303 CREATIVE LLC, PUBLIC ACCOMMODATIONS LAW, AND THE MANY POSSIBLE FUTURES OF RIGHTS

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INTRODUCTION

303 Creative LLC v. Elenis is the rare case with potential to reshape multiple different legal landscapes. At the narrowest doctrinal level, it continues the Court's decade-long trend of interdicting *any* governmental action that might prospectively chill free expression,[1] regardless of how socially beneficial the governmental interest.[2] The immediate policy impact of *303 Creative LLC* is equally clear: by protecting discriminatory decisions by vendors of public goods as a form of rights expression, the Court threatens to undermine the public accommodations regime that has served as a fulcrum for civil equality in the commercial sphere. Previous decisions have feinted in this direction (*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*)[3] or afforded such protections in the non-commercial context (*Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*; *Boy Scouts of America v. Dale*),[4] but *303 Creative LLC* is the first case to squarely apply it in the commercial context. Such application of private rights to curb government regulation of commercial practice makes *303 Creative LLC* a new zenith in what scholars have deemed a new age of Lochnerism.[5] For progressives, the fact that the decision

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[1] *See generally, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Citizens United v. FEC, 558 U.S. 310 (2010). Professor Almendares's observation about the "bluntness" of the opinion shows how *303 Creative LLC* could potentially accelerate this trend by failing to impose a limiting principle on the doctrine. Nicholas Almendares, *Blunt Speech Rights*, 32 WM. & MARY BILL RTS. J. 919, 919 (2024); *see also* Andrew Koppelman, *Why Gorsuch's Opinion in* 303 Creative *Is So Dangerous*, AM. PROSPECT (July 12, 2023), https://prospect.org/justice/2023-07-12-gorsuch-opinion-303-creative-dangerous/ [https://perma.cc/F6LS-R7PX].

[2] This trend has come under increasing scholarly scrutiny. *E.g.*, Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1241, 1243 (2020). However, the typical scholarly frame is now identifying First Amendment Lochnerism.

[3] *See generally* 584 U.S. 617 (2018).

[4] *See generally* 515 U.S. 557 (1995); 530 U.S. 640 (2000).

[5] *E.g.*, Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133; Elizabeth Sepper,

permitted discrimination against gay marriage makes it,[6] along with cases such as *Dobbs v. Jackson Women's Health Organization*[7] and *Students for Fair Admissions v. President & Fellows of Harvard College*[8] an alarming demonstration of the Roberts Court's declining to prioritize protection of vulnerable groups. Yet for conservatives, *303 Creative LLC* comprises appropriate limitation of increasingly expansive and intrusive state power and a healthy limitation of the residual effects of the Warren's Court's deference to legislatures.[9]

Any one of these trends—increasingly libertarian protection of rights; corresponding attenuation of a long-standing pillar of the civil rights regime; resurgent Lochnerism; and legitimate regulation of state overreach—could plausibly be identified as the most important aspect of *303 Creative LLC*. There is no doubt that scholars will make sense of the opinion through each of them. Yet each of these themes is contextualized by an institutional paradox of rising importance, of which *303 Creative LLC* is a uniquely clear expression. Both sides of the decision reflect a fundamental interest in rights protection (protection of the right to free expression on one side; protection of the right to equal treatment on the other). The framing feature of the decision is that the Court is asserting its own supremacy as the arbiter of the priority of competing rights, as well as its supremacy as a constitutional actor. Whether such a declaration is a continuation of an esteemed constitutional tradition,[10] or validation of concerns regarding juristocratic subversion of democracy,[11] depends upon core assumptions regarding the desirable constitutional order. Yet there is no question that *303 Creative LLC* demonstrates the assertiveness of the current judiciary to advance specific rights and reinforce its status as arbiter of the constitutional order.

The unifying theme of the contributions to this Collection of Essays on *303 Creative LLC*, which emerged from a panel held at the 2024 American Association of Law Schools meeting, is that while *303 Creative LLC* may have brought these

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Free Exercise Lochnerism, 115 COLUM. L. REV. 1453 (2015). The Lochnerist potential of *303 Creative LLC* is the focus of Professor Ferguson's contribution in particular. Lucien Ferguson, *The Limits of Lochnerism*, 32 WM. & MARY BILL RTS. J. 929 (2024).

[6] *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 604 (2023) (Sotomayor, J., dissenting).

[7] *See generally* 597 U.S. 215 (2022).

[8] *See generally* 600 U.S. 181 (2023).

[9] *303 Creative LLC*, 600 U.S. at 592 (citing *Dale*, 530 U.S. at 659) (discussing how the New Jersey public accommodations law could not interfere with the Boy Scouts' right to expressive association and how the same must be true in *303 Creative LLC*); *see also* Richard A. Epstein, *Public Accommodations Under Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1246–47 (2014) (describing Robert Bork's critique of Title II).

[10] This tradition begins, of course, with *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[11] *See generally* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF NEW CONSTITUTIONALISM (2004) (describing the transition to juristocracy); Samuel Moyn, *The Court Is Not Your Friend*, 67 DISSENT 70 (2020); JEREMY WALDRON, LAW AND DISAGREEMENT (2003).

themes forward, their full expositions lie in the hands of Supreme Court jurisprudence that is yet to come. If the Court declines to discipline the wide-ranging principle that underlies *303 Creative LLC*, it could lead to not only to the hamstringing of public accommodations law, but also to radical revision of First Amendment scrutiny more generally.[12] In such a view, the Court may decline standard balancing of government interests and free speech rights in favor of *per se* rules regarding protected speech. Such expansion could also morph into broad protection of economic and contract rights in effect, if not formally.[13] Yet the Court could very well discipline the yet-inchoate principle of *303 Creative LLC* by providing more precise guidance in balancing speech rights and other interests (whether advanced by the legislature or the Supreme Court itself),[14] or by simply indicating with greater clarity when speech rights are activated in specific contexts.[15] Moreover, the general principle established by *303 Creative LLC* over expansive First Amendment rights could be translated to other contexts, with radical and unexpected consequences.[16] In exploring these possibilities, this Collection seeks to anticipate what might come next for both the First Amendment and public accommodations law.

I. CONTEXT, FACTS, AND HOLDING OF *303 CREATIVE LLC*

Public accommodations statutes have long served as a central mechanism for preventing discrimination in the commercial provision of goods and services to the public.[17] Such statutes prohibit vendors from discriminating against customers based on race, gender, sexual orientation, and other protected characteristics.[18] The arc of public accommodation law broadly mirrors the broader arc of civil rights in America. After a period of innovation and uncertainty following the Civil War,[19] congressional

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[12] *See* Almendares, *supra* note 1.

[13] *See* Ferguson, *supra* note 5. However, so far, a majority of the Court appears tentative to take on questions that would establish this principle most explicitly, as Penrose notes. *See* State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1237 (Wash. 2019) (holding that a religious flower shop owner could not discriminate by refusing to provide a same-sex couple wedding flowers), *cert. denied*, 141 S. Ct. 2884 (2021).

[14] *See* Meg Penrose, *Understanding* 303 Creative LLC *in a Polycentric Constitutional World*, 32 WM. & MARY BILL RTS. J. 943, 946, 953 (2024).

[15] *See generally* James M. Oleske, Jr., *Law Office History and the Unrelenting Attack on Public Accommodations Law*, 32 WM. & MARY BILL RTS. J. 959 (2024).

[16] *See* Charquia Wright, *First Amendment Defenses to Alien Transportation Crimes*, 32 WM. & MARY BILL RTS. J. 971, 973–74 (2024); Paul Gowder, *Standpoint Epistemology, the First Amendment, and University Affirmative Action*, 32 WM. & MARY BILL RTS. J. 979, 979 (2024).

[17] 303 Creative LLC v. Elenis, 600 U.S. 570, 612–13 (2023) (Sotomayor, J., dissenting).

[18] *See id.* at 612–15.

[19] See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996) for an exhaustive recounting of public accommodations law in America. As Singer notes, between the end of the Civil War and the rise of Jim

efforts to advance racial equality through public accommodation legislation floundered with the *Civil Rights Cases*.[20] The Supreme Court, assessing a last-ditch congressional effort to pass a national public accommodation law, concluded that since the discriminatory actors were private rather than state actors, Congress lacked authority under the Reconstruction Amendments to advance such legislation.[21] It was not until the Civil Rights Era that a second forceful effort was made to advance public accommodation legislation in the parts of the country where it would have the greatest impact. With Title II of the 1964 Civil Rights Act,[22] Congress again sought nationwide public accommodation legislation but legitimated it by the Commerce Clause and the impact of discriminatory treatment of customers on interstate economic activity—a basis for congressional authority that the Supreme Court found convincing.[23] The national scope of Title II, meanwhile, has been buttressed by state legislation, which often ranges wider than the federal statutory regime.[24]

The past few decades have seen some challenges to the scope of public accommodations laws, however, as non-commercial actors have brought successful challenges based on expressive rights.[25] Yet until *303 Creative LLC*, no successful rights-based challenge had been brought by a predominantly commercial actor. The factual context of *303 Creative LLC* makes it a test case for the durability of public accommodations mandates in the face of an expressive challenge by a commercial actor. The plaintiff was the sole owner-operator of a wedding website design business based in Colorado, the eponymous 303 Creative LLC.[26] In light of previous actions to enforce the Colorado Anti-Discrimination Act (CADA)[27]—a seminal example of a

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Crow, there was a murky period that saw a mix of exclusion, limited access, and integration, even in the South. *Id.* at 1351–52.

[20] *See* 109 U.S. 3, 25 (1883).

[21] *Id.* The underlying principle, the state action doctrine, remains good law, though scholars have been widely critical of it. *See, e.g.*, Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145 (2017); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1380 (2006).

[22] 42 U.S.C. § 2000a (2018).

[23] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 244, 261–62 (1964).

[24] *State Public Accommodations Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (NCSL) (June 25, 2021), https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws [https://perma.cc/2JLR-FY6N].

[25] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 568 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000). Notably, the case that most directly prefigures *303 Creative LLC* as a practical matter, *Masterpiece Cakeshop*, did not address the constitutionality of a public accommodation statute, but rather indicated a requirement for neutrality in the administrative adjudication of claims of discrimination. 584 U.S. 617, 625–26, 637 (2018).

[26] 303 Creative LLC v. Elenis, 600 U.S. 570, 579 (2023).

[27] COLO. REV. STAT. § 24-34-601(1) (2022).

widely sweeping state accommodation law—the owner sought an injunction that she could decline commissions to design websites for same-sex marriages.[28] The parties stipulated to several facts that reduced the case to a bare confrontation between the application of the CADA and expressive rights, in sum[29]:

- the services and products offered by Smith were original, creative, attributable to her, and thus core expression;
- her religious commitments were genuine, preventing her from producing any content that will "contradict[] biblical truth," and this entailed her refusal to accept commissions for same-sex marriages; and
- Smith lacked market power (i.e., there were numerous competitors).

By a six to three majority—a classical partisan split on the current bench—the Court concluded that, despite the benefits afforded by public accommodation law[30] and the potentially offensive nature of Smith's position,[31] her First Amendment expressive rights defeat the interest of the state in advancing equality in provision of commercial services. Harkening back to the seminal case of *West Virginia Board of Education v. Barnette*,[32] which established that the state may not require children to recite the Pledge of Allegiance, Justice Gorsuch's majority opinion concluded that the state may not "force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance."[33] More pointedly, the majority declared that "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail."[34]

The dissenters rejected the core premises of the majority's reasoning. Most seminally, Justice Sotomayor's three-justice dissent rejected the idea that Smith's speech was burdened at all and advanced as a general principle that there is no "constitutional right to discriminate."[35] Correspondingly, in Justice Sotomayor's view, a public accommodations law "does not directly regulate petitioners' speech at all," and thus is not the type of expressive burden that activates constitutional rights.[36] Her core analogy is to *United States v. O'Brien*, in which burning a draft

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[28] *303 Creative LLC*, 600 U.S. at 580–82.

[29] *Id.* at 582–83.

[30] *Id.* at 590.

[31] *Id.* at 586.

[32] 319 U.S. 624, 642 (1943).

[33] *303 Creative LLC*, 600 U.S. at 602–03.

[34] *Id.* at 592.

[35] *Id.* at 622 (Sotomayor, J., dissenting) (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984)).

[36] *Id.* at 625. While analytically compelling, the dissenters seem hoisted on the petard of the stipulated facts. Justice Sotomayor asserts that Smith is merely engaged in the "conduct" of selling a product, *id.* at 628, which conflicts with the stipulated facts that each of Smith's commercial acts is a core instance of expression and uniquely personal to Smith. It makes

card was deemed legitimately regulable conduct despite its expressive aspects.[37] If this is accurate, any chilling effect of public accommodations law upon speech is "incidental" to the legitimate anti-discriminatory aim of the legislation and thus not enough to defeat it.[38]

II. DOCTRINAL AND POLICY IMPLICATIONS

Yet the real animator of the dissent seems less to be the technics of free expression and more the wider implications of the decision: "The breadth of petitioners' pre-enforcement challenge is astounding. . . . [T]he company claims a categorical exemption from a public accommodations law simply because the company sells expressive services. The sweeping nature of this claim should have led this Court to reject it."[39] The deeper concern of the dissent is that identifying the activation of free speech rights in such a context will mean that legislation that protects the vulnerable will *always* yield, in a rights analysis, to hypothetical speech interests.[40]

The immediate result could be, as the neo-Lochnerist scholars fear, the vast limitation of governmental regulatory power because of assertion of rights. Yet as emerged during the panel, particularly the presentations of Professors Oleske and Ferguson, one unclear question is whether the rights at issue are better conceptualized as First Amendment rights or more accurately as "traditional" Lochnerite rights to property and contract. Scholars who have identified neo-Lochnerite trends (such as Elizabeth Sepper)[41] have emphasized the First Amendment foundations of the contemporary version of the trend.

Yet the unclear limiting principle of *303 Creative LLC*[42] and the resonance of other commerce-linked constitutional challenges (such as those of *Masterpiece*

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the attempt to differentiate from *Hurley* and *Dale* as core instances of speech, *id.* at 634–35, less compelling than the dissent might like, even if as a logical and social matter the commercial/private distinction is convincing.

[37] 391 U.S. 367, 376 (1968).

[38] *303 Creative LLC*, 600 U.S. at 632–33 (Sotomayor, J., dissenting).

[39] *Id.* at 625.

[40] A sharp doctrinal aspect of this was raised by Professor Andrew Koppelman, who attended the panel: is it possible that *United States v. O'Brien* is now overruled? *O'Brien* held that a protestor who burned a draft card could still be convicted under a statute that criminalized mutilation of draft cards. 391 U.S. 367, 376 (1968). While the protestor's conduct was clearly expressive, the aim of the statute was protection of government property, not the chilling of free speech; any chilling effect was incidental and insufficient to generate a successful First Amendment challenge to the law. *See also* Jacob Eisler, *Discrimination, Private Liberty, and Public Accommodations Law*, 12 TEX. A&M L. REV. (forthcoming 2025) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4778283 [https://perma.cc/CHS6-D9ET]. The parallel principle in the free exercise context is established by *Employment Division v. Smith*, 494 U.S. 872, 890 (1990).

[41] Sepper, *supra* note 5, at 1498–1502; *see also* Shanor, *supra* note 5, at 176–82.

[42] *See* Eisler, *supra* note 40, at 31 n.156 and accompanying text.

Cakeshop, Ltd. v. Colorado Civil Rights Commission[43] and *Burwell v. Hobby Lobby Stores*[44]) raise the question of if the real locus of rights is commercial activity. Moreover, regardless of the *formal* basis for constitutional rights activation, if construed broadly enough, a functional right to dispose of property and commercial power would emerge. During the panel, as initially broached by Professor Penrose as an elaboration on the test case of *Masterpiece Cakeshop v. Scardina*,[45] this took the form of the question of if a decision by a baker to decline to sell a "plain cake" might activate constitutional rights.[46] If such "plain cake" sales can defeat state regulation (such as public accommodations statutes), the constructive result would be the ability of vendors to invoke property- or contract-based rights.

Future decisions may indicate limiting principles of the rights invoked by the conservative majority in *303 Creative LLC*. Yet the current prospective sweep of its reasoning led several panelists to identify wide-sweeping patterns, either prospective or retrospective. Professor Almendares drew an analogy with *Citizens United*, observing that *303 Creative LLC* similarly applied First Amendment rights without due analysis of countervailing interests.[47] The result is the emergence of a *per se*, rather than standard scrutiny-and-interests, approach to rights analysis. Professors Gowder and Wright, conversely, focused on the coeval or future implications of *303 Creative LLC*, suggesting it might explain other recent or prospective application of rights.[48] Professor Gowder observes how the deregulatory implications of *303 Creative LLC* could *vindicate* affirmative action programs even following *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* by establishing an expressive right for academic institutions in constructing their student and faculty bodies.[49] Professor Wright, similarly, observes how interventions to aid migrants and refugees might be protected as a form of religious liberty.[50] These contributions show that there will be multifarious opportunities for the novel application of constitutional rights if the doctrinal sweep of *303 Creative LLC* is as wide as it might be.

CONCLUSION: CONTRIBUTIONS OF THE COLLECTION: THE FUTURE OF RIGHTS, LIBERTY, AND GOVERNMENT AUTHORITY AFTER *303 CREATIVE LLC*

Together, the contributions of this Collection comprise a profound contribution to how the reasoning of *303 Creative LLC* could reshape the constitutional order,

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[43] 584 U.S. 617 (2018).

[44] 573 U.S. 682 (2014).

[45] Scardina v. Masterpiece Cakeshop, Inc., 528 P.3d 926 (Colo. App. 2023); *cf. Masterpiece Cakeshop, Ltd.*, 584 U.S. at 626 (emphasizing the plaintiff is an "expert baker" and the integration of his craft and his faith as defining of his identity).

[46] The purest form of this question is if the sale of a totally homogenous good—such as concrete—might activate similar rights.

[47] Almendares, *supra* note 1, at 919.

[48] Wright, *supra* note 16, at 973–74; Gowder, *supra* note 16, at 979.

[49] Gowder, *supra* note 16, at 979.

[50] Wright, *supra* note 16, at 973–74.

both by introducing new principles into judicial reasoning and by reallocating power among the different branches erected by the Constitution. The Collection begins with Professor Almendares's observation regarding the *bluntness* of *303 Creative LLC* as a decision.[51] He analogizes it to *Citizens United* as a case that advances a broad proposition—speech rights defeat other governmental interests—to resolve a nuanced and multifarious legal question.[52] Yet the bluntness of its principle does not yield to the possible corresponding quality—simplicity and ease of application. Rather, *303 Creative LLC* is (like *Citizens United*),[53] an opinion in which its limit is not clearly defined nor is its application explicitly delineated.[54] This reflects one of its challenging intersections with polycentric constitutionalism: in advancing a wider proposition than what is needed to resolve the particular case or precisely balancing the clash between competing interests, the judiciary constrains the capacity of the legislature to advance its own norms and values.[55]

Professor Ferguson identifies another possible ramification of the breadth of *303 Creative LLC*. The absence of a limiting principle in the context of the assertion of a right that manifests in commercial activity may not only be the genesis of wide First Amendment rights, but also of general commercial rights.[56] The practical effect of *303 Creative LLC* is economic deregulation—the same effect as Lochnerism. Yet the emergence of such a locus of economic rights may not be entirely surprising given current intellectual winds. While *Lochner* has typically been invoked as a bugbear of the canon,[57] it has recently enjoyed the very beginnings of exoneration and even return to legitimacy.[58] Ironically enough, part of this vindication of *Lochner* has looked to its invocation of substantive rights as laying the foundations for substantive due process that provided the Supreme Court with a point of entry for rights of sexual activity and sexual identity (a theme touched upon by Professor Penrose).[59] In this sense, *303 Creative LLC* may be the expansion, further development, and appearance of the dissimilar sibling of some of the very constitutional principles that have advanced sexual orientation rights in the Court.

Adjacent to this vein, Professor Penrose has a more hopeful future for the jurisprudence that will follow on *303 Creative LLC*. She observes that the legacy of *303*

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[51] Almendares, *supra* note 1, at 921–26.

[52] *Id.*

[53] *See generally* Citizens United v. FEC, 558 U.S. 310, 349–56 (2010) (holding corporate funding of political speech in campaigns is protected by the First Amendment).

[54] *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 638 (2023) (Sotomayor, J., dissenting).

[55] *See* Penrose, *supra* note 14, at 943–44.

[56] *See* Ferguson, *supra* note 5.

[57] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–22 (2011).

[58] *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* (2011); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003); Randy Barnett, *After All These Years,* Lochner *Was Not Crazy—It Was Good*, 16 GEO. J.L. & PUB. POL'Y 437 (2018).

[59] *See* BERNSTEIN, *supra* note 58; Greene, *supra* note 57, at 463; Penrose, *supra* note 14.

Creative LLC as limiting the scope of anti-discrimination law must be paired with the Court's recent expansion of homosexual rights and liberties under *Lawrence v. Texas*,[60] *Obergefell v. Hodges*,[61] and *United States v. Windsor*.[62] These cases show that the Supreme Court is pursuing twinned mandates that may, at a normative level, come into tension. The first norm is one of legal and constitutional equality on the basis of sexual orientation and identity; the second is protection of personal religious and expressive freedoms including where such practices do not accept these values. Professor Penrose observed that the Court has shown a desire to avoid especially direct confrontations between these values,[63] but that as the principle of commercial liberty in *303 Creative LLC* evolves, the Court may be required to develop a more comprehensive theory of "expressive commerce" to indicate when such First Amendment rights counterbalance the interest in equality.[64]

Such maturation in the application of *303 Creative LLC* will require engagement with long-debated questions regarding the legitimate scope of public accommodations law. In his Essay—sensitive to both the case law history and related historical scholarship—Professor Oleske critiques one argument advanced by critics of public accommodations law. Professor Oleske notes that some of the harshest scholarly opponents of public accommodations law—Richard Epstein and Christopher Green—might see in *303 Creative LLC* the prospect of limiting public accommodations laws to only apply to monopoly businesses.[65] Yet Oleske observes that the majority opinion of *303 Creative LLC* does not seem to advance such a premise,[66] and, moreover, that the doctrine from the Civil Rights Era onward (itself based in a much deeper English legal tradition) undermines the historical basis for limiting public accommodations law only to monopolies. Oleske's nuanced engagement with *303 Creative LLC* suggests the limits to any rolling back of the scope of public accommodations law that should be inferred from the case, and is characteristic of the type of debate that the scholarship must undertake.

Professor Wright's contribution is the first of two to consider how the elevation of expressive rights might be deployed to other domains. The First Amendment logic of *303 Creative LLC* should apply just as readily to religious as to speech rights (an inference supported by the parallels between *303 Creative LLC* and *Masterpiece Cakeshop*). Using this as a starting point, Professor Wright observes that religious

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[60] *See generally* 539 U.S. 558 (2003).

[61] *See generally* 576 U.S. 644 (2015).

[62] *See generally* 570 U.S. 744 (2013).

[63] *See* State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1237 (Wash. 2019) (holding that a religious flower shop owner could not discriminate by refusing to provide wedding flowers for a same-sex couple), *cert. denied*, 141 S. Ct. 2884 (2021).

[64] *Cf.* 303 Creative LLC v. Elenis, 600 U.S. 570, 599 (2023).

[65] Oleske, *supra* note 15.

[66] *See 303 Creative LLC*, 600 U.S. at 589–90; *cf.* Christopher R. Green, *Speech Complicity, Scarcity, and Public Accommodation*, 2022 CATO SUP. CT. REV. 93, 111.

instructions to aid the vulnerable—in particular, migrants and refugees—could generate a Free Exercise defense for such intervenors when they run afoul of anti-immigration legislation that prohibits aid.[67] This creative application of the logic of *303 Creative LLC* shows the ramifications of its defense of rights even when any burdening is incidental to an otherwise neutral law. Professor Wright's argument shows that *303 Creative LLC* might not only challenge *O'Brien*,[68] but also shows the fragility of cases such as *Smith v. Employment Division*.[69]

Professor Gowder's contribution deploys the elevation of First Amendment rights towards perhaps the most controversial decision of the 2023 Term—the deconstruction of the affirmative action regime by *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[70] Starting with the premise that universities may be expressive associations, Professor Gowder argues that the right to expression may provide a basis for defending affirmative action programs.[71] He argues that identity is central to the generation of ideas and discourse that is central to the mission of universities, and diversity provides a way of constructing that identity.[72] As such, Professor Gowder suggests that affirmative action is a central aspect of the expressive function of universities and should enjoy the same type of independent protection as commercial vendors from limitations on such activity.[73] Gowder's linking of identity to expression undermines the challenge that denying universities the right to constitute their own identities is only an incidental burden. His argument also evokes a different challenge of polycentric constitutionalism—since the Court is increasingly acting as the arbiter of rights across contexts, it must weigh when those rights come into conflict. The value of race blindness advanced by *Students for Fair Admission* and the value of expression advanced by *303 Creative LLC* come into conflict, in Gowder's analysis, potentially revealing the need for at least careful navigation of boundaries or of delineation of limiting principles in rights protection.

Together, these six Essays show the multifarious possible future avenues of *303 Creative LLC*: there are risks, the need for judicial discipline, and the possibility of doctrinal creativity. Each shows a unique facet of how the case may well stand as a landmark decision and demonstrates why the Court's increasingly central role in social and regulatory ordering will have a dramatic impact.

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[67] Wright, *supra* note 16.
[68] *See supra* note 36 and accompanying text.
[69] *See generally* 494 U.S. 890 (1990).
[70] *See generally* 600 U.S. 181 (2023).
[71] Gowder, *supra* note 16.
[72] *Id.*
[73] Gowder, *supra* note 16.