Speech, Complicity, Scarcity, and Public Accommodation

*Christopher R. Green**

303 Creative LLC v. Elenis[1] is the Supreme Court's second, but almost certainly not its last, case on the extent of state power to require wedding-related professionals to participate in same-sex wedding ceremonies or their accoutrements. Five years ago, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* held, in one of Justice Anthony Kennedy's last opinions for the Court, that Colorado had been improperly hostile to baker Jack Phillips's religious views in requiring him to design a cake for a same-sex wedding.[2] This time, after limiting the question presented to free speech,[3] the Court held that requiring Lorie Smith to prepare websites for same-sex weddings if she prepared them for traditional weddings would unconstitutionally compel her to speak, akin to requiring a group to salute the flag[4] or to add discordant

* Jamie L. Whitten Chair in Law and Government, University of Mississippi School of Law. Thanks to Will Berry, Steve Crampton, Richard Epstein, Adam Grainger, David Upham, and Randall Wenger for conversation.

[1] 143 S. Ct. 2298 (2023).

[2] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

[3] The petition for certiorari included a full gamut of free-exercise as well as free-speech issues: "The questions presented are: 1. Whether applying a public-accommodation law to compel an artist to speak or stay silent, contrary to the artist's sincerely held religious beliefs, violates the Free Speech or Free Exercise Clauses of the First Amendment. 2. Whether a public-accommodations law that authorizes secular but not religious exemptions is generally applicable under *Smith*, and if so, whether this Court should overrule Smith." Petition for Writ of Certiorari at i, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476). The Court granted review limited to the free-speech question: "Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022). This is the same as the petitioner's first question presented, only deleting "contrary to the artist's sincerely held religious beliefs" and the reference to the Free Exercise Clause.

[4] West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

elements to its parade[5] or its membership.[6] Justice Neil Gorsuch, who like Justice Kennedy had written in support of the rights of those in same-sex relationships in other contexts,[7] wrote for the Court's six-Justice majority.[8]

Justiciability and ripeness consumed a surprising amount of the initial media coverage of the case. Unlike many other similar controversies, which have featured a particular couple denied wedding-related services, Smith filed a pre-enforcement suit against Colorado officials based on the "credible threat" that they would treat her as they had treated Jack Phillips.[9] The Court mentioned that she was "worrie[d]" that Colorado would enforce its public-accommodation laws against her if she added wedding-related services to her business, but this, of course, was just a description of her motivation, not a new standard for ripeness. Shortly after the decision, however, District Judge Carlton Reeves joked about the "worries" language: "In certain civil rights claims, we have just learned, a plaintiff can establish subject matter jurisdiction merely by expressing 'worries' about the defendant's future course of conduct."[10] But Smith met the long-established "credible threat" requirement not merely by being worried, but by pointing

[5] Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995).

[6] Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

[7] Three years before *303 Creative*, Justice Gorsuch had written for the Court in interpreting Title VII to include discrimination based on homosexual or transgender status in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Three years before *Masterpiece*, Justice Kennedy had written for the Court in requiring states to recognize same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

[8] While *Masterpiece* was 7–2, with Justices Stephen Breyer and Elena Kagan joining the majority and only Justices Ruth Bader Ginsburg and Sonia Sotomayor dissenting, *303 Creative* was 6–3, with Justices Sotomayor, Kagan, and Ketanji Brown Jackson all dissenting.

[9] *See 303 Creative*, 143 S. Ct. at 2308–09.

[10] Bullock v. Revell Enterprises, LLC, 2023 WL 4355036, at *1 (S.D. Miss. July 5, 2023) (citing *303 Creative*). Judge Reeves had dealt with ripeness issues at length in an earlier opinion, creatively finding a range of injuries from Mississippi's House Bill 1523, a bill passed in the wake of *Obergefell* to accommodate individual public employees with objections to same-sex marriage. The Fifth Circuit found no justiciable injury and the Supreme Court denied review. *See* Barber v. Bryant, 193 F. Supp. 3d 677, 697–703 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017), *rehearing and rehearing en banc denied,* 872 F.3d 671, *cert. denied*, 138 S. Ct. 652 (2018), *cert. denied sub. nom.* Campaign for Southern Equality v. Bryant, 138 S. Ct. 671 (2018).

to Colorado's history with the likes of Jack Phillips. *The New Republic* further added to the drama over whether Smith's claims were ripe by reporting breathlessly that some of the information submitted to the district court on the ripeness issue—but not relied on by the Tenth Circuit or the Supreme Court—was possibly fake.[11] The controversy between Smith and Colorado, though, was all too real.

The Court's opinion gave little attention to the sorts of doctrinal "tiers of scrutiny" details that have sometimes filled other cases. A lessening of enthusiasm for the tiers may thus be a trend. Last year's gun case, for instance, anchored limits in Second Amendment law in particular exemplars of traditionally accepted gun regulations, rather than the means-end scrutiny that lower courts had been using.[12] *303 Creative* similarly rooted its analysis in particular instances of compelled speech rather than doctrinal labels and categories. The Court mentioned "strict scrutiny" only in recapitulating the lower court,[13] mentioned "compelling interest" only in describing an earlier holding,[14] and did not mention tailoring at all. The Court instead resolved the case by directly comparing Lorie Smith's situation to the particular fact patterns in its precedents—the Jehovah's Witnesses resisting the flag salute,[15] the Boston St. Patrick's Day parade resisting inclusion of a gay-rights group,[16] and the Boy Scouts resisting membership for a gay scoutmaster.[17] The Court similarly resisted counterarguments with a few fact patterns, not doctrinal labels: a Muslim filmmaker required to make a Zionist film, an atheist required to paint an evangelical mural, or someone in a same-sex marriage required to design websites for anti-same-sex-marriage advocates.[18] Future cases will surely test what sorts of work related to same-sex weddings might count as the vendor's "speech." Are florists speaking in their own voice? Photographers? Calligraphers? Bakers? Musicians? DJs? The "guy who provides

[11] *See* Melissa Gira Grant, *The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, The New Republic (June 29, 2023), https://tinyurl.com/4b384rdf.

[12] N.Y. Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2126–27 (2022).

[13] *303 Creative*, 143 S. Ct. at 2310.

[14] *Id*. at 2314 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984)).

[15] *Barnette*, 319 U.S. at 624.

[16] *Hurley*, 515 U.S. 557.

[17] *Boy Scouts of America*, 530 U.S. 640.

[18] *303 Creative*, 143 S. Ct. at 2314.

the chairs"?[19] Because Colorado had stipulated that the proposed wedding websites would in fact be speech,[20] none of these follow-on questions were posed directly. To decide in Lorie Smith's favor, the Court only had to take the small additional step beyond the stipulation of concluding that the websites would be partly *her* speech, and not just her customers'.[21]

Colorado's concession on the expressive nature of Smith's proposed websites also meant the Court could avoid considering the broader issue of complicity. Even if *services* themselves are non-expressive—as in the "guy who provides the chairs" example—might compelled commercial interaction itself sometimes be deemed to be expressive? This was the big issue involved in the parade and membership cases, *Hurley* and *Boy Scouts*, as well as cases in which freedom-of-association claims failed, like *Runyon v. McCrary* (no exemption to ban on racially discriminatory school admissions), *Roberts v. U.S. Jaycees* (another membership case), and *Rumsfeld v. FAIR* (requiring law schools to allow the military to recruit). Did inclusion of another group in a parade change the parade's message? Would the inclusion of a gay scoutmaster amount to compelled "expressive association"? The Court in *Hurley* and *Boy Scouts* said yes. In *Runyon*, though, the Court relied on a lower court assessment that "there is no showing that discontinuance of (the) discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."[22] In *Roberts*, the Court similarly held, "The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[23] In *FAIR*, the Court said that merely arranging meetings was not expressive: "The only expressive activity required of the law schools, the Court found, involved the posting of logistical notices along these lines: 'The U. S. Army recruiter will meet interested students in Room 123 at 11 a.m.'"[24]

[19] *See* Transcript of Oral Argument at 40, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476) (question of Justice Kagan).

[20] *303 Creative*, 143 S. Ct. at 2309.

[21] *Id*. at 2313.

[22] 427 U.S. 160, 176 (1976).

[23] 468 U.S. 609, 627 (1984).

[24] *303 Creative*, 143 S. Ct. at 2317 (quoting Rumsfeld v. FAIR, 547 U.S. 47, 61–62 (2006)).

Controversies over when marketplace interactions express complicity with another's actions are very difficult. Unsurprisingly, they have ancient roots, and they were difficult for the ancients to resolve too. Paul's letters to the Corinthians, for instance, discussed whether and when purchasing or eating meat that had been sacrificed to an idol would improperly send a message of approval of idol worship. Meat is not in itself expressive, but depending on the context, eating it can send a message. Paul offered four hypotheticals, two of which he thought were cases of improper encouragement of idol worship and two of which he did not. The easy case of complicity was eating in a temple itself: "[I]f anyone sees you who have knowledge eating in an idol's temple, will he not be encouraged, if his conscience is weak, to eat food offered to idols?"[25] At the other end of the spectrum, Paul told the Corinthians that when shopping in a marketplace, they should feel free to buy meat that may well have been sacrificed to an idol, but was not labeled as such. "Eat whatever is sold in the meat market without raising any question on the ground of conscience."[26] In the middle were two cases of eating in another's house. As long as nothing is said about sacrifice, there was no illicit complicity: "If one of the unbelievers invites you to dinner and you are disposed to go, eat whatever is set before you without raising any question on the ground of conscience."[27] However, when food is explicitly presented as having been offered to an idol, Paul told the Corinthians not to eat it. "But if someone says to you, 'This has been offered in sacrifice,' then do not eat it, for the sake of the one who informed you, and for the sake of conscience—I do not mean your conscience, but his."[28] Note that Paul did not tell the Corinthians to refuse to condone idol worship because he wanted them to express hostility to idol worshippers as people, but because he wanted them to serve unbelievers' own best interests—"for the sake of the one who informed you." The most charitable interpretation of objections to participation in same-sex weddings is similar: not as expressing bigoted hostility to others' well-being, but expressing a different view about what would in fact promote those interests.

[25] 1 Cor. 8:10.

[26] 1 Cor. 10:25.

[27] 1 Cor. 10:27.

[28] 1 Cor. 10:28-29.

For all its attention to the word "speech" in the First Amendment, the Court yet again[29] ignored the first word of the First Amendment—"Congress"—and did not mention the Fourteenth Amendment even in passing. The First Amendment was, of course, written to limit the activities not of states, but of a federal government with a much more limited menu of responsibilities. As the first Justice Jackson explained in his dissent in *Beauharnais v. Illinois*, and as the second Justice Harlan reiterated many times without ever receiving a compelling reply from his fellow Justices, the federal and state governments' different responsibilities make different collections of rights sensible with respect to the two governments.[30] Entrepreneurial rights and the right to engage in professions, for instance, are critically important for citizens against states, and the "right . . . to make contracts" was the very first right listed in the Civil Rights Act of 1866, which the Fourteenth Amendment proposed to constitutionalize. But the federal government lacks any general regulatory power over labor conditions; even the most severe abuse of the right to work—slavery in the states—lay beyond the commerce power at the Founding,[31] and the Thirteenth Amendment did not change the commerce power itself. The Bill of Rights of 1791 was thus not designed as a guide for establishing an inclusive republic for all citizens in the context of a general governmental power over

[29] *See, e.g.*, Counterman v. Colorado, 143 S. Ct. 2106 (2023) (the Court, in a decision issued three days before *303 Creative*, deciding a First Amendment case involving a state, but not even mentioning the Fourteenth Amendment).

[30] 343 U.S. 250, 287–95 (1952) (Jackson, J., dissenting); *see also* Roth v. United States, 354 U.S. 476, 503-07 (1957) (Harlan, J., dissenting); Zelman v. Simmons-Harris, 536 U.S. 639, 679 (2002) (Thomas, J., concurring); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *but see* First National Bank of Bos. v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (noting Court's rejection of the view that Jackson and Harlan "advanced forcefully," but not answering their arguments); McDonald v. Chicago, 561 U.S. 742, 784 (2010) (noting that Harlan argued "repeatedly and eloquently" and that he "fought a determined rearguard action," but that he failed to persuade the Court, and again, failing to answer Jackson and Harlan's argument about the difference between state and federal responsibilities).

[31] Besides the historical "federal consensus" behind this proposition, the lack of federal power over slavery in the states is made perfectly plain by Article I section 9 clause 1's careful limitation in time and space of congressional power to control the slave trade. For states not "now existing"—i.e., territories—Congress had power to do what it did in the Northwest Ordinance: exclude slavery altogether. But for existing states, Congress only had the power to limit the slave *trade*, and only beginning in 1808. That would make no sense if its commerce power extended to the power to prohibit slavery itself in existing states.

citizens' professional lives. Like the federal government itself, it had a much more limited aim. If instead of the 1791 meaning of "speech," the Court had focused on the 1868 meaning of "privileges or immunities of citizens of the United States," it could have struck a much more significant and historically grounded blow in favor of liberty and equality. The Fourteenth Amendment guarantees equality in civil rights for all similarly-situated citizens of each state, whatever their religious or political creed,[32] and thus secures the equal right of all citizens to enter *all* professions, even those not oriented around speech. Because this entrepreneurial liberty is "subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole,"[33] however, detailed knowledge of traditional uses of the police power is essential. In the future, as the Court tests the limits of what counts as "speech" under *303 Creative*, arguments from equal citizenship will remain important if those speech claims fall short. When that happens, clarity about the historical scope of states' police power will be essential.

Because of the Court's lack of doctrinal emphasis on the details of the state's interests, it had no need to characterize the interests served by public-accommodation law with much precision. The Court noted only that historically, public-accommodation laws were important in situations of local scarcity:

> Statutes like Colorado's grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants. Often, these enterprises exercised something like monopoly power or hosted or transported others or their belongings much like bailees. Over time, some States, Colorado included, have expanded the reach of these nondiscrimination rules to cover virtually every place of business engaged in any sales to the public.[34]

[32] *See, e.g.*, Civil Rights Act of 1875, 18 Stat. 335 (1875) ("equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political").

[33] Corfield v. Coryell, 6 Fed. Cas. 546, 552 (E.D. Pa. 1825); *cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 at n.22 (2022) (recognizing the importance of *Corfield* to interpreting the Privileges or Immunities Clause).

[34] *303 Creative*, 143 S. Ct. at 2314 (citations omitted); *cf. id*. at 2326 (Sotomayor, J., dissenting) (reading Court to "suggest that public accommodations or common carriers historically assumed duties to serve all comers because they enjoyed monopolies or otherwise had market power").

In saying only this, the Court thus did not accept the invitation of some amici, including this author, to tie the legitimate goals of public-accommodation law directly to local scarcity, in line with the Court's limited historic permission for special regulation of businesses "clothed with a public interest."[35] But neither did the Court reject such a theory, as the dissenters did at length.[36] The Court's failure to agree with the dissenters on this point leaves a scarcity-based approach to Fourteenth Amendment entrepreneurial liberty clearly viable. The weakness of the dissent's response on this score, moreover, should give advocates of a scarcity-based limit considerable optimism for its future success. The bulk of the rest of this essay will explain what the majority might have said in response to the dissent had it followed such a path, or should it follow it in the future.

The idea that not all businesses that offer to serve the public are "clothed with a public interest" traces back to Lord Chief Justice Matthew Hale's seventeenth-century treatise, *De Portibus Maris*. Hale discussed special duties placed on wharves because of their unique place in the economy: "because they are the wharfs only licensed by the queen . . . or because there is no other wharf in that port."[37] In the 1877 case of *Munn v. Illinois* and its companion cases, the Supreme Court took Hale's scarcity-based analysis of public-accommodation duties as its framework for assessing the constitutionality of the use of the police power to regulate grain elevators and railroads.[38] The Court's most pointed explanation of the *Munn* doctrine, and its most pointed rejection of the *303 Creative* dissent's view of public-accommodation law, came a hundred years ago, in 1923's unanimous *Charles Wolff Packing* case: "[O]ne does not devote one's property or business to the public use or clothe it with a public interest merely

[35] Brief of Law and Economics Scholars as Amici Curiae Supporting Petitioners at 14–17, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476), 2022 WL 2048478; Brief of Professor Christopher R. Green as Amicus Curiae Supporting Petitioners at 22–32, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476), 2022 WL 2047742.

[36] *303 Creative*, 143 S. Ct. at 2323–29 (Sotomayor, J., dissenting).

[37] Matthew Hale, De Portibus Maris, *in* Francis Hargrave, A Collection of Tracts Relative to the Law of England 77 (Professional Books Ltd., 1982) (1787).

[38] Munn v. Illinois, 94 U.S. 113, 126–30 (1877); Chicago, Burlington, & Quincy Railroad Co. v. Iowa, 94 U.S. 155, 161 (1877); Peik v. Chicago & North-Western Railway Co., 94 U.S. 164, 176 (1877).

because one makes commodities for, and sells to, the public . . ."[39] Scarcity was very clearly the key for the Court: "the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."[40] Besides cases like *Charles Wolff Packing*, early-twentieth-century thinkers like Harvard law professor Bruce Wyman explained a scarcity-based rationale for public-accommodation duties at great length.[41] Alfred Avins later identified two dozen "representative cases about the monopoly characteristics of common carriers and their franchises and licenses."[42] None of this material, alas, is mentioned by the *303 Creative* dissent. The clothed-with-a-public-interest doctrine has, moreover, been important for equality, not just liberty. *Munn* was the basis for the first Justice Harlan's dissent in the *Civil Rights Cases* of 1883[43] as well as Senator Warren Magnuson's February 1964 report for the Senate Commerce Committee in support of what became Title II of the Civil Rights Act of 1964.[44]

The *303 Creative* dissenters painted a very different picture of the common law; they thought the issue was important enough that they began here, rather than with the compelled-speech issue presented

[39] Charles Wolff Packing Co. v. Ct. of Indus. Rels., 262 U.S. 522, 537 (1923). While the Court took a very relaxed approach to the *Munn* issue in *Nebbia v. New York*, 291 U.S. 502 (1934), it did not overrule *Charles Wolff Packing*, and in fact relied on it. *See id*. at 536.

[40] *Id*. at 538.

[41] Bruce Wyman, The Special Law Governing Public Service Corporations (1911). Wyman had given a much slimmer version of the account in earlier articles, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156 (1904), and *The Inherent Limitation of the Public Service Duty to Particular Classes*, 23 Harv. L. Rev. 339 (1910), and in a treatise co-authored with Joseph Henry Beale, The Law of Railroad Rate Regulation (1907).

[42] Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 Colum. L. Rev. 873, 888 n.80 (1966).

[43] 109 U.S. 3, 41–42 (1883) (Harlan, J., dissenting).

[44] S. Rep. No. 88-872, at 9 (1964) (also noting reliance of *Munn* on Lord Chief Justice Hale). *See also* 110 Cong. Rec. 7403 (1964) (Senator Magnuson again relying on Hale and *Munn*); *id*. at 14185 (same). The House report similarly focused on tangible needs of commercial access: "If we consider the matter solely in commercial and economic terms, we can also substantiate the need for Title II. . . . The strain of traveling long distances without respite, the nagging uncertainty of locating a decent place to eat or sleep, or the fear of finding oneself on a lonely road at night with car trouble and no place to turn for assistance has forced innumerable families and individuals to stay at home." H. Rep. No. 88–914, pt. 2, at 9 (1963).

by the Court. The dissenters recapitulated at considerable length the account of public-accommodation law by another Harvard professor, Joseph Singer.[45] Justice Sonia Sotomayor, writing for the dissenters, presented public-accommodation law as serving two independent purposes: equal access to goods and equal dignity.[46] The independence of these purposes was critical to the dissenters' view. They contended that requiring those in the market to express respect for other citizens' views about human flourishing, *even if those other citizens already have full access to all relevant goods and services*, is still an important governmental rationale. But the very sources the dissent relied on at this point show that these two goals are not independent. Justice Sotomayor quoted *Heart of Atlanta Motel*'s reference to Senator Magnuson's concern with "the deprivation of personal dignity *that surely accompanies* denials of equal access to public establishments."[47] Freestanding dignity, *unaccompanied* by the denial of equal access to the market, was obviously not at issue. And as noted earlier, Magnuson took his cue on the nature of the common law from Lord Chief Justice Hale and *Munn*. Sotomayor then used two examples here that do not make her point at all: the Brooklyn Dodgers being required to split up the overnight accommodations for its team because of discrimination against players like Jackie Robinson,[48] and a same-sex couple in Mississippi being required to go 70 miles down the road for funeral-home services.[49] Both of these hypotheticals feature access to the market that is clearly different in

[45] *303 Creative*, 143 S. Ct. at 2323–29 (Sotomayor, J., dissenting) (citing and recapitulating Joseph W. Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283 (1996)). Singer and two other law professors filed an amicus brief in the case. *See* Brief of Public Accommodations Law Scholars as Amici Curiae in Support of Respondents, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476), 2022 WL 3648218. The same three professors and two others had written a similar brief in *Masterpiece*. Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127312.

[46] *303 Creative*, 143 S. Ct. at 2323–24 (Sotomayor, J., dissenting).

[47] *Id*. at 2324 (quoting Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 250 (1964), in turn quoting S. Rep. No. 88-872, at 22) (emphasis added). Sotomayor would return to this page of the Senate report later in her dissent. *See id*. at 2328.

[48] *Id*. at 2324 (citing J. Oleske, *The Evolution of Accommodation*, 50 Harv. Civ. Rights-Civ. Lib. L. Rev. 99, 138 (2015)).

[49] *Id*.

tangible ways because of the local scarcity of a good or service, not the mere unadorned expression of "otherness."[50]

Sotomayor next argued that imposing a duty on all businesses open to the public was narrowly tailored to achieve the goals of public-accommodation law.[51] However, the case that she cited at this point, *Roberts v. U.S. Jaycees*, described the compelling importance not of merely avoiding dignitary harm, but of women obtaining equal access to "leadership skills," "business contacts," and "employment promotions."[52] *Roberts* said nothing about the tailoring of an any-business-serving-the-public criterion to the avoidance of purely dignitary harm severed from any market-access limits. Indeed, it is hard to see how the use of public-accommodation law in this context could ever be narrowly tailored to promote dignity by avoiding unpleasant messages in the marketplace. Equivalently upsetting messages are often publicly expressed by those who are *not* in the market. Using public-accommodation law to promote dignity unaccompanied by tangible impact on market access will thus always be woefully underinclusive. Imagine a prospective plaintiff, in the market for wedding-related goods and services, walking along a city street. Behind door number 1 is someone like Jack Phillips or Lorie Smith, who is willing to sell goods and services for some weddings but not for weddings like the plaintiff's, and who makes this view painfully obvious by posting a sign at the door. The plaintiff is offended and thinks of suing. But then the plaintiff looks next door and finds, behind door number 2, another vendor perfectly willing to scoop up the profits abandoned by the vendor behind door number 1. After obtaining the goods and services, the plaintiff happily heads out the door. But this happiness is short-lived as the plaintiff walks past door number 3, the former shop of someone like Barronelle Stutzman, who no longer sells goods or services to anyone,[53] but who still includes a sign at her

[50] *Id*. at 2324–25 (citing K. Williams, *Ostracism*, 58 Ann. Rev. Psychology 425, 432–435 (2007)).

[51] *Id*. at 2325.

[52] Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984).

[53] *See* State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017), *cert. granted, judgment vacated*, Arlene's Flowers v. Washington, 138 S. Ct. 2671 (2018), *on remand*, State v. Arlene's Flowers, 441 P.3d 1203 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021), *rehearing petition dismissed*, 142 S. Ct. 521. For Stutzman's statement on settling her case, see Letter from Barronelle Stutzman (Nov. 17, 2021), https://tinyurl.com/rex9mftc.

door expressing support for the vendor behind door number 1. The plaintiff is again offended, in the same way and for the same reason as before, but of course cannot sue a vendor who has already left the market. Living in a nation with a First Amendment—and analogous principles governing states!—means sometimes encountering the expression of views about human flourishing that one may find distasteful. Shorn of any actual impairment of market access, there is no reason to allow a suit against the door 1 vendor that would not also apply against the equally offensive sign displayed by the door 3 former vendor. Because the dignity-promoting goal of public-accommodation law requires far more than any such law could ever achieve, such a purpose is inevitably poorly tailored to its coverage.

After presenting this picture of the dual, independent purposes of public-accommodation law, Sotomayor explained its supposed roots in the common law, citing five cases, four treatises, and an article. A careful examination of all nine of these sources undermines the dissent's claim. Following Singer, the dissent began[54] with Lord Chief Justice Holt's explanation of common-carrier law in 1701 in *Lane v. Cotton*, which said that common-carrier duties attach "where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects."[55] Singer and the dissent read Holt's "take upon himself a public trust" to refer to any offer to the public, in any sort of business at all. They similarly read the reference in the very short 1710 case *Gisbourn v. Hurst* to "any man undertaking for hire to carry the goods of all persons indifferently."[56] But in the light of another of Holt's cases called *Coggs v. Bernard* from 1703, which went unmentioned by the dissent, this interpretation of *Lane* is not plausible. Only in certain contexts would a universal offer subject sellers to special public-accommodation duties. It is a mistake to confuse the criterion used in particular fields that feature local scarcity as if it were a general rationale that applied everywhere. *Coggs* explained that the special regulation of common carriers was "contrived by the policy of the law, for the safety of all persons, the *necessity of whose affairs* oblige them to trust these sorts

[54] *303 Creative*, 143 S. Ct. at 2325–26 (Sotomayor, J., dissenting).

[55] 88 Eng. Rep. 1458, 1465 (K.B. 1701).

[56] 91 Eng. Rep. 220, 220 (K.B. 1710).

of persons."[57] The idea is that by inviting the public to rely on a general offer—for instance, by leaving home in the belief that certain services are regularly available without subjecting the vulnerable to price gouging—common carriers help *induce* local scarcity of certain goods and services. Sotomayor quoted Singer's statement that *Lane* was "cited over and over again in the nineteenth century in the United States."[58] However, *Coggs* was cited repeatedly as well,[59] and so was Lord Chief Justice Hale, most prominently in *Munn*, but in many other cases too.[60]

Like Sotomayor's erroneous assumption that the dignitary and market-access goals of common-carrier law are independent, Singer's key mistake in his account of the common law is his assumption that local scarcity of goods and services, on the one hand, and a vendor's general offer to the public, on the other, represent two *different* rationales, rather than two aspects of *one* rationale. Singer simply ignores thinkers like Lord Chief Justice Hale and the way that *Munn* heavily relies on him. The best account is to harmonize these two emphases: local scarcity, *induced by reliance on a general offer to the public*, is why common carriers and others at critical marketplace junctures or bottlenecks are subject to special duties to serve everyone. Preventing common carriers from backing out of their general offers prevents the bait-and-switch exploitation of the vulnerable. It is thus a mistake to put two possible justifications for common-carrier law—the fact that travelers have nowhere else to turn, and the fact that common carriers have held themselves out to the public to be trusted—in competition.

[57] 92 Eng. Rep. 107, 112 (K.B. 1703).

[58] *303 Creative*, 143 S. Ct. at 2325–26 (Sotomayor, J., dissenting) (quoting Singer, *supra* note 45, at 1304).

[59] *See, e.g.*, one of the articles on which Sotomayor herself relied, Edward A. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 156 (1914) (calling *Coggs* as well as *Lane* "frequently cited cases").

[60] *See, e.g.*, Young v. Harrison, 6 Ga. 130, 142 (1849) ("I will say, what is well known to jurists, that in England, this work, from which the above principle is extracted, is considered as conclusive upon any question relating to the rights of Sovereign or subject, either in the sea, arms of the sea, or public or private streams of water; and that its authority has been repeatedly recognized in this country."); Enfield Bridge v. Hartford Railroad, 17 Conn. 40, 63–65 (1845) (referring to Hale's treatise merely by citing "Harg. L.T.," i.e., Hargrave's Law Tracts); and a case that *Munn* cites repeatedly, Lord Chief Justice Ellenborough's opinion in Allnutt v. Inglis, 104 Eng. Rep. 206 (K.B. 1810).

To support Singer's claim that *any* business dealing with the public had public-accommodation duties, and indeed that this view was "firmly established in early American case law," Sotomayor cited a string of two treatises and three more cases.[61] James Kent's *Commentaries*, Sotomayor's first source, is a nice explanation of the two emphases of common-carrier law set side by side. It is true that Kent defines common carriers, in the course of describing their bailment duties, as "those persons who undertake to carry goods generally, and for all people indifferently."[62] But *why* were such businesses subject to special duties? The immediately preceding sentence explains, with a footnote to Holt's opinion in *Coggs*, that "the rule is founded on the same broad principles of policy and convenience which govern the case of innkeepers."[63] What principles were those? Five pages earlier, Kent explains in detail why innkeepers were subject to special bailment duties: because there was no other game in town.

> It is not necessary to prove negligence in the innkeeper, for it is his duty to provide honest servants, according to the confidence reposed in him by the public, and he ought to answer civilly for their acts, even if they should rob the guests who sleep under his roof. Rigorous as this law may seem, and hard as it may actually be in some instances, it is, as Sir William Jones observes, founded on the principle of public utility, to which all private considerations ought to yield. Travellers, who must be numerous in a rich and commercial country, *are obliged to rely almost implicitly on the good faith of innkeepers* . . .[64]

Sotomayor's other treatise, by Justice Story, likewise defined common carriers as those who "undertake to carry goods for persons generally."[65] But three pages earlier, Story quoted Holt's rationale for

[61] *303 Creative*, 143 S. Ct. at 2326 (Sotomayor, J., dissenting).

[62] 2 James Kent, Commentaries on American Law 464 (New York, O. Halsted 1827).

[63] *Id*.

[64] *Id*. at 459–60 (emphasis added); *cf*. William Jones, An Essay on the Law of Bailments 96 (Garland Publishing 1978) (1781).

[65] Joseph Story, Commentaries on the Law of Bailments § 495, at 322 (Cambridge, Hilliard & Brown 1832); *cf*. *id*. § 591 at 374–75 (common-carrier obligation "results from their setting themselves up, like innkeepers, farriers, and other carriers, for common public employment.").

common-carrier law from *Coggs*, which explained that it is "contrived by the policy of the law for the safety of all persons, *the necessity of whose affairs* obliges them to trust these sorts of persons."[66] Elsewhere Story referred to common-carrier law as "the public policy of subjecting particular classes of persons to extraordinary responsibility, in *cases where an extraordinary confidence is necessarily reposed* in them."[67] Story went back to Roman-law explanations: "[T]he reason assigned by Ulpian for this edict is, that *it is necessary to place confidence* in such persons . . ."[68] Story quoted the same source on which Kent relied, Sir William Jones, who said that "travellers . . . are obliged to rely almost implicitly on the good faith of innholders."[69]

None of the three early cases cited by the dissenters helps their case:

- *Markham v. Brown* involved an argument, made in reliance on Story's treatise on bailments, that "none but travellers have right in a common inn."[70] This would fit, of course, with the limited solicitude in *Coggs* for those the "necessity of whose affairs oblige them to trust these sorts of persons." The plaintiff in *Markham* was not himself a traveler, but a coach driver who sought to enter an inn to solicit passengers. The court did not reject the inn's argument, saying "perhaps there may be cases in which he may have a right to exclude all but travellers and those who have been sent for by them," but held that it was not necessary to answer the question, because the coach driver's connection to travelers was close enough.
- Justice Story in *Jencks v. Coleman* faced no question about the common-carrier status, beginning his charge to the jury, "There is no doubt, that this steamboat is a common-carrier of passengers for hire."[71] His opinion contained nothing suggesting any difference from his *Coggs*-following views in his bailment treatise.

[66] *Id*. § 490 at 319 (emphasis added).

[67] *Id*. § 464 at 303 (emphasis added).

[68] *Id*. (emphasis added).

[69] *Id*. § 471 at 308 (quoting Jones, *supra* note 64).

[70] 8 N.H. 523, 528 (1837).

[71] 13 Fed. Cas. 442, 443 (C.C.D.R.I. 1835).

- *Dwight v. Brewster* briefly mentioned the issue of whether a common carrier of passengers is also a common carrier of their packages, but without explaining the rationale of the area of law at all.[72] A footnote later added by the reporter on the common-carrier issue cites Kent's Commentaries, which as noted above give an obliged-to-rely-almost-implicitly-on-the-good-faith-of-innkeepers rationale for common-carrier law.[73]

Next, Sotomayor quoted Edward Adler's provocative statement in 1914 that "Nowhere is monopoly suggested as the distinguishing characteristic."[74] Sotomayor glossed this as "nowhere in the relevant case law."[75] However, in context, this referred only to the very old "carrier cases" that Adler had been discussing at that point in his article. Earlier in the article, Adler claimed that "[n]o distinction based upon monopoly between a private and a common carrier *prior to the year 1600* has been set forth."[76] At the point at which Adler makes the "[n]owhere is monopoly suggested" comment, he had been discussing cases prior to the eighteenth century; he had not even yet mentioned *Lane* and *Coggs*.[77] The next page, Adler noted that "a great change took place in business conditions toward the close of the eighteenth century."[78] According to Adler, the railroad was the big driver for changes in the conceptual apparatus applied to common carriers: "In the course of time, with the introduction of railroads, other special and peculiar features, such as the enjoyment of peculiar privileges, franchises, and rights of way, became characteristic of carriage, and the relative importance of the carrier's calling was greatly accentuated."[79] While Adler disagreed with

[72] 18 Mass. 50, 53–54 (1822).

[73] *Id*. at 54 n.1 (footnote citing Kent's Commentaries, not published until five years after the opinion was released in 1822).

[74] *303 Creative*, 143 S. Ct. at 2326 (Sotomayor, J., dissenting) (quoting Adler, *supra* note 59, at 156).

[75] *Id*.

[76] Adler, *supra* note 59, at 148 (emphasis added).

[77] *Id*. at 156; *see also id.* at 156–57 n.77 (quoting the early-eighteenth-century cases).

[78] *Id*. at 157.

[79] *Id*. at 158. Adler quoted Justices Field and Strong's dissent in *Munn*, which would have actually struck down the grain-elevator (and railroad) regulations, at length. *See id*. at 159.

Wyman's local-scarcity-based rationalization of the older common law,[80] Adler knew well that there were many, many nineteenth-century cases agreeing with Wyman. Adler called Wyman's explanation of the distinction between private and public callings the "doctrine uniformly accepted by our courts as well as by students of the common law today."[81] Adler explicitly said he wanted to return to a view of the common law that was "remote . . . from our modern thinking," and the modern thinking of which he spoke was exemplified in cases like *Munn*.[82] Adler's article does not suggest in the slightest that cases like *Charles Wolff Packing* had misread *Munn* itself.

A footnote in the dissent then cited two more treatises (in addition to citing Story's treatise and *Lane* again).[83] William Blackstone included a few sorts of common carriers in his list of those subject to implied contractual duties. "[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller."[84] Note the limit to travelers—i.e., those not in a position to find alternatives—and the reference to damages, the ordinary sort of which would not exist unless local scarcity were involved.

Finally, Sotomayor cited Theophilus Parsons's treatise on contracts. Parsons used the same general definition as Kent and Story, and also like them, Parsons relied on Holt's view in *Coggs* repeatedly. In *Coggs*, Parsons said, Holt "laid the foundation of this system

[80] *See id*. at 148, disagreeing with Wyman's treatise co-authored with Joseph Beale. For some representative samples for how Wyman explains early cases in terms of a local-scarcity rationale, see Wyman, *supra* note 41, at 7 (fewer doctors at the time) and 8 (fewer tailors). For Wyman's general take on the evolution of the common law, see *id*. at 17: "The common law persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. The early cases which were just under discussion are illustrations of this course of events. Barber, surgeon, smith and tailor are no longer in common calling because the situation in the modern times does not require it; but innkeeper, carrier, ferryman and wharfinger are still in that classification, since even in modern business the conditions require them to be so treated."

[81] Adler, *supra* note 59, at 141.

[82] *Id*. at 159.

[83] *303 Creative*, 143 S. Ct. at 2326 n.6 (Sotomayor, J., dissenting).

[84] 3 William Blackstone, Commentaries on the Law of England 164 (Oxford, Clarendon Press 1768).

of law."[85] Parsons referred to "the case of *Coggs v. Bernard*, so often cited."[86] Further, Parsons recapitulated many other scarcity-based explanations of the reason for common-carrier duties put forward by various courts. He quoted Pennsylvania Chief Justice John Gibson on the rationale for imposing common-carrier duties even on merely-occasional wagoners, explaining that America's much lower population density relative to England meant that greater common-carrier duties were appropriate: "[T]he policy of holding him answerable as an insurer was more obviously dictated by the solitary and mountainous regions through which his course for the most part lay, than it is by the frequented thoroughfares of England."[87] Finally, Parsons quoted Connecticut Justice Ellsworth on the inability of passengers to protect themselves: "The driver must, of course, be attentive and watchful. He has, for the time being, committed to his trust, the safety and lives of people, old and young, women and children, locked up as it were in the coach or rail-car, ignorant, helpless, and having no eyes, or ears, or power to guard against dangers, and who look to him for safety in their transportation."[88] Parsons added that the rule stated in the case "has been repeatedly declared to be the law in this country."[89] In short, Parsons, like Lord Chief Justice Holt and the other sources that rely on him, plainly saw common-carrier regulation as a response for preventing owners from taking advantage of particular market bottlenecks, not as a mechanism for requiring everyone in the market to think the same way about human flourishing.

* * *

Sometimes generals and Supreme Court Justices seem to be fighting the last war, rather than the conflict directly requiring their attention.[90] At other times, however, they seem to be fighting the *next*

[85] 1 Theophilus Parsons, The Law of Contracts 569–70 (Boston, Little Brown & Co. 1853).

[86] *Id*. at 590.

[87] *Id*. at 640 note r (quoting Gordon v. Hutchinson, 1 Watts & Serg. 285, 287 (Pa. 1841)).

[88] *Id*. at 691 note m (quoting Derwort v. Loomer, 21 Conn. 245, 253–54 (1851)).

[89] *Id*.

[90] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586–92 (2003) (Scalia, J., dissenting) (devoting the first part of his dissent to an extended criticism of Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

war as well as the one they are in. Given the majority's failure to use a scarcity-based view of public-accommodation law to give relief to Lorie Smith, it is hard to see why the dissenters would devote such space and prominence to rebutting that view, unless they expect to see it make headway in the future. Ideas that are really dead do not deserve this much bother. There is, accordingly, some reason to think that someday soon the Court may give entrepreneurial liberty the sort of attention it received from the Fourteenth Amendment's adopters and from the Court in cases like *Munn* and *Charles Wolff Packing*. When that happens, the precise scope of the Anglo-American traditions of market intervention to promote the general good of all citizens in an inclusive republic will once again be important. This intellectual terrain will be fought over again.