. On this mapping, those providing certain services are engaging in an expressive act. They thus provide only those services, goods, and content that conform to messages they wish to send. They allow all individuals *access* to those services, goods, and content, and thus do not discriminate based on status.

This section focuses on this distinction. It first explains the development of the access–content distinction in a different context—that of disability law. It then shows how the distinction evolved in LGBTQ+-retail exemption contexts.

1. *Explaining the Access–Content Distinction.* — Although Justice Gorsuch presents his argument as original, the access–content distinction developed decades ago in the disability law context and is best articulated in the 1999 case *Doe v. Mutual of Omaha*.[101] In that case, Seventh Circuit Chief Judge Richard Posner explained that an insurance company could impose a cap on AIDS-related treatment without violating the Americans with Disabilities Act (ADA).[102] Under the ADA, public accommodations, including "insurance office[s]" cannot "discriminate[] against" individuals "on the basis of disability in the full and equal enjoyment of the goods [or] services."[103] Posner conceded that under Supreme Court precedent, discrimination against people living with HIV and AIDS was illegal under the ADA, and "an insurance company cannot . . . refuse to sell an insurance policy to a person with AIDS."[104] But, he explained:

> Mutual of Omaha does not refuse to sell insurance policies to such persons—it was happy to sell health insurance policies to the two plaintiffs. But because of the AIDS caps, the policies have less value to persons with AIDS than they would have to persons with other, equally expensive diseases or disabilities. This does not make the offer to sell illusory, for people with AIDS have medical needs unrelated to AIDS, and the policies give such people as much coverage for those needs as the policies give people who don't have AIDS.[105]

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101. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999). The original appearance of this kind of reasoning appears in Alexander v. Choate, 469 U.S. 287 (1985). See Leslie Pickering Francis & Anita Silvers, Debilitating *Alexander v. Choate*: "Meaningful Access" to Health Care for People With Disabilities, 35 Fordham Urb. L.J. 447, 451 (2008) ("The core of the Court's approach in *Choate* was that the fourteen-day limit applied to the disabled and the non-disabled alike. There were no barriers to this benefit as everyone could use it. Therefore, everyone had 'meaningful access' to the benefit provided." (footnotes omitted) (citing *Choate*, 469 U.S. at 309)).

102. *Doe*, 179 F.3d at 564. Notably, the cap applied to payment for "'opportunistic' diseases that HIV allows, as it were, to ravage the body are exotic cancers and rare forms of pneumonia and other infectious diseases." Id. at 561.

103. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181, 12182(a).

104. *Doe*, 179 F.3d at 559.

105. Id.

Were Mutual of Omaha rendered liable, reasoned the court, a bookstore that declined to stock books in Braille, "a furniture store's decision not to stock wheelchairs, or a psychiatrist's refusal to treat" certain psychiatric conditions would all be vulnerable to legal attack.[106] *Doe* represents the dominant position when it comes to insurance companies' ADA liability.[107]

Disability law scholar Professor Samuel Bagenstos ultimately traces this line of thinking to a line of Supreme Court case law developed in the Medicaid context, which held that neutral limitations on coverage did not discriminate based on disability.[108] Bagenstos points out that the access–content distinction depends completely on the "level of generality" at which the product at issue is framed.[109] To illustrate his point, consider two examples.[110]

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106. Id. at 560.

107. The Fifth Circuit, for example, concluded "that Title III prohibits . . . denying the disabled access to . . . goods and services . . . [but] does not . . . regulate the content of goods and services that are offered. . . . The goods and services that the business offers exist a priori and independently from any discrimination." McNeil v. Time Ins. Co., 205 F.3d 179, 186 (5th Cir. 2000) (emphasis omitted). Like *Doe*, it listed a parade of horribles from bookstores to shoe stores to restaurants that "would have to limit their menus to avoid discriminating against diabetics." Id. at 187; see also Lenox v. Healthwise of Ky., Ltd., 149 F.3d 453, 457 (6th Cir. 1998) ("Lenox's claim is not analogous to a claim that a video store has failed to remove a physical barrier depriving her of access to the facility and the goods and services available therein."). In another case, a court faced with situations in which insurance companies treated mental and physical disabilities differently explained that "[s]o long as every employee is offered the same plan regardless of that employee's contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities." Ford v. Schering-Plough Corp., 145 F.3d 601, 608 (3d Cir. 1998). Arguably, in this case, such language is dicta, as a key aspect of the reasoning is that "differentiat[ing] between types of disabilities . . . is a far cry from a specific disabled employee facing differential treatment due to her disability." Id.; see also Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1015–16 (6th Cir. 1997) (en banc) (holding that "[b]ecause all employees . . . received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied," but also noting "the ADA does not mandate equality between individuals with different disabilities").

That said, the First and Second Circuits disagree. The First Circuit noted (without deciding) that there could be debate "about whether this is intended merely to provide access to whatever product or service the subject entity may offer, or is intended . . . to shape and control which products and services may be offered. Indeed, there may be areas in which a sharp distinction between these two concepts is illusory." Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc., 37 F.3d 12, 19 (1st Cir. 1994). This Article discusses the approach of the Second Circuit below, see infra note 117 and accompanying text.

108. Samuel R. Bagenstos, The Future of Disability Law, 114 Yale L.J. 1, 47 (2004) [hereinafter Bagenstos, Future of Disability Law] (analyzing Alexander v. Choate, 469 U.S. 287 (1985)).

109. Id.

110. Bagenstos notes that one might frame the product differently: "[P]eople without AIDS can expect to 'have all their medically necessary care fully covered' to a large degree, while people with that condition 'will have care for their most necessary, life-prolonging

First, in a case that has received almost no academic attention,[111] the Ninth Circuit offered a framing even more restrictive than *Doe*'s. In *Doe*, Judge Posner had distinguished between offering the same policy on the same terms to people with and without disabilities, versus, inter alia, "charging" a person living with AIDS "a higher price for such a policy."[112] The latter, he appeared to concede, would violate the ADA.[113] But in *Chabner v. United of Omaha Life Insurance Co.*, the Ninth Circuit held otherwise.[114] According to the court, the ADA mandated only that "an insurance office must be physically accessible to the disabled" but not that the insurance "treat[] the disabled equally with the non-disabled."[115] Accordingly, the court approved the insurer's "overcharg[ing]" the person living with AIDS.[116]

At the other extreme, in *Pallozzi v. Allstate Life Insurance Co.*, the Second Circuit required insurers to sell "a life insurance policy 'at a price which is based on sound actuarial principles, or actual or reasonably anticipated experience.'"[117] Recognizing that some conditions are more expensive than others, the ADA explicitly allows insurers to calculate charges based only upon actuarial principles.[118] The Second Circuit reasoned that this provision meant that the ADA did in fact regulate underwriting practices, and, in turn, policies' content.[119]

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care limited to a fraction of that amount.'" Id. at 45 (quoting Mary Crossley, Becoming Visible: The ADA's Impact on Health Care for Persons With Disabilities, 52 Ala. L. Rev. 51, 82 (2000)). In other words, if one were to frame the product as involving, on average, full coverage for X% of one's healthcare, where X is a relatively high number, then Mutual of Omaha provided that product only to people without AIDS.

111. The only work that discusses this aspect of the case is a footnote in Sidney D. Watson, Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race, and Equity, 55 How. L.J. 855, 880 n.153 (2012) (citing Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042 (9th Cir. 2000)).

112. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999).

113. See id. at 564 ("[S]ection 302(a) [of the ADA] relates specifically to the business of insurance . . . limited to a simple prohibition of discrimination . . . ."); see also Equal Emp. Opportunity Comm'n v. CNA Ins. Cos., 96 F.3d 1039, 1044 (7th Cir. 1996) ("It did not charge higher prices to disabled people, on the theory that they might require more in benefits. Nor did it vary the terms of its plan depending on whether or not the employee was disabled." (citations omitted)).

114. 225 F.3d 1042 (9th Cir. 2000).

115. Id. at 1047 (internal quotation marks omitted) (quoting Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1115 (9th Cir. 2000)).

116. Id. at 1045.

117. 198 F.3d 28, 30 (2d Cir. 1999) (quoting Complaint, Pallozzi v. Allstate Life Ins. Co., 998 F. Supp. 204 (N.D.N.Y. 1998) (No. 97–CV–0236)).

118. 42 U.S.C. § 12201(c)(2) (2018).

119. *Pallozzi*, 198 F.3d at 32. *Doe* rejected this reasoning on specious grounds. It claimed that the language was just a "backstop," that is, a backup argument for insurers to use. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 562 (7th Cir. 1999). This "backstop" canon runs straight into rules against surplusage in statutes. See Duncan v. Walker, 533 U.S. 167, 174 (2001) ("We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting." (alteration in original) (quoting Babbitt v. Sweet Home Chapter, Cmtys. for Great Or., 515

The courts in these cases interpret the ADA differently. But Bagenstos would likely argue that they also frame the insurance product in different ways. *Doe* frames the product as the specific policy that the insurance company has available—"access" equals people with disabilities getting access to *that* policy.[120] *Chabner* frames the product more generally as any insurance policy—"access" is being able to enter the office to get *any* policy.[121] And *Pallozzi* frames the product differently as an actuarially sound policy.[122] "Access" involves people with disabilities getting access to policies that are just as actuarially sound as those available to nondisabled persons.

2. *The Access–Content Distinction in the Gay Rights Context.* — The access–content distinction appeared in protean form in the earliest of the Court's refusal cases. For example, in *Hurley*, the Court noted that gay people had access in that they could *march* in the parade.[123] What was impermissible was "requir[ing] speakers to modify the *content* of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own."[124] The argument appeared in subsequent cases, but judges and scholars usually confused it with the status–content argument, given the latter's venerable history.

Consider one of the first cases to address retail exemptions, *Elane Photography, LLC v. Willock*.[125] There, the New Mexico Supreme Court addressed the claims of a business that "argue[d] that it did not violate the [relevant state statute] because it did not discriminate on the basis of sexual orientation when it refused service to Willock."[126] The business explained that it "would have taken portrait photographs and performed other services for same-sex customers," "would also have refused to take photos of same-sex couples in other contexts, including photos of a couple holding hands or showing affection for each other[,]" and "would have turned away heterosexual customers if the customers asked for photographs in a context that endorsed same-sex marriage . . . 'even if the ceremony was part of a movie and the actors playing the same-sex couple

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U.S. 687, 698 (1995))). To be clear, plaintiffs did not claim that the ADA prohibited higher charges for certain conditions, only that it prohibits charges unjustified by actuarial data—a question which *Pallozzi*, unlike *Doe*, found to be a triable issue of fact. See *Pallozzi*, 198 F.3d at 30; see also 2 Karen Moulding, Nat'l Lawys. Guild Lesbian, Gay, Bisexual & Transgender Comm., Sexual Orientation and the Law § 19:12 (2023) ("In practical terms, the EEOC's use of actuarial principles could hurt people with HIV or AIDS if an employer could show that it is indeed an exceptionally expensive disease.").

120. *Doe*, 179 F.3d at 559.

121. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1047 (9th Cir. 2000).

122. *Pallozzi*, 198 F.3d at 36.

123. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) ("The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression.").

124. Id. at 578 (emphasis added).

125. 309 P.3d 53 (N.M. 2013).

126. Id. at 61.

were heterosexual.'"[127] The reason for this, Elane Photography explained, is "that it 'did not want to convey through . . . pictures the story of an event celebrating an understanding of marriage that conflicts with [the owners'] beliefs.'"[128]

What is notable is that all of these explanations rely on the access–content justification (access to "portrait photographs and . . . other services").[129] But, after describing the retailer's argument, in the very next paragraph, the court pronounced that these claims boiled down to status–conduct arguments: namely, "an attempt to distinguish between an individual's status of being homosexual and his or her conduct in openly committing to a person of the same sex."[130] The remaining four paragraphs which constitute nearly all of the court's explanation as to why discrimination *had* occurred focus only on the status–conduct distinction. The *Elane* court is not unique in its confusion.[131]

But hints of the access–content distinction also appeared in the opinion. After the *Elane* court's excursion into case law on status and conduct, the court's final paragraph returned to "Elane Photography's argument that it . . . will photograph a gay person" and deny other services to heterosexual people.[132] But, it explains, "if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers."[133] Other courts addressing similar claims

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127. Id.

128. Id. at 62 (second alteration in original).

129. Id. at 61.

130. Id.

131. Consider *Klein*, a case in which the Oregon Court of Appeals held that a wedding cake could not "be understood to fundamentally and inherently embody the [bakers'] expression." Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1072 (Or. Ct. App. 2017), vacated, 139 S. Ct. 2713 (2019) (mem.). In addressing whether the plaintiffs had suffered discrimination under the state statute, the lower court had explained: "The Kleins state that they are willing to serve homosexual customers, so long as those customers do not use the Kleins' cakes in celebration of same-sex weddings." Id. at 1061. This is not discrimination according to the Kleins, as "the statute is silent as to whether it encompasses 'gay conduct' as opposed to sexual orientation. . . . As such, . . . they do not discriminate against same-sex couples 'on account of' their status; rather, they simply refuse to provide certain services that those same-sex couples want." Id. at 1061–62 (emphasis omitted). The court goes on to treat each of these statements as a question of whether "the drafters of Oregon's public accommodations laws intended that type of distinction between status and conduct"—a question they answered in the negative. Id. at 1062. Yet each statement holds a slightly different connotation. The first statement points to the access–conduct distinction: The Kleins will serve people who are gay, but their products cannot be used in ways that convey approbation of same-sex wedding. The second statement relates to the status–conduct distinction: The Kleins are not discriminating against gay people, just their conduct. And third, the Kleins do not discriminate: Their services simply do not encompass what same-sex couples want.

132. *Elane*, 309 P.3d at 62.

133. Id.

in the years after similarly picked up on *Elane*'s limited menu analogy,[134] including in Justice Sonia Sotomayor's dissent in *303 Creative*.[135] The courts would frequently connect the menu argument to the status–conduct distinction in conclusory fashion—but the relationship is hardly apparent.[136] After all, the limited menu would be offered to some groups and not to others based on their status, not their conduct.

But the turn to the limited menu analogy possibly reflects the fact that what is actually at stake is the access–content distinction. Judges and scholars regularly used the menu analogy to expose the problems with the access–content distinction in the *disability* context.[137] For example, the *Doe* dissent itself claimed that by demanding policies without AIDS treatment caps, the plaintiffs were "not . . . ask[ing the court] to force a restaurant to alter its menu" but rather "to stop a restaurant that is offering to its nondisabled diners a menu containing a variety of entrees while offering a menu with only limited selections to its disabled patrons."[138]

As Justice Gorsuch began to intervene in the debate, the access–content distinction came into sharper relief. In *Masterpiece Cakeshop*, his first foray into the issue, he explained that the question was whether the baker could be forced to produce a cake that celebrated same-sex marriage. "Suggesting that this case is only about 'wedding cakes'—and not a wedding cake celebrating a same-sex wedding—actually points up the problem."[139] If we restrict the framing of the good at issue to wedding cakes celebrating same- and different-sex weddings, then there is no problem—the baker Mr. Phillips is happy to produce a cake celebrating different-sex weddings. That is simply the good that he provides. Justice Gorsuch's defense thus focuses not on the status–conduct distinction, but on the content—that is, the particular good—being sold.

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134. See, e.g., Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 372 (W.D.N.Y. 2021) ("[T]he statute does not permit businesses to offer a limited menu of goods and services to customers on the basis of a status that fits within one of the protected categories." (internal quotation marks omitted) (quoting Gifford v. McCarthy, 23 N.Y.S.3d 422, 428–29 (App. Div. 2016), aff'd in part, vacated in part, rev'd in part, 107 F.4th 92 (2d Cir. 2024))).

135. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2339 (2023) (Sotomayor, J., dissenting) (noting that Smith, "like Ollie McClung, who would serve Black people take-out but not table service, discriminates against LGBT people by offering them a limited menu" (citing Katzenbach v. McClung, 379 U.S. 294, 296 (1964))).

136. *Emilee Carpenter*, 575 F. Supp. 3d at 372 ("Plaintiff thus makes a plausible case that the 'limited menu' prohibition compels her to create speech—*i.e.*, photographs celebrating the marriage of same-sex clients—to the same extent she creates such speech for opposite-sex clients.").

137. Though they do not always cite the case, they appear to have drawn it, as did Justice Sotomayor, from *McClung*. See *303 Creative*, 143 S. Ct. at 2339. This analogy is not a strong one: The point is whether individuals can receive the same menu when that menu ignores the needs of certain individuals.

138. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 565 (7th Cir. 1999) (Evans, J., dissenting).

139. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1738 (2018) (Gorsuch, J., concurring).

Therefore, Justice Gorsuch explains, the only way in which one could consider the baker to have acted in a discriminatory way "is . . . to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all."[140] In making this point, Justice Gorsuch echoes Bagenstos's own discussion of the access–content distinction—"the application of the access–content distinction turns crucially on the level of generality at which the benefit offered by the defendant is defined."[141] As noted above, framing the content at issue as a particular insurance policy, complete with AIDS cap, would lead one to conclude there is no discrimination: Everyone has access to the same policy. But framing it at a "higher level of generality," namely, as a policy that covers a certain amount of health needs, entails a finding of discrimination.[142] And like Justice Gorsuch, Bagenstos criticizes judges for manipulating the level of generality in their description of the good in determining whether discrimination (in his case, in the disability context) has occurred.

Justice Gorsuch's majority opinion in *303 Creative*, then, represents another step in the direction of the access–content distinction. Justice Sotomayor's wry observation in dissent that "a gay or lesbian couple might buy a wedding website for their straight friends" reflects the shift.[143] Just as—one might add—a person living with AIDS might purchase an insurance policy that is of no use to them.[144]

C. *Relationship Between the Justifications*

In *Hurley*, what determined the organizers' message was the *conduct* of gay people—the organizers protected their message by prohibiting that conduct. In *303 Creative*, the *content* of what was sold defined the message. The distinctions in each case are analytically different—and yet, in certain cases, they can both apply.[145]

In cases like *Hurley* and *Dale*, advancing an access–content claim was harder because no "product" per se was involved. The organizers were engaged in an activity. One might reframe the question in those cases as whether GLIB or Dale could demand alteration of the content of the

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140. Id. at 1737–38.

141. Bagenstos, Future of Disability Law, supra note 108, at 42.

142. Id. at 45 (internal quotation marks omitted).

143. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2339 (2023) (Sotomayor, J., dissenting).

144. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 564–65 (7th Cir. 1999) ("[T]he Americans with Disabilities Act does not regulate the content of the products or services sold in places of public accommodation . . . . If . . . the AIDS caps . . . are not consistent with state law and sound actuarial practices . . . plaintiffs can obtain all the relief to which they are entitled from the state commissioners . . . .").

145. Note that "access" and "status" are identical concepts. To discriminate based on access is to discriminate based on status and vice versa. But this Article uses access—content rather than "status–content," as the former is the phrase traditionally used in the literature.

activity,[146] but a further complication arises. In *303 Creative* and *Masterpiece Cakeshop*, the Court paints the product as primarily created by the vendor.[147] In *Hurley* and *Dale*, the question was whether GLIB and Dale could participate in the *creation* of the activity at issue—they were on the supply, rather than the demand, side. The question of access and content in cases without a clear seller or buyer becomes complicated and less clean. Thus, arguing that the *conduct* defines the message and relying on the status–conduct distinction is far more straightforward.

Inversely, one might imagine situations in which a store engages in an access–content distinction, but there is no analogous distinction based on status and conduct. Imagine a store owned by a same-sex couple. The store is decorated with rainbow flags. Because of supply chain issues, stocking miscalculations, and customer demand, they lack wedding toppers for weddings for same-sex couples. This store explains that it has limited content but is happy to serve everyone the content it has. It therefore distinguishes between access and content, but not between status and conduct.

In situations like *303 Creative*, however, when there is a *product* that symbolically represents certain *conduct*, both justifications can apply.[148] A refuser can claim that they seek to target a certain kind of conduct. Or, they might claim, they are simply creating a certain kind of product (defined, in turn, either by certain conduct or status).[149] Why does the Court shift from the justification of status–conduct (which was mentioned at oral argument) to access–content? The next Part attempts to answer this question.

II. THE STAKES OF DISCRIMINATION DENIAL

The denial that discrimination has occurred has important doctrinal implications. Further, the access–content justification can affect identity- and status-based claims made by religious and gay claimants. To be sure, it may seem reassuring that the Court does not simply say that *any* expressive conduct, even if it is discriminatory, is constitutionally protected—it appears to use the status–conduct and access–content justifications to limit the kinds of expressive denials of service it will approve. But the cost of

146. See supra note 31 and accompanying text.

147. See supra note 16 and accompanying text.

148. Sending a *message* is not required here. The owner could refuse to stock a product because of secret hostility to same-sex marriage but claim that supply chain issues are at stake. He has engaged in both content and conduct discrimination but has not necessarily sent a message.

149. That is, the item being sold can be defined either by the conduct it supports or objects to, or by its relationship to certain identity groups. For further discussion, see infra text accompanying notes 245–249.

these fig leaves is that they obscure actual discrimination that can have long-term harms.[150]

A. *Doctrinal Stakes*

The claim that no discrimination has occurred may have doctrinal importance for two reasons. First, it might limit the scope of antidiscrimination law. If there is no discrimination, then no antidiscrimination statute is violated in the first place—courts need not even reach the First Amendment inquiry. Second, even if discrimination has occurred, the claim that there is no discrimination can affect the constitutionally required compelling interest assessment.

1. *Discrimination Determination.* — First, the claim that no discrimination has occurred—using either the access–content or status–conduct rationales—limits the reach of antidiscrimination law. Consider the judgment of the Supreme Court of the United Kingdom cited by *303 Creative*, *Lee v. Ashers Baking*.[151] There, Ashers Baking declined to make a cake with the message iced with "a coloured picture of cartoon-like characters 'Bert and Ernie,' the QueerSpace logo, and [a] headline 'Support Gay Marriage.'"[152] Lee filed suit, alleging discrimination based on sexual orientation (among other things), and the trial and appeals courts sided with him. The United Kingdom Supreme Court reversed.

Unlike in *303 Creative* or its predecessors, the British court did not analyze whether Lee's sexual orientation discrimination claim was trumped by the bakery's speech rights. Rather, it held that there was no sexual orientation discrimination in the first place. First, it turned to the findings of the lower court: "The District Judge did *not* find that the bakery refused to fulfil the order because of Mr Lee's actual or perceived sexual orientation" but rather "'because they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs.'"[153] Similarly, "the Court of Appeal pointed out, . . . the bakery would have supplied Mr Lee with a cake without the message 'support gay marriage' and that they would also have refused to supply a cake with the message requested to a hetero-sexual customer."[154] Accordingly, the British Supreme Court concluded that there was no status-based discrimination: "The objection was to the message, not the messenger."[155]

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150. This Article does not necessarily claim that the Court's majority offers the nondiscrimination claim in bad faith. But even if the Court genuinely believes the claim, the malleability that underlies its reasoning renders the claim meaningless as a constraint.

151. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 (appeal taken from N. Ir.).

152. Id. [12].

153. Id. [22] (emphasis omitted) (quoting Lee v. Ashers Baking Co. Ltd. [2015] (County Court) (N. Ir.), [43]).

154. Id.

155. Id.

The court considered two counterarguments. First, could the bakery's discrimination simply be a *proxy* for discrimination based on sexual orientation?[156] In other words, is support for gay marriage "indissociable from sexual orientation?"[157] The court concluded "there is no . . . identity between the criterion and sexual orientation of the customer. People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any sexual orientation."[158]

Second, it considered the possibility that the discrimination was directed not at Lee but at a third party, which the antidiscrimination provision also prohibited. The appellate court had held that "this was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community."[159] But the court rejected that possibility as well. "The evidence was that [Ashers Baking] both employed and served gay people and treated them in a nondiscriminatory way."[160] The court ultimately held that there was no identified individual who was being targeted, and thus the regulation did not apply: "In a nutshell, the objection was to the message and not to any particular person or persons."[161]

American courts have generally not yet followed suit. But one lower federal court has held, in a judgment later vacated on other grounds, that under Title VII, discrimination based on conduct does not count as discrimination based on status. Thus, an employer is "permitted to require employees to abide by Biblical standards of sexual conduct, or . . . fire an employee who engages in some form of sexual conduct prohibited by its policies."[162] But in the future, lower federal courts might feel bound by the Supreme Court's claim in *303 Creative* when interpreting federal law, and state courts might also find its analysis persuasive.[163]

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156. Id. [25] (considering "the question of whether the criterion used by the bakery was 'indissociable' from the protected characteristic and holding that support for same sex marriage was indissociable from sexual orientation").

157. Id.

158. Id. Arguably, the court would hold differently if the requested cake were a wedding cake. People from all sexualities, as they point out, support marriage equality. But usually only LBGTQ people marry someone of the same sex.

159. Id. [28] (internal quotation marks omitted) (quoting Lee v. Ashers Baking Co. Ltd. [2016] NICA [58] (N. Ir.)).

160. Id.

161. Id. [34].

162. Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 622 (N.D. Tex. 2021), aff'd in part, vacated in part, rev'd in part sub nom. Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914 (5th Cir. 2023).

163. Cf. Commonwealth v. Carter, 172 N.E.3d 367, 378–80 (Mass. 2021) (citing federal antidiscrimination cases regarding sexual orientation to interpret state antidiscrimination law); Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 328–29 (Tex. App. 2021) (same). It bears noting that while there is no federal law prohibiting discrimination in public accomodation on the basis of sexual orientation (or sex, for that matter), other federal

2. *Compelling Interest Analysis.* — Discrimination denial can also affect the interests analysis. In applying strict scrutiny under free speech doctrine, as the cases that find in favor of anti-marriage plaintiffs usually do,[164] courts investigate whether the putatively violated public accommodation law serves a compelling interest.[165]

Thus, in *Brush & Nib Studio, LC v. City of Phoenix*, the Arizona Supreme Court held that state and federal free speech rights allowed a custom wedding invitation business to discriminate against same-sex weddings.[166] The city defendants asserted that this holding would undermine what the court admitted was a "compelling purpose of eradicating discrimination in the provision of publicly available goods and services."[167] But the court disagreed that the compelling interest was implicated in that case because, among other things, the vendor's refusal was "based solely on the

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statutes are relevant. To take one example, an employer might fire an employee for marrying someone of the same sex. But only if this counts as discrimination based on sexual orientation would Title VII be violated. See Bostock v. Clayton County, 140 S. Ct. 1713, 1740 (2020) (finding that termination of employment constituted discrimination within the meaning of Title VII); cf. Shahar v. Bowers, 114 F.3d 1097 (1997) (assenting to a withdrawn employment offer from Shahar for marrying someone of the same sex, but declining to describe this as discrimination.).

164. Yoshino suggests that "Justice Gorsuch did not view strict scrutiny to be the apt approach to [*303 Creative*]. Like the *Barnette* Court, he adhered to a categorical approach, finding that if the conduct is speech, government compulsion is absolutely forbidden." Yoshino, Rights, supra note 18, at 280–81 (footnote omitted). He notes that Justice Clarence Thomas *did* adopt a strict scrutiny analysis in *Masterpiece Cakeshop*. Id.; see also John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1493–96 (1975) (providing an early explanation contrasting the approaches). There is perhaps more ambiguity in the Court's opinion than Professor Yoshino sees. Justice Gorsuch cited West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), to argue that the issue at stake was compelled speech but relied on other cases' constitutional test and did not explicitly adopt the *Barnette* framework. See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318 (2023). He was also the only Justice to sign on to Justice Thomas's partial concurrence in *Masterpiece Cakeshop*. While Justice Thomas argued only that speech rights were at issue and did not apply strict scrutiny there as he ultimately did in *303 Creative*, this suggests that Justice Gorsuch does not yet seek to split sharply from Justice Thomas. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1742–44 (2018) (Thomas, J., concurring in part and concurring in the judgment). Finally and most importantly, the Court goes out of its way to deny that any discrimination had occurred here. *303 Creative*, 143 S. Ct. at 2318 (rejecting the dissent's claim that the Court "grants a business open to the public" a "right to refuse to serve members of a protected class"). Just as Yoshino reads Justice Sotomayor's discussion of the important interests public accommodations laws serve as "tacitly follow[ing] the structure" of strict scrutiny, Yoshino, Rights, supra note 18, at 281, Justice Gorsuch appears to do the same, if not to the identical degree.

165. See, e.g., Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 922 (Ariz. 2019) (finding that the government furthered a compelling interest when it passed an ordinance prohibiting discrimination on the basis of sexual orientation because "eradicating discrimination in the provision of publicly available goods and services" is a compelling government interest).

166. Id.

167. Id. at 922.

celebratory *messages* Plaintiffs convey[ed] (or refuse[d] to convey), not the race, gender or sexual orientation of the customer. . . . Plaintiffs consistently testified that they were willing to serve all customers, regardless of their status."[168] No compelling interest meant that the vendor's refusal won the day.

Compelling interest considerations are particularly important in federal court holdings. State courts can simply interpret the state statute narrowly, as *Lee* did the British statute, to avoid the constitutional analysis.[169] (Indeed, it is unclear why the *Brush & Nib* court did not do just that.[170]). But federal courts are bound by state court interpretations of statutes. Even so, if a federal court finds that a First Amendment interest *is* implicated, it can hold that the state's interest is not compelling enough to overwhelm a refuser's speech rights.

A federal court is not bound by a state's assessment of whether an interest is compelling enough to withstand incursion into constitutionally protected rights.[171] The federal court might hold that even if it is bound by the state court's finding that discrimination *has* occurred under the state statute,[172] the state's understanding of discrimination does not correspond to federal courts' understanding of discrimination. If there is no discrimination from a federal law perspective, then there is no countervailing interest to the vendor's loss of expression—the court will hold that the vendor can proceed to deny the service. Alternatively, the federal court might hold that even if discrimination has occurred, it is not sufficiently compelling unless status-based discrimination is involved.

Indeed, this is arguably what occurs in *303 Creative*.[173] The Court begins its analysis by canvassing its precedent, concluding ultimately that Smith's service denial was expressive.[174] It then agreed that "governments in this country have a 'compelling interest' in eliminating discrimination

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168. Id. at 925 (citations omitted).

169. See supra section II.A.1.

170. In other words, the court could have simply held, as the *Lee* court did, that there was no discrimination. If that had been its holding, it would have neither had to consider whether the First Amendment applied nor concluded (as it did) that the First Amendment interests trumped any interests of the couple involved.

171. See, e.g., Loving v. Virginia, 388 U.S. 1, 8 (1967) ("[W]e do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose."). There, the state court had adhered to precedent that stated that "preserv[ing] the racial integrity of its citizens" was a sufficiently important state purpose. Id. at 7 (internal quotation marks omitted) (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)). The Supreme Court nonetheless held that no compelling interest existed. Federal courts have never appeared to consider themselves bound to state interpretations of what constitutes a compelling interest. See, e.g., id. at 8.

172. A question on which there is doubt. See Allison Orr Larsen, Confronting Supreme Court Fact Finding, 98 Va. L. Rev. 1255, 1271–77 (2012) (discussing the increased frequency with which Justices engage in factfinding).

173. See supra note 164 (analyzing whether scrutiny is being applied).

174. See 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2312 (2023).

in places of public accommodation."[175] But then it rejects Colorado's argument that Smith's refusal constitutes an objection to the "'protected characteristics' of certain customers," by distinguishing between status and message.[176] In other words, the Court's reasoning tracks the path laid out in the Introduction—it holds that Smith's behavior is (a) expressive, and (b) not discriminatory.[177]

B. *Identity Stakes*

The doctrinal stakes of obscuring the fact that discrimination has occurred are high. But the access–content justification, in particular, raises the stakes even further. It makes it easier for religious claimants to advance their claims and obscures the harms and claims of gay litigants. It thereby shifts the social movement possibilities of different groups of litigants, each "vying for visibility" in the public sphere.[178]

1. *Honoring Religious Status Claims.* — Why has Justice Gorsuch shifted from the classic focus on the status–conduct distinction to the access–content distinction to support his claim of discrimination denial? It is hard to answer this question with certainty, but the reason might lie in the distinction between cases like *Hurley* and *Dale*, and *Masterpiece Cakeshop* and *303 Creative*. Unlike the litigants in the first set of cases, those making anti-same-sex marriage claims in the newer cases also have a stake in the status–conduct debate—namely, religious status.[179] The status–conduct debate did not affect the Irish American or Boy Scout plaintiffs in *Hurley* or *Dale*. The "act" of discriminating against gay expression is arguably not

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175. Id. at 2311–21 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984)).

176. Id. at 2316–17.

177. Some might argue that the Court is willing to accept First Amendment claims even when a protected trait is clearly involved. In passing, the Court questions the notion that "the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's statutorily protected trait." Id. at 2313. But that is not the best reading of this passage. The Court here is primarily rebutting the Tenth Circuit's claim that the uniqueness of the product makes the state's interest compelling. See *303 Creative*, 143 S. Ct. at 2312 (agreeing that governments have a compelling interest in eliminating discrimination in public accommodations). Further, the message being sent may "somehow implicate[]" a protected trait without being the trait itself: same-sex marriage "somehow implicates" homosexuality, but on the Court's analysis is not itself homosexuality. *303 Creative,* 143 S. Ct. at 2313–14. The Court's examples support that analysis, among them scenarios in which a provider has to produce services that support Zionist or anti-same-sex marriage messages. Id. While these messages "somehow implicate" protected characteristics—presumably Jewish and conservative religious identities—they are not the same as those identities. It may be the case that the Court would approve of a message that clearly targets a certain protected characteristic, but it is not *this* case.

178. Yoshino, Rights, supra note 18, at 270.

179. See Craig Konnoth, The One Remaining Identity the Supreme Court Is Willing to Protect, Slate (July 5, 2023), https://slate.com/news-and-politics/2023/07/supreme-court-winners-losers-christians.html [https://perma.cc/CDG4-9RTN] ("There is one group that the court does not put into an identity straitjacket—those claiming religious exemptions.").

as intimately connected with Irish American or Boy Scout identity as it is with the religious identity of the refusers in *Masterpiece Cakeshop* and *303 Creative*.[180] Thus, emphasizing the status–conduct distinction is a fraught move.

Consider *Masterpiece Cakeshop* where Justice Gorsuch first begins to emphasize the access–content distinction, though the case turned on a religious discrimination claim. There, the Court noted that in various cases, bakers had refused a request to bake cakes with an anti-gay message for a customer, William Jack.[181] The Colorado Civil Rights Commission had denied Jack's claim that these refusals were anti*religious* discrimination even though they found that the refusal to bake a cake for a same-sex wedding was anti-gay discrimination.[182] The Court seemed troubled by this apparent disparity but did not analyze it much further—to the point that Justice Elena Kagan's concurrence claimed that Jack's claim had no bearing on *Masterpiece Bakeshop*.[183]

But Justice Gorsuch took issue with her assertion. He noted that the Commission held in Jack's cases that the bakers "didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions."[184] But, he reasoned, if an objection to same-sex marriage "is 'inextricably tied' to a protected class," to gay people,

> then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic.[185]

Justice Gorsuch goes on to explain how the *Masterpiece Cakeshop* baker's objection to same-sex marriage is tied to his religious beliefs.[186]

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180. Boy Scouts of Am. v. Dale, 530 U.S. 640, 670–71 (2000) (Stevens, J., dissenting) ("[I]t is exceedingly difficult to believe that [Boy Scouts of America] nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation."); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574–75 (1995) ("The parade's organizers . . . may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade.").

181. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1735 (2018) (Gorsuch, J., concurring).

182. Id.

183. See id. at 1733 (Kagan, J., concurring) ("The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law . . . .").

184. Id. at 1735 (Gorsuch, J., concurring) (citing Joint Appendix at 237, 247, 255–56, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4232758).

185. Id. at 1736.

186. See id. at 1738.

It bears noting that in a series of free exercise cases, Justice Gorsuch has also taken exception to the claim that discrimination against religious behavior does not count as discrimination based on religious status. In 2022, the year before *303 Creative* was decided, the Court invalidated Maine's education voucher scheme because it restricted voucher use at religious schools in *Carson ex rel. O.C. v. Makin*.[187] The First Circuit had held that the restriction was distinguishable from previous cases, in which states had engaged in "solely status-based religious discrimination," while the challenged provision here "imposes a use-based restriction."[188] Justice Stephen Breyer's dissent made a similar argument: Maine targeted not religious schools but rather schools that promoted a certain religious point of view.[189] Justice Gorsuch's majority opinion, however, concluded that the "prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."[190]

Based on *Carson* and his characterization of similar decisions,[191] Justice Gorsuch arguably seeks to preserve legal space for future litigants to argue that any discrimination they may suffer because of their (anti-gay) *actions* constitutes discrimination based on their (religious) *identity*, resulting in a free exercise violation.[192]

2. *Strengthening Discrimination Denial Claims.* — Shifting the justification toward the access–content binary depersonalizes and belittles the burden gay people experience. The original status–conduct justification required service deniers to target an individual for a specific objectionable behavior.[193] Frequently, courts have recognized those behaviors as having deep personal, social, and legal significance. Thus, those objecting to marriage equality object to an act that many believe "embodies the highest ideals of love, fidelity, devotion, sacrifice, and family," and that entails "two people becom[ing] something greater than

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187. See 142 S. Ct. 1987, 2002 (2022).

188. Carson ex rel. O.C. v. Makin, 979 F.3d 21, 37–38 (1st Cir. 2020), rev'd, 142 S. Ct. 1987.

189. See *Carson*, 142 S. Ct. at 2006 ("Maine chooses not to fund only those schools that 'promot[e] the faith or belief system with which [the schools are] associated and/or presen[t] the [academic] material taught through the lens of this faith'—i.e., schools that will use public money for religious purposes." (alterations in original) (quoting *Carson*, 979 F.3d at 38)).

190. *Carson*, 142 S. Ct. at 2001.

191. See id. (discussing Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020), and Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017)).

192. See, e.g., 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168 (10th Cir. 2021) ("Appellants challenge Colorado's Anti-Discrimination Act . . . on free speech, free exercise, and vagueness and overbreadth grounds."), rev'd, 143 S. Ct. 2298 (2023); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. Ct. App. 2015) ("[W]e next consider whether the Commission's application of the law . . . violated Masterpiece's rights to freedom of speech and free exercise of religion . . . ."), rev'd sub. nom. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

193. See supra sections I.A.1–.2.

once they were."[194] Even if the distinction between status and conduct is valid, there are high stakes to exhibiting animus toward particular acts.

Shifting from a status–conduct justification to an access–content justification diminishes service deniers' agency, reframes their message, and depersonalizes the harm gay people experience. The service denial becomes unlinked from an individual's animus toward specific actions—or people. Rather, the denial can be framed as analogous to other market decisions about the kinds of services an individual wants to provide, just as other store owners make decisions about the kinds of products they seek to stock. Those kinds of decisions benefit from the presumption of market rationality. Reframing the question into a capitalist, market-informed framework offers a powerful antidote to the image of someone stricken with prejudice targeting personal behavior of which they disapprove. Especially in a cultural and legal context in which intentional bias and animus play an important role in determining moral, if not legal, liability, the perception of rationality offers insulation against critique;[195] indeed, it is not the first time that market rationales have been leveraged to disguise anti-LGBTQ+ animus.[196]

Thus, by deploying an access–content argument, discrimination based on status is not at issue, nor, indeed, is discrimination based on conduct. In fact, the store owner's behavior has nothing to do with the individuals involved at all. Rather, the focus shifts simply to what kinds of goods the store stocks. The gay person's injury is no worse than if the local grocery store failed to stock a favorite brand of cookies. Framing the harm as lack of access to a product was made possible because of the shift from *Hurley*, *Dale*, and *Christian Legal Society* to *Masterpiece Cakeshop* and *303 Creative*. Unlike the first set of cases, which involved membership-based nonprofits that implicated LGBTQ+ people's intersecting identities—being Irish American, a Boy Scout, or a law student—*Masterpiece Cakeshop* and *303 Creative* involve commercial transactions.

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194. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

195. For examples of works that discuss the importance of intent in finding liability in various discrimination law contexts, see Stephanie Bornstein, Reckless Discrimination, 105 Calif. L. Rev. 1055, 1077 (2017) (observing that "federal case law interpreting Title VII . . . currently requires proof of" discriminatory intent); Leora F. Eisenstadt & Jeffrey R. Boles, Intent and Liability in Employment Discrimination, 53 Am. Bus. L.J. 607, 613 (2016) (noting that proof of workplace disparate treatment discrimination "requires consideration of the decision maker's state of mind or intent"); Aziz Z. Huq, What Is Discriminatory Intent?, 103 Cornell L. Rev. 1211, 1231 (2018) (describing intent to discriminate as "an organizing principle in Equal Protection jurisprudence"); W. Kerrel Murray, Discriminatory Taint, 135 Harv. L. Rev. 1190, 1196–97 (2022) ("The Supreme Court's antidiscrimination doctrine is widely understood as requiring specific, subjective intent to harm because of a protected trait.").

196. See Alex Reed, Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation, 9 Stan. J. C.R. & C.L. 153, 212 (2013) ("[T]hese measures are likely to be upheld against any equal protection challenge on the grounds they are rationally related to promoting intrastate commerce.").

Second and relatedly, the shift also reframes the harm narrative. Advocates who press against LGBTQ+ rights frame their motives as not "anti-gay" but "pro-family."[197] Anti-abortion activists paint themselves as pro-life.[198] And racist groups like the Ku Klux Klan and the National Policy Institute claim that they are not racist because they are "not anti-black," but instead "pro-white."[199] The access–content justification allows individuals to partake of this rhetorical shift.[200] Rather than painting themselves as *against* a particular group or activity, as the status–conduct justification would require, they can argue that the products and services they choose to sell simply advance a certain vision of family and marriage.

Finally, when discrimination is justified based on the status–conduct distinction, the service denial targets a specific individual—their status or their behavior. But under the access–content distinction, the target of the action is not the individual directly, but rather, a specific product. The action of the service denier is directed first at the product they choose to stock (or not stock) or the service they choose to provide (or not provide). The product or service exists independently of any specific gay plaintiff.

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197. See Kevin Begos & Catherine Dolinski, New Campaign Manager Faces Challenge, Tampa Trib., July 28, 2006, at 4 (on file with the *Columbia Law Review*) ("Friedes . . . described Rudnick as a zealot who appears to think gays and lesbians are inferior, despite Rudnick's protestations . . . that his motives were pro-family, not anti-gay."); Adam Graham, The Christian Moral Agenda, RenewAmerica (Mar. 24, 2005), https://web.archive.org/web/20151011120244/http://www.renewamerica.com/columns/graham/050324 (on file with the *Columbia Law Review*) ("The American family has many problems and challenges, the homosexual movement is just one of them."); People Are Not Anti-Gay but Pro-Family, Lancashire Telegraph (UK) (Feb. 7, 2000), https://www.lancashiretelegraph.co.uk/news/6093945.people-not-anti-gay-pro-family/ [https://perma.cc/U4WD-Y72A] ("[O]rdinary people are not anti-gay - indeed, they are anti-discrimination - but they are far from 'pro' the promotion of sexual behaviour that goes beyond the family values guidelines . . . .").

198. E.g., Fireworks Few as Candidates Air Their Views, Whidbey News-Times (Oak Harbor, Wash.), (Oct. 15, 2000), https://www.whidbeynewstimes.com/news/fireworks-few-as-candidates-air-their-views/ [https://perma.cc/4F3F-KKG2] ("When one audience member called him anti-choice on women's issues, Koster said he was not anti-choice but pro-life.").

199. Corky Siemaszko, Who Is David Duke, the White Supremacist Who Endorsed Donald Trump?, NBC News (Feb. 29, 2016), https://www.nbcnews.com/news/us-news/who-david-duke-white-supremacist-who-endorsed-donald-trump-n528141 (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting David Duke); see also Eric Franklin Amarante, Why Don't Some White Supremacist Groups Pay Taxes?, 67 Emory L.J. Online 2045, 2047 (2018), https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1011&context=elj-online [https://perma.cc/GZ2Z-BNU6] ("In the parlance of modern white supremacists, [the National Policy Institute (NPI)] is pro-white, not anti-black or anti-immigrant, and NPI members are not racists, they are 'race realists.'").

200. Some evidence suggests that the shift is more than rhetorical. See Clark Freshman, Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research, 55 Stan. L. Rev. 2293, 2326–27 (2003) ("[I]ngroup sympathy, rather than outgroup hostility, explains most modern prejudice and discrimination in the United States.").

Indeed, *303 Creative* brings the point home, since Smith filed a pre-enforcement challenge: No gay couple was involved in the lawsuit, and the allegation that a specific gay couple sought Smith's services turned out to be falsified.[201] But Smith, anyway, did not object to any specific wedding—rather, as the Court frames it, she was focused on the product she sought to offer to the public.

3. *Normative Concerns*. — There were other ways in which the Court could have framed matters that would have acknowledged the real burdens on either side. Indeed, there are moments when it came close to doing so. In a footnote, the Court discusses the reach of the First Amendment: "While it does not protect status-based discrimination unrelated to expression, generally it *does* protect a speaker's right to control her own message—even when we may disapprove of the speaker's motive or the message itself."[202] This passage *may* be read as an acknowledgment that when "status-based discrimination" has occurred, that "discrimination unrelated to expression" would not generally be protected,[203] but here, when "a speaker's right to control her own message is at stake," that expressive right trumps the right against discrimination because of the First Amendment. In other words, there are times when controlling one's message involves status-based discrimination but such instances deserve special First Amendment protection. Had this been what the Court said, it would have at least acknowledged the stakes on both sides of the issue.[204]

But that is not the course the Court took.[205] Rather, it erases the stakes for gay people. The Court distinguishes "status-based discrimination

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201. Adam Liptak, What to Know About a Seemingly Fake Document in a Gay Rights Case, N.Y. Times (July 3, 2023), https://www.nytimes.com/2023/07/03/us/politics/same-sex-marriage-document-supreme-court.html (on file with the *Columbia Law Review*).

202. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2317 n.3 (2023).

203. Indeed, this would be the better reading if the comma were placed after the "generally" rather than before. Id.

204. Some may argue that this approach is more dangerous than the status quo. Yet, if the status quo consists of a distinction that is ultimately somewhat manufactured as the final Part argues, it simply constitutes a fig leaf for the Court to do what it wants. This Article argues for removing the fig leaf in ways that can enable mobilization and engagement with the Court's decisions for what they are.

205. Some colleagues have generously engaged with this Article at length and suggest that it is incorrect to read the Court as claiming that no discrimination has occurred. They offer four reasons, to which I provide responses below.

> The first reason comes from the language the Court uses (and does not use) regarding discrimination itself. "[T]he Court did not deny the existence of discrimination . . . . First . . . , there is no passage in the opinion that explicitly states that discrimination does not exist. For this reason, the no-discrimination interpretation must . . . [be] inferred . . . ."

Email from Lawrence Solum to Craig Konnoth (on file with the *Columbia Law Review*).

Yet, the inference—if there is any—is a strong one. At the relevant portion of the opinion, the Court says that the record "speaks differently" from certain claims that Colorado and Justice Sotomayor in dissent make. *303 Creative*, 143 S. Ct. at 2317. What are

these claims with which the majority disagrees? The Court notes that "the State insists . . . [that Smith] objects to the 'protected characteristics' of certain customers." Id. at 2316–17. At the cited portion of the brief, Colorado accuses Smith of "refusing to sell based on an attribute inextricable from a customer's protected characteristic[,] [which] is discriminatory." Brief on the Merits for Respondents at 16, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), 2022 WL 3597176. Similarly, at the cited portion of Justice Sotomayor's opinion, she claims that Smith's behavior "is status-based discrimination, plain and simple." *303 Creative*, 143 S. Ct. at 2338 (Sotomayor, J., dissenting).

By *explicitly* disagreeing with Colorado's and Justice Sotomayor's claim that status-based discrimination has occurred, the Court is therefore taking the position that status-based discrimination has *not* occurred. It goes on to explain why: the parties "agree that Ms. Smith 'will gladly create custom graphics and websites for gay, lesbian, or bisexual clients.'" Id. at 2317 (majority opinion) (quoting Petition for a Writ of Certiorari at app. 184a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), 2021 WL 4459045). Some might feel that any failure to mention antidiscrimination values "is a more definitive statement of rejection of such claims than explicit discussion of them in the opinion would have been." Frederick Schauer, The Politics and Incentives of First Amendment Coverage, 56 Wm. & Mary L. Rev. 1613, 1629–30 (2015). But in any case, here, the values were mentioned—and rejected. (In conversation another colleague hinted that the Court's reference to "status-based discrimination unrelated to expression" implicitly acknowledges that expression might sometimes involve discrimination. Id. at 2317 n.3. But it is a stretch to assume from that passage that the Court seeks to imply that such discrimination has occurred in this case.)

A second reason my colleagues disagree with the claim that the Court denies the existence of discrimination arises from their reading of free speech doctrine.

> [T]he discussion of the status-message distinction in the opinion strongly suggests that Justice Gorsuch views the distinction as internal to free-speech doctrine [and not about the legal concept of discrimination], . . . [namely a] fundamental feature of the Free Speech Clause. While [the clause] does not protect status-based discrimination unrelated to expression, generally it does protect a speaker's right to control her own message—even when we[ ]may disapprove of the speaker's motive or the message itself. This passage strongly implies that Justice Gorsuch believed that the [status-message] distinction was an element of First Amendment doctrine and was not implying that 'message' could not be an element of discrimination itself.

Email from Lawrence Solum, supra (quoting *303 Creative*, 143 S. Ct. at 2317 n.3). Another colleague points out that the Court does not identify any antidiscrimination interests, not because it believes that discrimination has not occurred, but rather, because it takes a categorical approach to First Amendment doctrine, meaning that expression always trumps, whatever the antidiscrimination interest. Email from Colleague 1 to Craig Konnoth (on file with the *Columbia Law Review*).

Suggesting that actually what is occurring is a novel and dramatic doctrinal move to a categorical First Amendment approach seems strained. It would be strange for Justice Gorsuch to invoke the "distinction between status and message" as an attempt to distinguish between cases where there was status-based discrimination without expression and status-based discrimination with expression. *303 Creative*, 143 S. Ct. at 2317 n.3. It is far more likely—especially in the context of his rebuttal of the dissent's claim that there is "status-based discrimination"—that he is distinguishing between status- and message-based discrimination in the same case. Not to mention the fact that he cites to a British opinion in which that is precisely what happens. See id. at 2317 n.3 (quoting Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [47] ("The less favourable treatment was afforded to the message not to the man.")); see also supra note 164 (rejecting the claim that Justice Gorsuch adopts a categorical approach to the First Amendment and explaining why).

[from] . . . a speaker's right to control her own message."[206] Speech rights do not clash with equality claims. That is because, as the body of the opinion explains, "all customers" are subject to Smith's refusal; and as she does not target only gay people, there is no status discrimination.[207] Indeed, she "will gladly create custom graphics and websites for gay, lesbian, or bisexual clients or for organizations run by gay, lesbian, or bisexual persons."[208]

It may seem reassuring that the Court is at pains to parse out whether the allegedly expressive conduct is discriminatory before approving it. Yet, the porosity between status and conduct or access and content outlined above makes the Court's reasoning extremely malleable. In such situations, the supposed boundaries the Court imposes on itself do not actually limit the Court's reasoning. Rather, they create both normative and practical harms.

At a normative level, the Court's opinion makes claims that undermine gay people's understanding of their lived experience. Even if this does not affect LGBTQ+ people's understanding of what has happened, such behavior might amount to epistemic injustice.[209]

A third reason for counseling against my reading is "because it is inconsistent with Justice Gorsuch's understanding of discrimination in *Bostock* . . . and with the Supreme Court's decisions in a wide variety of contexts in which a message is an element of a discrimination claim." Email from Lawrence Solum, supra. But rather than seek consistency with *Bostock*, it is more likely that the Court was seeking consistency with *Hurley* and *Dale*—cases that are on point and repeatedly cited in the opinion—than with *Bostock*. The latter, in any case, involved a different question—whether sexual orientation discrimination is sex discrimination. But the parameters of gay identity can be narrowly drawn just as those of womanhood have been for purposes of Title VII. See Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (holding that California's state disability insurance program, which excluded certain disabilities resulting from pregnancy, does not violate the Equal Protection Clause). And especially given the criticism he received for his position in *Bostock*, Justice Gorsuch may well be seeking to do just that. See, e.g., Nelson Lund, Unleashed and Unbound: Living Textualism in *Bostock v. Clayton County*, 21 Federalist Soc'y Rev. 158, 158 (2020), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/dXJwyyWQDylardYLxHoy Tbbi3KcSWsQkWpG409eo.pdf [https://perma.cc/S859-9PD8] (noting that "*Bostock* invites unconfirmable speculation, even cynical speculation, about the motives of Gorsuch and the other members of the majority").

Finally, yet another colleague notes that as the state statute treats marriage discrimination as sexual orientation discrimination, the Court must admit there is discrimination. Email from Colleague 2 to Craig Konnoth (on file with the *Columbia Law Review*). As I explain above, I do not think this is true for the purposes of constitutional interests analysis. See supra section II.A.2.

206. *303 Creative*, 143 S. Ct. at 2317 n.3.

207. Id. at 2317.

208. Id. (internal quotation marks omitted) (quoting Petition for a Writ of Certiorari at app. 184a, *303 Creative*, 143 S. Ct. 2298 (No. 21-476), 2021 WL 4459045).

209. Rachel McKinnon, Allies Behaving Badly: Gaslighting as Epistemic Injustice, *in* The Routledge Handbook of Epistemic Injustice 167, 167–74 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds., 2017) (noting that this is true regardless of intention, and that either testimonial or hermeneutic harm is possible); see also Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing 154–55 (2007) ("From the epistemic point of view, what

Philosophers have begun squarely reckoning with the problem of epistemic injustice only in the last two decades.[210] They argue that knowledge production is a collective enterprise: what we understand about the world and people, and how we interpret those facts is largely secondhand, mediated by sources that hold positions of trust and authority in our communities.[211] Epistemic injustice occurs when certain individuals or groups of individuals are not allowed to participate in the process of constructing this shared reality, obscuring unjust and oppressive experiences.[212]

There are debates as to whether a specific act counts as epistemic injustice and if there is such injustice, a question of how egregious it is.[213] Whether injustice has occurred is a function of how confidently one endorses the claims of the next Part that discrimination has occurred. The more apparent it is to an observer that discrimination has occurred, the more egregious the Court's denial appears. For those who agree that discrimination *has* occurred, the epistemic injustice here has important implications. As critical race theory scholars have argued in analogous contexts, it diminishes not only the harm that gay people experience but also their standing and dignity in society.[214] Whether someone is

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is bad about . . . hermeneutical marginalization is that it . . . will tend to issue interpretations of that group's social experiences that are biased because insufficiently influenced by the subject group, and therefore unduly influenced by more hermeneutically powerful groups . . . .").

210. Inaugurated by Fricker, supra note 209, at 1.

211. See Amy Allen, Power/Knowledge/Resistance: Foucault and Epistemic Injustice, *in* The Routledge Handbook of Epistemic Injustice, supra note 209, at 187, 193 ("Foucault's aim is to show how the production of scientific knowledge is entangled with relations of power . . . ."); Katherine Hawley, Trust, Distrust, and Epistemic Injustice, *in* The Routledge Handbook of Epistemic Injustice, supra note 209, at 69, 69–70 ("Trusting, distrusting, being trusted, and being distrusted can all flow from the exercise of social power, and all can have consequences for social power."); Heidi Grasswick, Understanding Epistemic Trust Injustices and Their Harms, 84 Royal Inst. Phil. Supplement 69, 71 (2018) ("[M]embers of socially marginalized lay communities can suffer epistemic trust injustices when potentially powerful forms of knowing such as scientific understandings are generated in isolation from them . . . .").

212. "Who has voice and who doesn't? . . . Who is being understood and who isn't (and at what cost)? Who is being believed? And who is even being acknowledged and engaged with?" asks the introduction to one of the foremost volumes examining questions of epistemic justice. Ian James Kidd, José Medina & Gaile Pohlhaus, Jr., Introduction, *in* The Routledge Handbook of Epistemic Injustice, supra note 209, at 1, 1.

213. For example, sexual harassment was not understood as a concept at all until the 1970s, and even afterwards many women are not believed when they claim such harassment has occurred—such women thus experience epistemic injustice. See Deborah Tuerkheimer, Incredible Women: Sexual Violence and the Credibility Discount, 166 U. Pa. L. Rev. 1, 51 (2017) ("To conceive of credibility discounting as a form of discrimination that should be actionable under certain circumstances raises a host of questions, the answers to which are largely dependent on context.").

214. See Angelique M. Davis & Rose Ernst, Racial Gaslighting, 7 Pol., Grps. & Identities, no. 4, 2019, at 1, 2 ("Th[e] manipulation of perception [caused by racial gaslighting] is powerful because our reality — how we perceive the world and our place in it — is socially

acknowledged and believed and whether their interpretation of an incident is accepted helps determine their social standing—whether they are understood to be equal, autonomous, and competent members of society. [215]

One might, of course, question the extent of the discrimination, or its importance—the Colorado area has other wedding vendors.[216] But to deny that there is discrimination altogether disrespects those who experienced it.

Diminishing the burden experienced and disrespecting those who experienced it also has the effect of undermining movement organizing. My previous work documents how 1960s and 1970s activism in the gay rights movement "altered individual gay self-perceptions from that of religious outcasts and medical case studies to those of members of a political minority seeking legal rights."[217] Gay people and their allies increasingly saw themselves reflected in the civil rights movement—they saw the harms they experienced not as the inevitable result of medical or religious fate but through the lens of the movement, as discrimination and legal injustice. This perception created space for legal and political activism. Those who accept the Supreme Court's claim that no discrimination has occurred will be less likely to frame the harms in *303 Creative*, *Masterpiece Cakeshop*, and a range of other cases as injustices. They will less willingly take on the "task of making gays self-consciously seek to change the law as a minority movement."[218] These consequences can affect the future of LGBTQ+ rights claims.

Finally, the denial of discrimination potentially violates the duty of what Professor David Shapiro called "judicial candor."[219] The Court's majority does not necessarily deny the existence of discrimination in

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constructed."); Leah M. Watson, The Anti-"Critical Race Theory" Campaign—Classroom Censorship and Racial Backlash by Another Name, 58 Harv. C.R.-C.L. L. Rev. 487, 498 (2023) ("While culturally relevant teaching aids all students, some students are disproportionately harmed by its exclusion. [Especially] BIPOC students and students with intersecting identities, such as social class, English proficiency, disability status, and LGBTQ+ status . . . .").

215. See Tuerkheimer, supra note 213, at 42–46 ("[T]estimonial injustice occurs when a credibility assessment results from prejudice. . . . Hermeneutical injustice undermines one's ability to make sense of certain experiences . . . ." (citing Fricker, supra note 209, at 1)).

216. See infra Part III.

217. Craig J. Konnoth, Note, Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s, 119 Yale L.J. 316, 346 (2009) [hereinafter Konnoth, Created in Its Image]. See generally William N. Eskridge Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. Pa. L. Rev. 419 (2001) (discussing how identity-based social movements have affected the formulation of legal concepts).

218. Konnoth, Created in Its Image, supra note 217, at 349.

219. See David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731, 737 (1987) ("In a sense, candor is the sine qua non of all other restraints on abuse of judicial power, for the limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another.").

subjective bad faith. But claiming that there is no discrimination, rather than parsing the stakes of each case, is much more convenient and less messy. The clearer it is to the observer that Smith engages in discrimination, the more disingenuous the Court's reasoning appears. To the extent candor requires judges to reflect on the actual motivations of their decisions and engage in a clear weighing of the facts to ensure respect for litigants and the integrity of the judicial process,[220] the failure of the Court to do so is normatively problematic.[221]

In the long run, obscuring the existence of discrimination may offer short-term gain. Long-run consequences are problematic, however, and the normative stakes incline in favor of a frank weighing of the issues at stake.

III. ADDRESSING THE ACCESS–CONTENT JUSTIFICATION

The Court's claims—both historical and contemporary—that no discrimination has occurred are misplaced. The counterargument is fairly straightforward on certain accounts of antidiscrimination theory.

Scholars generally see antidiscrimination law as vindicating three sets of values: antisubordination, antibalkanization, and anticlassification. and symbolic resources in society.[222] A second nondiscrimination goal of more recent provenance is the antibalkanization principle, which targets behavior that harms social cohesion.[223] This approach disapproves of behavior that results in any sense of "social estrangement," even if those experiencing it are the socially privileged.[224]

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220. To be clear, the weighing of the stakes would be permissible under current doctrine. See Richard M. Re, Permissive Interpretation, 171 U. Pa. L. Rev. 1651, 1654 (2023) ("As a matter of first principles, the three primary interpretive inputs in the United States legal system are literal text, legislative goals, and pragmatic consequences. When two or more of these incommensurable factors strongly conflict, . . . formal principles of law do not dictate how to weigh or reconcile them." (footnote omitted)).

221. Cf. Guido Calabresi, A Common Law for the Age of Statutes 181 (1982) (indicating uncertainty as to whether judges should be candid).

222. This definition differs from typical formulations that speak in terms of power, dominance, or status (albeit with minute but relevant variations), but also best encapsulates each of them. See Laurence H. Tribe, American Constitutional Law §§ 16–21, at 1515 (2d ed. 1988) (explaining that the "antisubjugation principle . . . aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens"); Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Affs. 107, 167 (1976) (explaining that "[u]nder the group-disadvantaging principle, it is harm to a specially disadvantaged group" that triggers an equal protection inquiry); Reva B. Siegel, From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases, 120 Yale L.J. 1278, 1288 (2011) ("[T]he antisubordination principle is concerned with protecting members of historically disadvantaged groups from the harms of unjust social stratification.").

223. Siegel, supra note 222, at 1300 ("[Justices reasoning from an antibalkanization perspective] often explain their position in opinions concerned with threats to social cohesion.").

224. See id. at 1284.

Service refusals are discriminatory under both theories of discrimination. Behaviors such as these refusals materially disadvantage and symbolically denigrate their targeted groups and encourage social divisions by enabling some members of the polity to expel and exclude others.[225] These refusals require gay people to expend time, effort, and expense seeking alternative services and means of transportation to access those services.[226] LGBTQ+ individuals who are constrained in terms of where they live—for family or work reasons—may be particularly affected. LGBTQ+ service members in particular who are posted in "military installations . . . located in out-of-the-way areas" might be more vulnerable to these denials.[227] And denials affect subsequent service-seeking in various contexts: LGBTQ+ people who had experienced expressive service denials reported avoiding stores, restaurants, banks, medical offices, houses of worship, and other public places.[228] Finally, most importantly, psychologists argue that such refusals would *code* as discrimination for LGBTQ+ individuals: "[A] wedding vendor's declining to serve same-sex couples would be a prejudice event—a type of minority stress—which would subject LGB persons to indignities that have both tangible and symbolic impacts."[229]

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225. See Samuel R. Bagenstos, Bottlenecks and Antidiscrimination Theory, 93 Tex. L. Rev. 415, 433 (2014) [hereinafter Bagenstos, Bottlenecks] (reviewing Joseph Fishkin, Bottlenecks: A New Theory of Equal Opportunity (2014)) ("[D]isparate impact doctrine is often thought of as a paradigmatic application of anti-subordination . . . . "); see also Francis & Silvers, supra note 101, at 449–52 (explaining that the access–content distinction does not account for disparate impact).

226. Caitlin Rooney & Laura E. Durso, Ctr. for Am. Progress, The Harms of Refusing Services to LGBTQ People and Other Marginalized Communities 4 (2017), https://www.americanprogress.org/wp-content/uploads/sites/2/2017/11/112717_ServiceRefusals-brief.pdf [https://perma.cc/K9PQ-UFCN]. Twenty-one percent of LGBTQ+ people said it would be "very difficult" or "not possible" to find the same type of service at a different retail store selling wedding attire; and eleven percent each said it would be "very difficult" or "not possible" to find the same type of service at a different bakery. Ten percent said the same about a different florist. Id. These numbers increase to thirty-nine percent, twenty-nine percent, and twenty-one percent respectively in nonmetropolitan areas. Id. at 5.

227. Brief of Outserve-SLDN, Inc., American Military Partner Ass'n & American Veterans for Equal Rights as Amici Curiae in Support of Respondents at 14, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5152970.

228. Caroline Medina & Lindsay Mahowald, Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022, Ctr. For Am. Progress (Jan. 12, 2023), https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/ [https://perma.cc/JQ97-5XLF] (describing how LGBTQ+ people who had experienced discrimination were seven times more likely to steer clear of public places to avoid anti-LGBTQ+ discrimination than LGBTQ+ people who had not experienced discrimination).

229. Brief for Ilan H. Meyer, PhD & Other Social Scientists & Legal Scholars as Amici Curiae Supporting Respondents at 27, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476), 2022 WL 3757343 [hereinafter Brief for Ilan H. Meyer]; see also id. at 15 (citing Ilan H. Meyer, Minority Stress and Mental Health in Gay Men, 36 J. Health & Soc.

The third and dominant approach to antidiscrimination under current doctrine is the anticlassification principle. The final section expands on the principle in greater detail, but in short, on this account, disparate treatment against groups defined on the basis of certain characteristics is wrong.[230] *303 Creative*'s discrimination denial rests on the claim that the service denial does not *classify* based on sexuality. But this claim fails.

The status–conduct binary—one hook on which the Court's discrimination denial hangs—has been roundly criticized and undermined by legal scholarship.[231] Filling a gap in the scholarship,[232] this Part offers two responses to address the access–content distinction.

Behav. 38, 38 (1995); Ilan H. Meyer, Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence, 129 Psych. Bull. 674, 674 (2003); Ilan H. Meyer, Sharon Schwartz & David M. Frost, Social Patterning of Stress and Coping: Does Disadvantaged Social Status Confer More Stress and Fewer Coping Resources?, 67 Soc. Sci. & Med. 368, 371 (2008)); id. at 27, 29–31 (quoting Mark L. Hatzenbuehler, Jo C. Phelan & Bruce G. Link, Stigma as a Fundamental Cause of Population Health Inequalities, 103 Am. J. Pub. Health 813, 813 (2013) (describing how stigma leads to poor health outcomes)); Rooney & Durso, supra note 226, at 2 ("For LGBTQ people, discrimination—including in wedding-related services—also undermines the promise of equality."); Sejal Singh & Laura E. Durso, Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways, Ctr. For Am. Progress (May 2, 2017), https://www.americanprogress.org/article/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/ (on file with the *Columbia Law Review*) ("LGBT people who've experienced discrimination in the past year are significantly more likely to alter their lives for fear of discrimination . . . ."). Discrimination, including anti-LGBTQ+ discrimination, can lead to "higher rates of depression, anxiety, and substance abuse as well as an increased risk for physical health problems, such as cardiovascular disease." Rooney & Durso, supra note 226, at 3 (citing Inst. of Med. of the Nat'l Acads., The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding (2011), https://www.ncbi.nlm.nih.gov/books/NBK64806/pdf/Bookshelf_NBK64806.pdf [https://perma.cc/MB5F-9JSS]; David J. Lick, Laura E. Durso & Kerri L. Johnson, Minority Stress and Physical Health Among Sexual Minorities, 8 Persps. on Psych. Sci. 487, 487 (2013)); see also Brief for Ilan H. Meyer, supra, at 17 (citing David M. Frost, Keren Lehavot & Ilan H. Meyer, Minority Stress and Physical Health Among Sexual Minority Individuals, 38 J. Behav. Med. 1, 1 (2015)); id. at 9 ("Engaging in commercial activities in such a segregated marketplace will have both *tangible* and *symbolic* stressful effects on LGB consumers. LGB people will bear the burden of finding businesses that do not discriminate against them, a process that may entail significant harm to their dignity and wellbeing.").

230. See id. at 1288.

231. See Konnoth, Created in Its Image, supra note 217, at 337–38 (summarizing the origins of the act–identity distinction and critiquing its implications); see also Jessica A. Clarke, Against Immutability, 125 Yale L.J. 2, 6–7 (2015) (critiquing the use of immutability considerations in discrimination analysis). See generally Deborah A. Widiss, Intimate Liberties and Antidiscrimination Law, 97 B.U. L. Rev. 2083, 2109–15 (2017) (discussing the distinction courts make between status and conduct); Kimberly A. Yuracko, Trait Discrimination as Race Discrimination: An Argument About Assimilation, 74 Geo. Wash. L. Rev. 365 (2006) (categorizing different forms of trait discrimination).

232. Scholarship on the access–content distinction largely ends with Bagenstos's authoritative statement that the framing of "content" is indeterminate and arguments that

First, content discrimination is illegitimate when the content is clearly identified with the group in question. And second, the access–content distinction cannot be framed in a way such that the content is defined in terms of the protected characteristic at issue. For both arguments, the Article takes the Supreme Court and lower courts at their word that objections to gay conduct constitute objections to gay status[233] and that same-sex marriage is seen by society at large, for better or worse,[234] as a defining factor of gay identity.

A. *Taxonomizing the Access–Content Distinction*

Before embarking on these arguments, it is important to recognize that not all instances of the access–content distinction are discriminatory. Under the anticlassification theory of discrimination, denying certain content to individuals involves illegal discrimination only when there is disparate treatment based on a protected characteristic.[235] Situations in which a protected group is simply *impacted* differently do not count under this definition.[236] Someone claiming discrimination must show that the

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Congress did not intend the access–content distinction. Bagenstos, Future of Disability Law, supra note 108, at 54.

233. See Christian Legal Soc'y v. Martinez, 561 U.S. 661, 689 (2010) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination." (alteration in original) (emphasis omitted) (quoting Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring))).

234. Compare Paula L. Ettelbrick, Since When Is Marriage a Path to Liberation?, OUT/LOOK, Fall 1989, at 9, 14 (criticizing the fight for gay marriage as "undermin[ing] the very purpose of [the gay liberation] movement"), with Thomas B. Stoddard, Why Gay People Should Seek the Right to Marry, OUT/LOOK, Fall 1989, at 9, 10 (arguing in favor of gay marriage despite the shortcomings of marriage as an institution).

235. While this definition is the one most in keeping with standard understandings of antidiscrimination law, it is not necessarily the most preferred.

236. The Court has held that the Equal Protection Clause does not protect protected groups from disparate impact without more. See Washington v. Davis, 426 U.S. 229, 242 (1976). Some statutes, like Title VII, do protect against disparate impact, but evidentiary standards are so high that disparate impact theories are hard to advance. See Michael Selmi, Was the Disparate Impact Theory a Mistake?, 53 UCLA L. Rev. 701, 705, 738–43, 769 (2006) (analyzing outcomes of Title VII challenges to employment decisions under a disparate impact theory). In any case, public accommodations statutes, the primary focus of this Article, do not contemplate disparate impact theories. See Jessica A. Clarke, Sex Discrimination Formalism, 109 Va. L. Rev. 1699, 1709–10 (2023) (describing judge-made limits on disparate impact) [hereinafter Clarke, Sex Discrimination Formalism].

discrimination is intentional,[237] namely, that the protected characteristic was a motivating factor in the service refusal.[238]

But when does a distinction between access and content simply produce a disparate impact, and when is it the result of targeting a protected characteristic? This depends on what factors count as "the characteristic itself."[239] One might take a subjective approach to this question—for discrimination to have occurred, the discriminator must have self-consciously sought to disadvantage a certain sexual orientation. Under an objective approach, discrimination occurs when certain practices and behaviors that society recognizes as constituting the category are targeted, whether or not the refuser agrees as such.[240] This is precisely the claim of the various scholars who reject the status–conduct distinction: they recognize that sexuality is constituted by certain thoughts, behaviors, and practices—participation in a certain community, self-identification, certain sexual predilections, actions taken based on those predilections, and, indeed, relationships and even marriages with someone of the same

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237. That is, when there is usually no facial classification. See Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020) ("In so-called 'disparate treatment' cases like today's, this Court has . . . held that the difference in treatment based on sex must be intentional."); see also Jessica A. Clarke, Scrutinizing Sex, 92 U. Chi. L. Rev. (forthcoming Jan. 2025) (manuscript at 12), https://ssrn.com/abstract=4787833 [https://perma.cc/A6GP-4XRJ] ("[A]s a matter of Supreme Court doctrine, facial classifications trigger heightened scrutiny regardless of other measures of disparate treatment, such as intent . . . ."). For complications in accounts of intention, see Deborah Hellman, Diversity by Facially Neutral Means, 110 Va. L. Rev. (forthcoming 2024) (manuscript at 11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4742118 [https://perma.cc/6ZKL-PUAG] (explaining that the Court's use of "intention," "purpose," and "motive" is ambiguous).

238. Which is different from "but-for" causation. See Mitchell N. Berman & Guha Krishnamurthi, *Bostock* Was Bogus: Textualism, Pluralism, and Title VII, 97 Notre Dame L. Rev. 67, 101 (2021) (arguing that "[e]ven if . . . an adverse job action must fail the ordinary but-for standard, not the lessened 'motivating factor' standard, to be unlawful," it does not necessarily follow that the action automatically happens "because of" a specific reason just because it wouldn't have occurred without that reason); David A. Strauss, Sexual Orientation and the Dynamics of Discrimination, 2020 Sup. Ct. Rev. 203, 207 ("An employee's sex might be the but-for cause of many attributes that an employer is entitled to take into account."). Whether but-for causation also applies depending on the state statute at issue does not affect this Article's analysis.

239. With thanks to Lily Hu for helpful conversations on this issue. See Lily Hu, Race, Reasons, and Acting on the Basis of Race (As a Reason) 11 (unpublished manuscript) (on file with the *Columbia Law Review*).

240. On the question of motivation, one might similarly adopt an objective or subjective approach. Let us say that a shop owner excludes someone because they are gay but does not realize it—that is, their bias is implicit rather than explicit. See generally Jerry Kang, What Judges Can Do About Implicit Bias, 57 Ct. Rev. 78, 81–89 (2021) (relaying strategies for judges concerned with checking their own biases in adjudicating). One account might require that the owner explicitly avow their bias for it to count as a motivating factor; other accounts might hold otherwise. This Article does not focus on this particular issue—it assumes for the purposes of its analysis that any motivation is explicit and fully acknowledged.

sex.[241] No one factor is decisive in this analysis.[242] These scholars hold that targeting those characteristics and behaviors amounts to a denial based on the status they constitute, whether or not the refuser sees themself as acting based on the status.

On this account, not every access–content distinction would be discriminatory: some simply create a disparate impact. Consider the following examples.

- First, the store mentioned in Part I, run by a same-sex couple with rainbow flags in their store, which has run out of same-sex wedding toppers due to supply chain issues, but otherwise allows gay people to access the store on equal terms;
- Second, a large environmentally conscious chain store issues an edict that only biodegradable plastic items (including wedding toppers) can be stocked. It turns out that only different-sex biodegradable wedding toppers are available on the market. The store has historically expressed strong support for marriage equality;
- Third, a store owner who has no objection to marriage equality himself realizes his customer base does. The store owner thus declines to stock products relating to same-sex marriage;
- Fourth, a store owner objects to marriage equality on religious grounds. The owner has numerous gay friends—though he has fastidiously refused to attend their weddings. Otherwise, the owner treats gay people equally and believes them to be equal to straight people;
- Fifth, a store owner objects to marriage equality and consciously connects those beliefs to their negative beliefs about gay people.

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241. Konnoth, Created in Its Image, supra note 217, at 324–28.

242. Notably, the characteristics of interest are those that *constitute* the identity, not those that are structurally related to it such that discriminating against one effectively constitutes discrimination against the other, what some might call proxies. See, e.g., Larry Alexander, What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies, 141 U. Pa. L. Rev. 149, 167–72 (1992) ("In conclusively presuming for purposes of a particular decision that an individual with a proxy trait possesses the material trait, we stereotype those with the proxy trait.").

Thus, most would agree that discriminating against people who engage or have a desire to engage in same-sex sodomy *is* anti-gay discrimination. But a policy discriminating against those who live in urban zip codes is not, even though such a policy might have been adopted because of the perception that gay people tend to congregate in urban areas (a perception that is merely stereotypical). Movement Advancement Project, Where We Call Home: LGBT People in Rural America 6 (2019), https://www.lgbtmap.org/file/lgbt-rural-report.pdf [https://perma.cc/XP99-CJCQ]. Structural relationships can, of course, transmute into constitutive relationships. For example, zip codes 94114 or 10037—zip codes for the Castro and Harlem—might be considered constitutive of gay and Black identity. Targeting those codes might, for some, count as targeting the characteristic itself. Thanks to Deborah Hellman for her contribution to this discussion.

> They only allow gay people into their store because the law requires it.

The first two examples do not involve anti-gay discrimination—on the anticlassification account as the owners have not deliberately classified based on sexuality. The last two accounts involve classification and discrimination against same-sex marriage. There is a question under the Court's reasoning: Are these also examples of anti-gay discrimination, given that gay people are given access to the store, even if they are denied certain content? As the rest of this Part will argue, the reasons the Court gives for defending content discrimination are problematic because the refuser's actions target behavior that is constitutive of the group identity in question.[243]

B. *Rethinking Content Discrimination*

As noted above, the Supreme Court has retreated from, and lower courts have roundly rejected, the claim that discrimination against same-sex weddings is not anti-gay discrimination. In so doing, they reject the status–conduct distinction. But does the access–content distinction still hold water?

The answer depends on the content at issue. As the Supreme Court explained in a decision that was heavily cited by courts rejecting the status–conduct distinction,

> Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews.[244]

Yarmulkes and menorahs help define Jewish identity; crosses and scapulars define Christian identity. Scholars have written at length about how other items, like archeological artifacts, bodily remains, and land, define collective or national identity.[245] At a more retail level, portraits of ancestors, a great-grandparent's wedding ring, or urns containing the

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243. See Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) ("[W]e do not feel that the fact that Pan Am's passengers prefer female stewardesses should alter our judgment.").

244. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993); see also Elane Photography, LLC v. Willock, 309 P.3d 53, 62 (N.M. 2013); Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1063–64 (Or. Ct. App. 2017), vacated, 139 S. Ct. 2713 (2019) (mem.).

245. Kristen A. Carpenter, Real Property and Peoplehood, 27 Stan. Env't L.J. 313, 316–17 (2008) (explaining that land is the foundation of social practices and collective identities for Native American communities); John Henry Merryman, Thinking About the Elgin Marbles, 83 Mich. L. Rev. 1881, 1912–13 (1985) ("For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community. They tell people who they are and where they come from.").

remains of a family member can define and constitute family identity.[246] One's own wedding ring helps constitute the bond and relationship one shares with another. Various artifacts similarly represent gay identity: Rainbow flags or banners[247] and cake-toppers with same-sex couples symbolize gay identity.[248]

By focusing on the status–conduct distinction, the scholarship and judicial analysis have tended to be unidirectional—how do things define the identity of people or the groups to which they belong. But just as things can help constitute social identities, social identities can be imprinted onto things. A yarmulke or a menorah is not simply a head covering or a candlestick set but a Jewish item. A cross is similarly not just sticks linked together. A wedding ring isn't just jewelry but is imprinted by the relationship which it symbolizes. Just as items can define and symbolize collective social categories, those categories come to define the item.

Just as individuals get imprinted with a social identity because of their traits, behaviors, self-identification, and affiliations, so do things. That is precisely the situation with, say, the wedding cakes of same-sex couples (though one can pick other wedding artifacts). Indeed, that is the very

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246. Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959 (1982) ("[I]f a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo—perhaps no amount of money can do so."); Fred O. Smith, Jr., On Time, (In)equality, and Death, 120 Mich. L. Rev. 195, 205 (2021) (describing the author's father asking at a public hearing: "If you can't get outraged about someone destroying your great-grandparents' graves, what can you get outraged about?" (internal quotation marks omitted) (quoting Rebecca McCarthy, Panel Wrestles With UGA's Legacy of Slavery, Flagpole (Mar. 27, 2017), https://flagpole.com/news/city-dope/2017/03/27/panel-wrestles-with-ugas-legacy-of-slavery/ [https://perma.cc/3GK5-9AJ6])).

247. Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 570 (1995) (discussing the group's desired banner).

248. Some may object to the suggestion that "marriage" is inherently part of gay identity. See Konnoth, Created in Its Image, supra note 217, at 325 (discussing opposition to marriage as a goal within the gay community dating back to the 1950s). But it is hard to claim as a descriptive matter that items symbolizing a same-sex wedding are not associated and—for many people and in the law—constitutive of gay identity. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 666 (2015) ("The nature of marriage is that . . . two persons together can find other freedoms, such as expression, intimacy, and spirituality. . . . There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."). Whether or not that is a good thing normatively is a different issue. But in any case, the association between same-sex weddings and homosexuality comes, not from the fact that the object at issue is a wedding—weddings are jointly a part of straight and LGBTQ+ culture and do not uniquely define LGBTQ+ identity. Rather, it is the same-sex nature of the underlying romantic relationship that, like all kinds of same-sex romantic relationships, characterize gay identity. Konnoth, Created in Its Image, supra note 217, at 325 (citing David M. Halperin, How to Do the History of Homosexuality 109 (2002)). Indeed, many argue that gay married couples have queered or at least once sought to queer marriage. See, e.g., Michael Boucai, Glorious Precedents: When Gay Marriage Was Radical, 27 Yale J.L. & Humans. 1, 62 (2015) ("What made the publicity of [early gay] marriage litigation uniquely powerful was its refutation of certain ideas about what it meant to be 'a queer.'").

basis of the baker's claim in *Masterpiece Cakeshop*. As Justice Gorsuch's concurrence described: "Like 'an emblem or flag,' a cake for a same-sex wedding is a symbol that serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution.' It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith."[249] Not just artifacts but messages can be imprinted by speaker-identity. As *303 Creative* notes, a provided service can "implicate[] a customer's statutorily protected trait" and the state could force "'an unwilling Muslim movie director to make a film with a Zionist message,' or 'an atheist muralist to accept a commission celebrating Evangelical zeal.'"[250]

Individuals can be disfavored because of their social statuses. But so can things. Certain items are seen as undesirable because of their uses, or the contexts and groups they are associated with. Sex toys have been disfavored as obscene[251] because of the social categories they occupy. Similarly, an anti-Semite's antipathy to a yarmulke or an Islamophobe's demand as to "why can't [Muslim women] dress like *us*?"[252] constitute discriminatory attitudes toward Judaism and Islam—the clothes are targeted because of the social categories imprinted on them rather than sartorial taste.[253] The baker's antipathy to the same-sex wedding cake or the website designer's rejection of messages relating to same-sex weddings are premised on the social categories those artifacts represent—these are cakes and websites for same-sex weddings and are thus imprinted with gay identity. And when a certain good or service is metonymically associated with a specific group and their attributes, then discrimination against that good or service can constitute discrimination "on the basis of" that attribute.

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249. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1738 (2018) (Gorsuch, J., concurring) (alteration in original) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943)); see also id. at 1743 (Thomas, J., concurring in part and concurring in the judgment) ("The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple.").

250. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2313–14 (2023) (first citing 303 Creative LLC v. Elenis, 6 F.4th 1160, 1198 (10th Cir. 2021) (Tymkovich, C.J., dissenting), then quoting id. at 1199).

251. Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1233 (11th Cir. 2004) (upholding obscenity prohibition on sex toys).

252. Ruth Nasrullah, Why Don't You Dress Like Us?, Muslim-Matters (Apr. 5, 2008), https://muslimmatters.org/2008/04/05/why-dont-you-dress-like-us/ [https://perma.cc/UXU5-WVPD].

253. This may not always be clear from the face of an action. For example, an airport might require a Muslim woman or Sikh man to remove head coverings in the interests of security, and a plaintiff can prove discrimination if they can show that the requirements are enforced inequitably. Michael T. Luongo, Traveling While Muslim Complicates Air Travel, N.Y. Times (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html (on file with the *Columbia Law Review*) (explaining that TSA officers may ask passengers to remove head coverings and both Muslim women and Sikh men are frequently asked to do so).

This doesn't mean that every expression of distaste toward goods associated with a certain identity is actionable. As the previous Part notes, discriminating based on sexual orientation in the abstract does not involve discriminating against any specific gay person.[254] This allows individuals to escape liability under some statutes that require a specific person to be harmed in order for there to be a cause of action. Take the original text of Title VII, which prohibits adverse employment action against "any individual, . . . because of *such individual's* race, color, religion, sex, or national origin."[255] The operation of this provision of the statute, some courts therefore hold, turns on the protected attribute of the individual, not generalized animus against the attribute.[256] Thus, with such statutes, claiming that there is discrimination against a generalized attribute without showing discrimination against an individual would be insufficient.[257]

Courts might adopt a limited reading even when there are no limitations on the face of the statute. For example, in *Lee*, the British

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254. The access–content distinction allows the service denier to claim that the service denial is about the product, not about any specific person. See supra section II.B.2.

255. 42 U.S.C. § 2000e-2(a)(1) (2018) (emphasis added).

256. See Jessica A. Clarke, Protected Class Gatekeeping, 92 N.Y.U. L. Rev. 101, 113–14 (2017). Note that some courts have still interpreted Title VII to apply to white employees in certain circumstances. For example, when white employees have been fired for associating with or marrying Black people, employers have argued that Title VII does not apply because the firing occurred because of the race of *third* parties. But courts have explained that the firing occurred not *just* because of the race of the third parties but also because of the race of the employee—the employers objected to the fact that a *white* employee was associating with Black people. Id. at 129; see also Johnson v. Univ. of Cincinnati, 215 F.3d 561, 574 (6th Cir. 2000) (noting that "to state a cognizable claim under Title VII, the plaintiff himself need not be a member of a recognized protected class").

257. In blunt terms, the store can discriminate against gay cakes. As long as the store allows gay people access to straight cakes, it is not discriminating, since the statute prohibits discrimination based on the traits of the people given access, not the content of the goods. Note that textual readings such as this can sometimes expand liability in analogous circumstances. Consider City of Los Angeles v. Manhart, 435 U.S. 702, 709 (1978), in which the Court invalidated a pension plan that required women to make a larger contribution to pension plans on the theory that women live longer. The contribution requirements were actuarially valid. But the Court relied on a textual reading of Title VII that required treating women as individuals rather than as a class. A pension plan that treated women as a group rather than as individuals violated this requirement. This Article will not parse the textual distinctions of the ADA and Title VII here to determine whether *Doe* was valid as a textual matter. Compare Brief of Petitioner Liberty National Life Insurance Co. at 44, Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209 (11th Cir. 2001) (No. 00-14507), 2000 WL 33978824 ("Whereas drawing distinctions between groups based upon their race, sex, or age may be socially unacceptable in other contexts, such distinctions are critical to guaranteeing actuarial equity in the context of pricing life insurance."), with Jesse A. Langer, Comment, Combating Discriminatory Insurance Practices: Title III of the Americans With Disabilities Act, 6 Conn. Ins. L.J. 435, 460–61 (2000) ("If Congress intended the 'full and equal enjoyment' clause to refer only to degrees of access, and not to the content of the products offered, then it would be unnecessary for Congress to enumerate the distinctions between the types of benefits to be received by individuals.").

Supreme Court looked to the provision at issue which stated that discrimination occurs when "on grounds of sexual orientation," the discriminator treats another "less favourably than he treats or would treat other persons."[258] The court admits that the provision "is not limited to less favourable treatment on the grounds of the sexual orientation of [the victim] . . . . There is no 'his or her' in the definition."[259] It looks to case law that held that discrimination based on association with members of a protected class, or "*imagin[ed]*" sexual orientation, violated the antidiscrimination law.[260] It also considered administrative guidance that interpreted the provision to apply when discrimination occurred based on the sexual orientation "of another person with whom they associate."[261] But the court declined to go beyond this: "[t]hat is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is 'on grounds of' sexual orientation."[262]

But a textualist reading in other contexts may require some courts to conclude just the opposite. For example, the public accommodations statute at issue in Colorado does not have the limiting text of Title VII as originally enacted,[263] or the limiting guidance of the British law. It states simply that disadvantaging "an individual or a group," in a public accommodation "because of . . . sexual orientation" violates the law.[264] This means precisely that "because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is 'on grounds of' sexual orientation."[265] The statute here is not limited only to access. Thus, even if the store allows access to gay people but discriminates against *gay content*, it violates the statute.

There are three caveats to this conclusion. First, this claim does not mean that simply expressing disapproval and disdain toward certain products violates the statute. Under the statute, the store's act of discrimination must involve limiting service to a specific individual or group

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258. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [20] (appeal taken from N. Ir.) (internal quotation marks omitted) (quoting The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 SR 2006/439 art. 3, ¶1).

259. Id. [27] (quoting Equality Act 2006 § 82 (UK))

260. Id. [30] (emphasis added) (internal quotation marks omitted) (quoting English v. Thomas Sanderson Blind Ltd. [2009] ICR 543 [38]).

261. Id. [32] (internal quotation marks omitted) (quoting The Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263, Explanatory Notes ¶ 7.3 (UK)).

262. Id. [33]; see also discussion supra note 158.

263. It bears noting that Title VII was amended in 1991 to add 42 U.S.C. § 2000e-2(m), which states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor." This effectively renders the modern Title VII to reach cases of discrimination as broadly as the Colorado statute.

264. Colo. Rev. Stat. § 24-34-601(2)(a) (2024).

265. Lee v. Ashers Baking Co. Ltd. [2018] UKSC 49 [33] (appeal taken from N. Ir.).

because of its antipathy to the product because of its association with the group. In other words, there must be a specific individual or group that suffers a concrete harm because of the store's discrimination based on sexual orientation (such concrete and particularized harm is likely required to satisfy constitutional standing requirements in any case).[266] Similarly, a store can make an anti-gay cake for a customer. The store might be making content that stigmatizes based on sexual orientation, but in so doing, it does not harm a specific individual.

Second, this does not mean that stores must stock all items that would appeal to all groups at all times. To see why, it bears looking to the ADA context. The DOJ disapproved of the access–content distinction in *Doe*.[267] At the same time, regulations it promulgated specified that "a public accommodation" need not "alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities."[268] DOJ offered analogous commentary in the context of services.[269]

Under this reasoning, stores carrying ready-made items would not generally be required to alter their inventory. This makes sense as a normative matter. First, unless one is presented with a conveniently worded hypothetical, it is hard to prove that the reason a store does not carry certain ready-made items in stock is because of animus. A range of issues could be at play.[270] Second, as commentators have argued, antidiscrimination statutes consider costs and benefits.[271] The antidiscrimination

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266. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) ("Over the years, our cases have established that the irreducible constitutional minimum of standing . . . [requires] the plaintiff [to] have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized.").

267. Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 562–63 (7th Cir. 1999) (contending "that the insurance exemption has no function if section 302(a) [of the ADA] does not regulate the content of insurance policies," and thus the court "should infer that the section does regulate that content"). This position disagrees with this Article's premise that the access–content distinction is valid, but that does not affect its argument.

268. 28 C.F.R. § 36.307 (2024). This limitation is "consistent with the 'fundamental alteration' defense to the reasonable modifications requirement of § 36.302," which in turn, is required by statute. 28 C.F.R. § 36.302 app. C; see also 42 U.S.C. § 12182 (2018); 28 C.F.R. 36.302.

269. For example, it notes that medical providers need not provide services that go beyond their usual expertise. See 28 C.F.R. § 36.302 app. C.

270. Further, sometimes the motivation requirement that the Supreme Court demands is high. At least in some cases the Supreme Court has narrowly defined discrimination as occurring when the discriminator acts "because of" not "in spite of" a characteristic, as in the case of Store 2 in the hypotheticals above. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (1979) (internal quotation marks omitted) (upholding state law giving hiring preference to veterans over nonveterans, though it effectively discriminated against women).

271. See, e.g., Michael Ashley Stein, Anita Silvers, Bradley A. Areheart & Leslie Pickering Francis, Accommodating Every Body, 81 U. Chi. L. Rev. 689, 713 (2014) ("Under the ADA, an employer does not have to provide an accommodation that would impose costs constituting an 'undue hardship' on the operation of the employer's business.").

mandate is limited in various ways to avoid overburdening those it regulates. Of course, while the ADA has limiting regulations, state sexual orientation public accommodation laws may not.[272] In that case, however, courts may require a showing that the refusal to stock a certain item arises from animus toward a group, rather than other problems like supply chain issues. Stores, as in *Masterpiece Cakeshop* or *303 Creative*, however, which are offering custom products, and are logistically capable of satisfying a customer's demand, will have to provide clearer justification.[273]

Third, this Article's concern is only with *statutory* violations. It may be the case that the Court will hold that the First Amendment trumps the statute and allows for content-based decisions that stigmatize sexual orientation. Justice Clarence Thomas contemplated the possibility in his *Masterpiece Cakeshop* concurrence that "blocking [gays and lesbians] from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say 'God Hates Fags'" "stigmatizes gays and lesbians."[274] Similarly, "burn[ing] a 25-foot cross" or "conduct[ing] a [white supremacist] rally on Martin Luther King Jr.'s birthday" can constitute "racist, demeaning, and even threatening speech."[275] Nonetheless, such speech is permitted under the First Amendment, he concludes. Similarly here, the stigma a group suffers by denying content to a specific individual might be permitted by the First Amendment—but, for the reasons discussed above, it is important to acknowledge that the actions *do* discriminate.

C. *Limiting the Access–Content Distinction*

Not every item is imprinted by identity, however: The content-based analysis above only goes so far. In such situations, it is important to clearly identify when a refuser only limits content and when it limits access as well.

Recall from the discussion above, however, that whether the denial is one of access or of content depends entirely on the level of generality at which one defines the good.[276] In his *Masterpiece Cakeshop* opinion, Justice Gorsuch offered no guidance as to which level of generality was appropriate, demanding only that the level of generality applied to products requested by religious individuals and gay individuals be similar.[277] And Bagenstos himself appears agnostic on the distinction: The "application of the access–content distinction turns crucially on the level of generality at

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272. Colorado's does not. Colo. Rev. Stat. § 24-34-601 (2023).

273. This inverts Carpenter's view in *How to Read* 303 Creative v. Elenis, supra note 18, that the burden–benefit analysis counsels in favor of deferring to custom providers.

274. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1747 (2018) (Thomas, J., concurring in part and concurring in the judgment).

275. Id. (citing Virginia v. Black, 538 U.S. 343 (2003); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)).

276. See supra section I.B.1.

277. See *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

which the benefit offered by the defendant is defined—a matter on which the distinction itself provides no guidance."[278]

The problem, ultimately, is one of comparison. How should we situate a product in comparing the needs of a gay couple to those of a straight couple? In so doing, another area of equality law in which questions of comparison arise proves useful for understanding the problem at hand.

In various contexts involving equality law—both statutory and constitutional—courts often inquire into whether plaintiffs are similarly situated to some other group that receives the benefit that the plaintiffs seek.[279] Consider *Women Prisoners of D.C. Department of Corrections v. District of Columbia*, in which the D.C. Circuit reviewed a trial court holding that women inmates did not get "access to academic, vocational, work, recreational, and religious programs that were available to similarly situated men at other prisons."[280] The district court had determined that women and men were similarly situated "by virtue of their similar custody levels, sentence structures and purposes of incarceration."[281] The panel majority reversed, finding that "five factors: population size of the prison, security level, types of crimes, length of sentence, and special characteristics" were more relevant—a different prison size, in particular, merited different resources.[282] Because men and women were differently situated (because their prisons were differently situated), there was no legitimate comparison that the women could assert, and thus, no cognizable discrimination claim.

Judge Judith W. Rogers dissented from that analysis, claiming that the majority's invocation of prison size was an "irrelevanc[y]" that has only "to do with the cost of administering programs."[283] Instead, the key question was "the purpose [of the program, good, or service] with respect to which [the plaintiffs] are dissimilarly situated" and the court should ask whether women were "similarly capable of benefiting from" the programs as men.[284] Scholars have persuasively argued that Judge Rogers's position is the correct one as a doctrinal matter: One looks at purpose to determine similar situatedness.[285] Yet, resolving that question, much as in the access–

278. Bagenstos, Future of Disability Law, supra note 108, at 42.

279. Clarke, Sex Discrimination Formalism, supra note 236, at 1722–23 (explaining that some areas are relatively consistent, including "Title VII, where a 'similarly situated' inquiry is the 'default methodology' for determining if intentional discrimination occurred"). For a discussion of the inconsistency in the constitutional context, see generally Giovanna Shay, Similarly Situated, 18 Geo. Mason L. Rev. 581 (2011).

280. 93 F.3d 910, 923–24 (D.C. Cir. 1996).

281. Id. at 924 (quoting Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 675 (D.D.C. 1994)).

282. Id. at 925 (citing Pargo v. Elliott, 894 F. Supp. 1243, 1259–61 (S.D. Iowa 1995)).

283. Id. at 954 (Rogers, J., concurring in part and dissenting in part).

284. Id.

285. See Brenda V. Smith, Watching You, Watching Me, 15 Yale J.L. & Feminism 225, 275 (2003) ("[They] are similarly situated because the State of Nebraska and the Department of Corrections view the purpose of incarceration to be the same for all

content context, has to do with the *level of generality* at which we should understand the program (or good or service) to exist. One might argue that the government purpose is not only to provide programs to those who benefit, as Judge Rogers would have it, but to provide programs to the greatest number of people who will benefit. In that case, the size of the prison is hardly an irrelevancy.

But Judge Rogers's arguments do not stop there. Her analysis begins with a hypothetical: "Two people commit the same crime. Each is similarly convicted by a District of Columbia court. In all respects—criminal history, family circumstances, education, drug use, favorite baseball team—they are identical. All save one, that is: they are of different sexes."[286] And "[s]olely because of that difference, they are sent to different facilities at which the man enjoys superior programming options."[287] Thus, the majority "errs because it starts in the middle," *after* the discrimination occurs that disparately situates the men and women, "rather than at the beginning" where they are similarly situated.[288]

Thus, although Judge Rogers does not quite state it in these terms, taking the characteristics of the prison-like size into account is wrong for a second reason. Not only, according to her, is it irrelevant—it is also illegitimate. The majority effectively says that women('s prisons) are not similarly situated to men('s prisons) because of sex. Therefore, they can be treated differently from men. This reasoning is "circular."[289]

This move is important to focus on. In determining comparators for "similarly situated" analysis, we can focus on a range of characteristics depending on the program. But—depending on the regime at issue—we are forbidden from distinguishing based on certain characteristics determined by what Professor Kent Greenawalt referred to as "substantive norms of equality."[290] Under federal employment law, characteristics that *cannot* render someone dissimilarly situated are race, sex, religion,

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inmates . . . ." (alteration in original) (internal quotation marks omitted) (quoting Klinger v. Nebraska Dep't of Corr., 107 F.3d 609, 734 (8th Cir. 1997) (McMillan, J., dissenting))); see also Donna L. Laddy, Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims of Gender Discrimination in Educational and Vocational Programming at Women's Prisons, 5 Temp. Pol. & C.R. L. Rev. 1, 21 (1995) ("[C]ourts should consider factors such as purposes of incarceration and need rather than cost-driven, gender proxy differences between prison populations." (footnote omitted)).

286. *Women Prisoners*, 93 F.3d at 951.

287. Id.

288. Id.

289. Id. at 952 (internal quotation marks omitted) (quoting United States v. Virginia, 518 U.S. 515, 545 (1996)).

290. Kent Greenawalt, How Empty Is the Idea of Equality?, 83 Colum. L. Rev. 1167, 1178–79 (1983) (explaining that substantive norms of equality are different from other norms of equality in that it centers on "a particular concrete choice" and "particular individuals" who come with set equality characteristics).

national origin,[291] disability,[292] and, after *Bostock v. Clayton County*, sexuality and gender identity.[293] Education and experience, however, are characteristics that can properly distinguish individuals. In voting, the list of characteristics that constitute substantive equality norms expands, excluding nearly all factors except age, nationality, and basic competency pursuant to a court judgment.[294] When it comes to public accommodations, federal law permits distinguishing individuals based on sex (and LGBTQ+ status), as there is no federal public accommodations law prohibiting sex discrimination.[295]

In framing a certain resource at issue then, we cannot manipulate its description in ways that refer to forbidden characteristics.[296] Take wedding cakes for example. Let us frame the product as a "different-sex wedding cake." Framing the resource in that way will situate people who engage in

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291. See 42 U.S.C. § 2000e-2 (2018).

292. See 42 U.S.C. § 12112.

293. 140 S. Ct. 1731 (2020). *Bostock*'s holding, of course, is subject to new and developing limitations. See Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n, 70 F.4th 914, 937 (5th Cir. 2023) ("[The Religious Freedom Restoration Act] requires that Braidwood, on an individual level, be exempted from Title VII because compliance with Title VII post-*Bostock* would substantially burden its ability to operate per its religious beliefs about homosexual and transgender conduct."); A. Russell, Note, *Bostock v. Clayton County*: The Implications of a Binary Bias, 106 Cornell L. Rev. 1601, 1612 (2021) (explaining that *Bostock* "reflects and reinvents . . . patterns of nonbinary erasure").

294. Charles P. Sabatino, Guardianship and the Right to Vote, ABA Hum. Rts. Mag. (June 25, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/guardianship-and-the-right-to-vote/ (on file with the *Columbia Law Review*).

295. Title II of the Civil Rights Act of 1964 prohibits "discrimination or segregation on the ground of race, color, religion, or national origin" in public accommodations but not on the ground of sex. 42 U.S.C. § 2000a(a). In the early 1970s, the National Organization for Women (NOW) sought to add "sex" as a prohibited basis for discrimination under Title II of the Civil Rights Act, but this effort was ultimately unsuccessful. See Elizabeth Sepper & Deborah Dinner, Sex in Public, 129 Yale L.J. 78, 103 (2019); see also Ira C. Lupu & Robert W. Tuttle, Same-Sex Family Equality and Religious Freedom, 5 Nw. J.L. & Soc. Pol'y 274, 287 (2010) ("Same-sex couples have no federal constitutional right to be free from discrimination, based on sexual orientation, in the non-governmental provision of goods and services.").

296. Arguably, the same problem exists in *Hardwick*. By referring to the issue there as involving exclusively homosexual sodomy, as noted supra notes 53–58 and accompanying text, the Court was able to limit the "product" subject to constitutional analysis. The Court described in disparaging terms the historical treatment of "homosexual" sodomy (as opposed to heterosexual sodomy), and thus concluded that the particular behavior did not deserve protection. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) ("Proscriptions against that conduct have ancient roots."). As Justice Stevens notes in dissent,

> Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. But his claim that [the law] involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Id. at 201 (Stevens, J., dissenting) (citations omitted).

same-sex and different-sex weddings differently. As we stipulate above,[297] that is equivalent to situating people who are gay and straight differently in the first place. Along those lines, framing the insurance policy in *Doe* as an AIDS-restrictive insurance policy, which would situate people with a certain disability (AIDS) and people without differently, is similarly problematic. In *Women Prisoners*, the majority sought to address Judge Rogers's concerns by noting that sex segregation in prisons does not violate equal protection principles, and that the resultant prison differentiation in terms of size and other characteristics was therefore a valid factor to take into account—in other words, only factors resulting from *illegitimate* discrimination must be excluded from a similarly situatedness analysis.[298] But even if one agrees with the majority that prison characteristics are not inherently related to sex, the question in *Doe* or *Masterpiece Cakeshop* is not even close—*the product is defined precisely in terms of the group in question.*

One response to this Article's argument is to draw a further distinction between the *Women Prisoners* case (and similar equal protection cases) and the cases here. On one hand, in *Women Prisoners*, women were not given equal access to facilities (however framed). In the examples above, on the other hand, gay people and people with AIDS are *given* access to the good in question. But if the question in *Women Prisoners* was simply about accessing particular facilities, then there would be no case—the answer was clearly that women did not have access to the facilities. Rather, the fundamental question in *Women Prisoners* was whether the plaintiffs were given access to *unequal* resources to men. Under the majority's analysis, the answer was no.[299] The dissent held the answer was yes.[300] They framed what an "unequal resource" was in different ways because they disagreed on what factors should be taken into account in assessing how to compare groups. In *Masterpiece Cakeshop* and *Doe*, the question is also whether the minorities in question have access to a resource on equal terms.[301] And in determining the answer, one cannot gerrymander the nature of the resource based on the characteristics of the group in question to render them dissimilarly situated.

That does not mean that we cannot manipulate the description of the resource in other ways that produce a disparate impact. For example, a cakeshop might say that it does not make rainbow cakes as they are too

297. That is, the stipulation at the beginning of this Part that the status–conduct distinction between gay identity and same-sex marriage is invalid.

298. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 926–27 (D.C. Cir. 1996).

299. See id. at 932.

300. See id. at 951.

301. See Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999); see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018).

laborious. It may be the case that gay people order rainbow cakes more,[302] and therefore that decision will harm them more. The decision to exclude rainbow cakes might indeed be grounded in the intent to deter gay customers. But as long as gay people are given equal access to nonrainbow cakes (and in contexts, like here, in which disparate impact is not prohibited),[303] then equal access is not violated. The key point is that framing the good at issue as a rainbow cake is acceptable as rainbowness does not constitute gay identity in the same way that gay marriage does.[304] Framing the cake as a non-gay(-marriage) cake is circular. And of course, defenses to claims of animus including supply chain issues or other problems discussed in the previous section continue to apply.[305]

CONCLUSION

Refusal to provide marriage-related services because of antipathy to same-sex marriage is discrimination. The Supreme Court's conservative majority has sought to sweeten its overhaul of First Amendment law to favor powerful religious majorities by painting the harms to LGBTQ+ communities as minimal. This is not a new strategy. In previous cases in which the Court held in favor of gay people, dissents, usually penned by Justice Antonin Scalia, painted gay individuals as powerful, wealthy, and capable of getting their way in legislatures and courts.[306] The burdens they faced were therefore ephemeral and limited. Similarly, today, the Court paints the harms of discrimination as minimal, and magnifies the burdens on those who oppose same-sex marriage, with both doctrinal and normative consequences.

In so doing, courts that claim that no discrimination has occurred denigrate gay people even further. What they seek can only be achieved by carving out marriage to someone of the same sex from gay identity, even though marriage constitutes the kind of behavior, conduct, and indeed, love that is often central to gay identity. The manipulation of the identity by these courts goes even further, as they seek to define the symbols of gay identity in ways that erase it.

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302. See Manuel Betancourt, The Radical History of the Rainbow Cake, Food52 (June 2, 2019), https://food52.com/blog/22603-rainbow-cake-40th-anniversary-gilbert-baker [https://perma.cc/FCZ7-V44S].

303. Cf. Mary Crossley, Becoming Visible: The ADA's Impact on Health Care for Persons With Disabilities, 52 Ala. L. Rev. 51, 68, 81 (2000) (noting that the "ADA clearly contemplates reaching at least some forms of disparate impact discrimination" but that the situation with respect to insurance is "murkier").

304. Whether or not something constitutes an identity is an objective inquiry based on social circumstances. It does not depend on the subjective attitudes and associations of the parties involved. The determination depends on social circumstances and artifacts of identity as scholars of queer theory have documented; definitions might be contested.

305. See supra Part III.A.

306. See, e.g., Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (arguing that gay people "enjoy[] enormous influence in American media and politics").

Recognizing services denials for what they are—acts of real discrimination and harm that gay couples face from their fellow citizens—is at least an honest accounting of the stakes involved. Those seeking to deny services may have speech interests, but those experiencing the denials can suffer a loss of resources, material and dignitary, because of the discrimination they experience.[307] The Court may yet decide that notwithstanding this discrimination, *the putative speech rights of the refusers must win the day*. But it owes at least an honest accounting of what is at stake before depriving individuals of these basic benefits.

307. See Brief of Amici Curiae Colorado Organizations & Individuals in Support of Respondents, supra note 41, at 26.