COMPELLING INTERESTS AND COMPELLED SPEECH

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In one of the blockbuster cases from the 2022 term, *Students for Fair Admission*s, the Supreme Court struck down affirmative action policies at Harvard College. Affirmative action, the Court held, could not meet what it referred to as the "daunting two-step examination" required by the Court's precedents, examination also known as "strict scrutiny."[1] As part of running the first step of this "two-step examination," the Court found that the interests that the universities proffered in support of affirmative action programs—such as better educating students through diversity and "producing new knowledge stemming from diverse outlooks"—were not "compelling."[2] The Court went even further and stated that those asserted goals were barely "coherent"" and at best were "elusive."[3] With that established, it was hardly worth it for the Court to consider step two of its "examination"—*i.e.*, to see if the affirmative action policies were narrowly tailored (or "necessary") to achieve those interests.[4]

In another highly publicized case from the term, *303 Creative*, the Court also seemed to need to apply the "daunting two-step examination" known as "strict scrutiny."[5] In *303 Creative*, a wedding website designer filed suit against the state of Colorado, alleging that the Colorado Anti-Discrimination Act ("CADA") required her to create websites for same-sex couples in violation of the First Amendment.[6] In the decision below, the 10th Circuit Court of Appeals found that although the Colorado law in question compelled speech, the State could justify that compulsion due to its "compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace."[7] In analyzing the second step of the strict scrutiny test, the requirement of "narrow tailoring," the 10th Circuit held that the law was narrowly tailored with respect to the state's second interest, access to the marketplace.[8] However, the court held that the law was not narrowly tailored as to the first interest: protecting the dignity of members of marginalized groups.[9] Ultimately, the 10th Circuit upheld the law as applied to the designers.[10]

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1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2162 (2023).
2. *Id.* at 2166.
3. *Id.* at 2167.
4. *Id.* at 2167.
5. 303 Creative LLC v. Elenis, 600 U.S. 570, 583 (2023).
6. *Id.* at 580–81.
7. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021).
8. *Id.* at 1179.
9. *Id.*
10. *Id.*

The Supreme Court reversed, but their use of "strict scrutiny" was not nearly as clear nor as recognizable as the 10th Circuit's analysis.[11] The majority opinion did at one point call the state's interest in eliminating discrimination in places of public accommodation "compelling."[12] However, as Michael Dorf noted after the Court released the decision, Justice Gorsuch "never consider[ed] the implications of that compelling interest."[13] Instead, Gorsuch said that "when a state public accommodations law and the Constitution collide, there can be no question which must prevail."[14] The Court called it for the plaintiffs accordingly. But as Dorf asked, what happened to the fact that if the Constitution and public accommodations law collide, you apply "strict scrutiny"?[15] And—again, following Dorf here—if Gorsuch concedes that there is a "compelling interest" in eliminating discrimination, doesn't that mean moving on to the narrowly tailored requirement of the test?[16] But, Dorf observes, Gorsuch says "nada. Zip. Zilch" about narrow tailoring.[17]

The Supreme Court's selective application of strict scrutiny might be frustrating on its own, but in the context of religious speech cases—which is how many would classify *303 Creative*—it marks something of a trend. For example, in *Masterpiece Cakeshop* the Court, in an opinion led by Justice Kennedy, also loosely applied strict scrutiny.[18] Its discussion of the State's compelling interest was vague and incomplete.[19] Even further, the Court did not touch on the question of whether Colorado's law was narrowly tailored.[20] In the end, *Masterpiece* paid, at best, only lip-service to strict scrutiny. Considering both *Masterpiece* and *303 Creative*, we may be witnessing only the latest chapter in the slow and irregular death of strict scrutiny.

These decisions lead us to the question of why the Court is letting strict scrutiny die, because I believe we will miss it when it is gone. This article has three parts. In the first part, I look at an old classic strict scrutiny compelled speech case, *Wooley v. Maynard*, to analyze how the Court *did* apply the strict scrutiny test, then go on to contrast how the Court *did not*

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11. *303 Creative LLC*, 600 U.S. at 590.
12. *Id.* at 589.
13. Michael C. Dorf, *Unanswered Questions in the Web Designer Case*, DORF ON LAW (June 20, 2023), https://www.dorfonlaw.org/2023/06/unanswered-questions-in-web-designer.html [https://perma.cc/2BBJ-3PN5].
14. *303 Creative LLC*, 600 U.S. at 592.
15. Dorf, *supra* note 13.
16. *Id.*
17. *Id.*
18. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617 (2018).
19. *Id.* at 639.
20. *Id.*

apply the test in *Masterpiece* or *303 Creative.* In the second part, I consider some reasons why the Court did not apply strict scrutiny in *303 Creative*. I give three explanations: (1) that compelled speech cases are just different, (2) that the Court is starting to dispense with doctrinal tests like strict scrutiny, and (3) that the Court wanted to avoid a discussion about the interests in eliminating some types of discrimination over others. All of these are plausible, but I conclude that no explanation justifies eliminating a strict scrutiny analysis altogether. In the final section, I argue there are good reasons to have tests like strict scrutiny. Even when the Court finds against the State when it applies strict scrutiny—which, it seems, is pretty often—there is a good to be realized by the Court recognizing some asserted State interests as important, perhaps especially when it finds them not very "compelling."

I. WHAT WAS STRICT SCRUTINY AND WHERE IS IT NOW?

In this section, I discuss a very short story about strict scrutiny fading away in some of the Court's recent cases. I start with a familiar case, *Wooley v. Maynard*, just to give an idea of how that test plays out in practice in a compelled speech case.[21] I then fast forward to the recent case of *Masterpiece Cakeshop* to show how the Court can sort of apply strict scrutiny sub silentio—that is, still working within the framework of strict scrutiny without using the words "compelling interest" or "narrow tailoring." After that, I take a close look at *303 Creative* where the Court seems not to apply strict scrutiny: somewhat in contrast to *Masterpiece Cakeshop*, all that is left is just the words and concepts associated with the test and not anything resembling the test itself. The trend here—if we can call it a trend—is the Court deciding the cases on grounds other than a running through of the strict scrutiny test, while still hanging on to at least the rhetoric of strict scrutiny. I turn in the next part to reasons why the Court might be doing this.

Again, by strict scrutiny, I mean in the context of this paper the test that the Supreme Court has applied when there is an infringement of someone's First Amendment speech rights. In this context, the usual scenario is either the government preventing speech or compelling speech. When either of those situations happen, the Court typically determines whether the State has a compelling interest in violating those rights.[22] This is step one of strict scrutiny. If there is a compelling enough interest (or

21. Wooley v. Maynard, 430 U.S. 705, 714 (1977).
22. *Id.* at 715.

sometimes even when there may not be[23]), the Court then turns to step two: whether the infringement imposed by the law is "narrowly tailored" to serve the State's interest.[24] In other words, this step focuses on whether the State is not infringing speech any more than it has to in order to advance its interests. The State can lose at either of these steps. It can fail to have a compelling interest, or it can have a compelling interest but not go after that interest in a way that is "narrowly tailored." Sometimes the steps blur, so that the real question turns out to be: is the government's interest applied *in this way* strong enough to justify the infringement of the right? What this requires, in the end, is that the Court conduct a "sensible balancing" of interests.[25]

A. Wooley

The facts of *Wooley* are fairly simple: New Hampshire required car license plates to include the State motto "Live Free or Die" and made it a misdemeanor to cover up the slogan.[26] The Maynards, taking issue with the motto, cut off the "or die" part of the motto from their license plates and then covered the other words (and the "resulting hole") with tape.[27] They were cited three times for violating New Hampshire law.[28] The Maynards then sued to enjoin the law. It went up to the Supreme Court, and the Court sided with the Maynards.[29]

The Court put the question in *Wooley* as whether the State could "constitutionally require an individual to participate in the dissemination

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23. In *Hobby Lobby*, for example, the Court applied a version of strict scrutiny, and assumed—without deciding—that the government had a compelling interest. The government still lost, however, because whether their interest was compelling, the means to achieving that interest were not the "least restrictive." *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 73 (2014).

24. *Id.* at 716.

25. *See, e.g.*, Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 58, n.179 (1995) (using phrases "sensible balance" and "sensible balancing" in context of passage of the Religious Freedom Restoration Act). *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1335–36 (2007). For a historical overview of the compelling interest test, *see* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL. HIST. 355 (2006). And for general criticism of the Supreme Court's strict scrutiny jurisprudence, *see* John D. Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOKLYN L. REV. 1 (2023).

26. *Wooley*, 430 U.S. at 705.

27. *Id.* at 708.

28. *Id.* at 711.

29. *Id.* at 716.

of an ideological message by displaying it on his private property."[30] The First Amendment, the Court said, applies to both laws that infringe the right to speak and the right not to speak, and the license plate requirement in New Hampshire hit upon the latter right.[31] But simply saying that the law ended up making the Maynards speak when they did not want to speak, and to speak a message they found morally objectionable, was not the end of the matter. As the Court put it, "[i]dentifying the Maynards' interests as implicating First Amendment protections does not end our inquiry."[32]

What comes next, the Court says, is testing whether the State has important enough interests, interests that are "sufficiently compelling," in the Court's words, to justify forcing the Maynards to operate as a mobile billboard for the State.[33] The State advanced two interests: first, that the license plate motto helps to facilitate the "identification of passenger vehicles" and second, that the law promotes "appreciation of history, individualism and state pride."[34] The Court made short work of both interests. On the first interest, the Court said that license plates already have numbers and letters that separate passenger vehicles from other vehicles.[35] On the second interest, the Court flatly denied that forcing someone to promote a message was a compelling interest at all.[36] The Court acknowledged that the State is free to promote an appreciation of history, state pride, and individualism in general; however, the State cannot do that by making everyone display a specific message.[37] The Court explained that an individual's First Amendment right "to avoid becoming the courier" for a message will always outweigh the government's interest in spreading that message.[38]

Wooley is a short opinion and although it provoked what seems now a surprising three dissents, it bears taking some time to note what the opinion itself takes time to do. First, the Court acknowledges the proffered interests of the State. It does not think much of those interests, but it makes sure that they are labeled and considered.[39] The opinion points out problems

30. *Wooley*, 430 U.S. at 705.
31. *Id.* at 715.
32. *Id.*
33. *Id.* at 716.
34. *Id.*
35. *Wooley*, 430 U.S. at 716.
36. *Id.* at 717.
37. *Id.*
38. *Id.* at 716–17.
39. *Id.*

with those interests[40] and indicates what kind of interests it will tend to view as frankly out of bounds, especially when it comes to compelled speech.[41]

Second, although the Court does not analyze this in great detail, it still determined whether the State's pursuit of those interests was narrowly tailored. In the case of identifying passenger vehicles, the Court held that there has to be a less ideologically loaded way of doing this, possibly what the State was already doing with its combinations of letters and numbers on license plates.[42] And with the goal of promoting history, pride, and individualism, the Court alluded to the fact that the Court can pursue this in any number of ways *besides* compelling speech.[43] The Court goes through the steps of strict scrutiny—*all* the steps—even when it finds the State's interests not all that persuasive.

B. Masterpiece Cakeshop

Masterpiece was not a speech case but rather a free exercise case.[44] However, it still involved a situation where the Court seemed to accept that strict scrutiny was the relevant test. But it is not clear that the Court ended up applying strict scrutiny. I made this point with a co-author in another paper, and here, I briefly rehearse those claims.[45] Compared to *Wooley*, the Court in *Masterpiece* only gave a vague summary of the State's possible interests in enforcing the Colorado law and did not even attempt to apply step two of strict scrutiny. As we will see, however, *Masterpiece* fares better than *303 Creative* in at least seeming to accept the strict scrutiny test as the one to apply. Ironically, it is in the concurring opinions of Justices Gorsuch, who would write the majority opinion in *303 Creative*, and Justice Thomas, who generally disdains doctrinal tests,[46] that we get the clearest statement that strict scrutiny *should* apply.[47]

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40. *Id.* at n.13. For example, the opinion in *Wooley* has a lengthy footnote about how New Hampshire license plates have features that identify passenger vehicles from other vehicles.

41. *Wooley*, 430 U.S. at 716–17.

42. *Id.*

43. *Id.* at 717.

44. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 617 (2018).

45. Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISCOURSE 154 (2019).

46. On Thomas's turn away from doctrinal tests to the method of "text and history" *see generally* Chad Flanders, *Flag Bruen-ing:* Texas v Johnson *in Light of The Supreme Court's 2021–22 Term*, 2022 U. ILL. L. REV. ONLINE 94 (2022). *See also infra* Section II.B.

47. *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 644, 663–64.

It may be fair to assert that a lot of *Masterpiece* is just getting to the point where the Court recognizes that strict scrutiny applies.[48] Briefly, the facts were these: Jack Phillips, a baker, refused to bake a cake for a same-sex wedding.[49] The Colorado Civil Rights Commission found that this violated Colorado's anti-discrimination law.[50] Phillips raised a First Amendment free-exercise challenge, claiming that forcing him to bake a cake for a same-sex wedding compelled him to express a message that conflicted with his religious beliefs.[51]

Under the *Smith* test for free exercise violations, which is still at this point good law,[52] laws that are neutral and generally applicable can incidentally burden religious beliefs with no problem.[53] We might say, a little tendentiously perhaps, that laws like this are subject to only rational basis scrutiny.[54] But things change if the law singles out religion for special disfavor or is the product of anti-religious animus.[55] If either of these things is the case, then strict scrutiny applies.[56] This is what Justice Kennedy found was the case in the application of Colorado's law against Jack Phillips: based on some remarks by the commissioners in Colorado and spotty enforcement of the law, the Court said the State showed hostility toward the religious beliefs of Phillips.[57] Accordingly, strict scrutiny should apply.[58]

Or does it? The Court, strangely, stops the analysis here. It just finds in favor of Phillips.[59] This is not, I argued with my co-author, how the Court should apply the analysis.[60] When the Court determines strict scrutiny is the relevant test to apply, the next step is to apply strict scrutiny. But the Court does not do this; it just calls it for Phillips and moves on.

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48. Kennedy stops the case after he has found the baker's religious expression to be burdened, and then decides for the baker. *Id.* at 159.

49. *Id*. at 621.

50. *Id.* at 622.

51. *Id.* at 624.

52. *See, e.g.,* Christopher C. Lund, *Answers to Fulton's Questions*, 108 IOWA L. REV. 2075 (2023); Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990).

53. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (citing *Smith*, 494 U.S. at 887–890)).

54. Flanders & Oliveira, *supra* note 45, at 168 n.50.

55. *Id*. at 533.

56. *Id.*

57. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 635 (2018).

58. *Id.*

59. *Id.* at 638–40.

60. Flanders & Oliveira, *supra* note 45, at 159.

Where the Court should have discussed compelling interests and narrow tailoring, it instead repeats claims about how the Commission showed hostility to Phillips and his beliefs.[61] But that is only the *prelude* to a finding for Phillips. Phillips only wins if there is no compelling interest that the State pursues in a way that's narrowly tailored. It may be a no-brainer that the State cannot show this, but that did not stop the *Wooley* court from going through the analysis, even though that case might have been a no-brainer too.

Although Justice Kennedy does not conduct a strict scrutiny analysis, he does take some strict scrutiny-adjacent steps. For example, he acknowledges some possible state interests and explains why those are important. "Our society has come to the recognition," Kennedy says, "that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[62] He also writes of the possibility of a "long list of persons who provide goods and services for marriages and weddings . . . refus[ing] to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[63] This *seems* to be what Kennedy would take to be a compelling state interest promoted by the Colorado law. In the very next paragraph, Kennedy writes that it is "unexceptional" that Colorado "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[64]

Again, these sound like arguments that the state of Colorado could have presented in favor of it having a compelling interest in enforcing its anti-discrimination law. It is a similar rationale that New Hampshire used about its "Live Free or Die" license plates, although the Colorado interests seem much more important. Kennedy certainly seems to take these interests far more seriously than do Justices Gorsuch and Thomas, who take Colorado's only possible interest to be suppressing speech it finds "offensive."[65] They treat Colorado's interests, in other words, as similar to New Hampshire's interests in promoting its message of individuality but much less persuasive. I give Kennedy credit here for at least mentioning the interests that Colorado might have, and at least trying to paint them sympathetically, even if he does not actually weigh those interests against

61. *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 634–35.
62. *Id.* at 631.
63. *Id.*
64. *Id.* at 632.
65. *Id.* at 644 (Gorsuch, J., concurring).

Phillip's interests, much less consider whether Colorado's law advances those interests in a way that is "narrowly tailored."[66]

C. 303 Creative

One might wonder how a case that does not use the phrase "strict scrutiny" in its entire opinion—*Masterpiece Cakeshop*—could nonetheless be a better example of that test in action than one that at least *mentions* the phrase "strict scrutiny" and purports to identify the "compelling interest"—also using that term. The answer to this would be an opinion that purports to be about strict scrutiny, but in fact perverts and distorts that test, toying with it but not applying it. If *Masterpiece* was incomplete in its use of strict scrutiny, *303 Creative* uses the terms of strict scrutiny but seems to be doing something else altogether. Consider a couple of opening lines from Justice Gorsuch's opinion: "Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe."[67] This mangles the strict scrutiny test—if that indeed is what it purports to be applying. It places the Colorado interest and the *303 Creative* interest on parallel tracks, instead of going one step at a time: for strict scrutiny, first, we consider whether the speech is compelled, and *then* we look at Colorado's interests and see how compelling they are. Gorsuch blends these two steps with the implication that *if* you compel speech, then *no* interest could ever be enough. There are other, similar statements throughout his opinion. They are previews of a decision that will say in so many words that one side just *wins*. There is no balancing to be done.[68]

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66. *Id.* Interestingly, in *Kennedy v. Bremerton Sch. Dist.*, Justice Gorsuch refers to *Masterpiece Cakeshop*, but only to assert that *Masterpiece* is a case where no test needs to be applied. Gorsuch writes: "A plaintiff may also prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise; in cases like that we have 'set aside' such policies without further inquiry." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 n.1 (2022). I think this is slightly revisionist, but revealing about the way Gorsuch thought the strict scrutiny test was trending. I thank Conor Clark for the reference and discussion.

67. 303 Creative LLC v. Elenis, 600 U.S. 570, 577–78 (2023).

68. Contrast this with the opening of *Masterpiece*:

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 624 (2018).

The issue in *303 Creative*, of course, was whether Colorado's anti-discrimination law (the same law in *Masterpiece*) violated the free speech rights of a web-designer who wanted to be able to refuse to design wedding pages for same-sex couples. The 10th Circuit, as already canvassed, found that Colorado had asserted two possible compelling interests in enforcing its antidiscrimination law: the dignitary interests of same-sex couples and protecting same-sex couples' access to the marketplace.[69] Intriguingly, and a little problematically, the 10th Circuit said that same-sex couples had an interest in the supposedly unique and irreplaceable services of 303 Creative itself.[70] It was this latter interest, the 10th Circuit said, that prevailed. Colorado's anti-discrimination law was not only compelling but also narrowly tailored to make sure same-sex couples had access to custom-made websites that were of the same quality and nature as 303 Creative.[71] The Supreme Court reversed. It framed the question it had to answer as: "Can a state force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?" The Court answered: no.[72]

While the Court recognized that the 10th Circuit had applied strict scrutiny (and that the dissent had disagreed not as to whether strict scrutiny applied but how the majority had applied it), the Court did not seem to apply strict scrutiny itself. To be sure, it said—repeatedly—that the State had a strong interest in enforcing anti-discrimination laws. It called that interest "compelling" and said that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments," which the parties stipulated included 303 Creative.[73] Justice Gorsuch also gave a story-of-progress narrative about the expansion of those laws to include more places and more previously excluded groups.[74] All of this *sounds like* Gorsuch is saying and agreeing with the State that they have shown that

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69. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021), *rev'd*, *303 Creative LLC*, 600 U.S. 570.

70. *Id.* at 1180. *See also* Andrew Koppelman, *The Dangerous* 303 Creative *Case*, CANOPY F. (June 13, 2022), https://canopyforum.org/2022/06/15/the-dangerous-303-creative-case/ [https://perma.cc/SQB2-AJMU] ("The Tenth Circuit's monopoly argument is strange: 'For the same reason that [Smith's] custom and unique services are speech, those services are also inherently not fungible.' Allowing her to refuse 'would necessarily relegate LGBT consumers to an inferior market because Appellants' *unique* services are, by definition, unavailable elsewhere.' By this logic, one could justify compelling anyone to do anything. It is as if to say, We realize that someone else could do what we're asking, but that just wouldn't be you alone, irreplaceable you.").

71. *303 Creative LLC*, 6 F.4th at 1180.

72. *303 Creative LLC*, 600 U.S. at 597.

73. *Id.* at 590.

74. *Id.* at 585–87.

there was a compelling interest. But then he stops. What is more, Gorsuch stops and takes it back. The good of Colorado's compelling interest—whatever it is—is not just outweighed by the bad of violating the rights of 303 Creative; it does not matter. Why? Because "when a state public accommodations law and the Constitution collide, there can be no question which must prevail."[75] On this sort of blunt reckoning, states cannot force people to speak the State's message, period, even if the State's interest in making them speak that message is compelling. *Wooley* did not go this far, yet even *Wooley* considered the fit between the State's means and ends. The strict scrutiny analysis in *303 Creative* starts, stops, and goes back on itself. The question is how we got here.

II. EXPLAINING THE DECLINE OF STRICT SCRUTINY

My aim in this part is to set out three hypotheses for *why* the Court might be abandoning strict scrutiny in these types of cases—both specifically as to compelled speech cases and more generally as to *all* cases in which the Court previously saw fit to use the strict scrutiny test. The first hypothesis suggests that compelled speech is just different—different enough so that we do not have to go through the two steps of strict scrutiny. The second hypothesis posits that the Court is generally avoiding any kind of doctrinal "balancing tests" these days as part of its shift to originalism or the "text and history" method. Accordingly, we should view *303 Creative* (and, perhaps, *Masterpiece Cakeshop*) as just part of this larger trend. The third hypothesis is that the Court was deliberately obfuscatory about the interests in *303 Creative* to avoid analyzing how avoiding one type of discrimination (*viz.*, racial discrimination) might be a compelling interest but not avoiding another type of discrimination (*viz.*, discrimination against sexual orientation). This last hypothesis is, of course, more speculative and is more about the Court's motives than about any doctrinal moves it may (or may not) be making.[76]

What I want to resist as a general matter, however, is an explanation that holds that the Court in fact was applying strict scrutiny—and believes that strict scrutiny is the test to apply—but was not being very clear about it. Something like this explanation may in fact be true, and it may be possible to reconstruct the opinion in a way that shows it to be following the two steps of strict scrutiny. Indeed, a future Court may engage in

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75. *Id.* at 592.

76. For an explanation of *303 Creative* that looks more into the motives of the Justices, *see* Jeremiah Ho, *Queer Colonization in the Court's Wedding Vendor Cases,* __ ST. LOUIS L. J. (forthcoming 2024).

precisely such a reconstruction of *303 Creative* to show that it was faithfully applying strict scrutiny. But again, I want to resist this, at least for the most part. It is only in the third hypothesis that I imply that the Court was (silently) applying strict scrutiny but had reason to be coy about it.[77]

A. Compelled Speech Is Just Different

There are multiple places in *303 Creative* where Justice Gorsuch seems to assert, flatly, that compelled speech is just different—and that the Constitution forbids compelling another's speech.[78] Gorsuch discusses how the law in Colorado would be *forcing* the wedding website to speak the government's message when it deeply disagrees with that message.[79] Justice Gorsuch makes these statements about compelled speech in an almost *res ipsa loquitur* kind of way. Cases that ban or abridge the freedom of speech might require some kind of balancing of the government's interest against the infringed right but not cases where the government compels the speaker to create and speak a message that the speaker disagrees with. It is a whole other level of badness with compelled speech—a difference in kind, perhaps, and not just degree—so that any sort of balancing, any sort of weighing, is simply out of place.

This explanation flies in the face of the fact that in other cases when the government has compelled speech, the Court *has* gone through the steps of strict scrutiny. It has done this even when a) those who are compelled to speak disagree with the message and b) the government interest is very weak.[80] The Court has held that the test still applied in these cases even when the opinion from almost the beginning was going to go

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77. I also should note that the Court may simply be inconsistent in these cases in applying strict scrutiny. I am trying to see a pattern here and some logic, but there may not be any pattern or any logic. *See* B. Jessie Hill, *Look Who's Talking: Conscience, Complicity, and Compelled Speech*, 97 IND. L.J. 913, 917 (2022) ("The prohibition on compelling ideological speech is so strong that in some instances the Court does not bother to apply any test or level of scrutiny at all, instead appearing to assume that the law is automatically and categorically unconstitutional. In other cases, the Court assumes that some form of heightened scrutiny—possibly strict scrutiny—would apply to laws compelling ideological speech, which are treated like content- or viewpoint-based speech restrictions." (citations omitted)).

78. *See, e,g.*, 303 Creative LLC v. Elenis, 600 U.S. at 588; *id*. at 592 (stating that the Constitution simply "prevails" when speech is compelled).

79. *303 Creative*, 600 U.S. at 587.

80. *See, e.g.*, Livestock Mktg. Ass'n v. U.S. Dep't of Agric., 335 F.3d 711, 721 (8th Cir. 2003) ("In compelled speech cases, the Supreme Court has traditionally applied a balancing-of-interests test to determine whether or not the challenged governmental action is justified.").

against the government.[81] For example, in *Wooley*, the Maynards disagreed with the message in that case (for religious reasons, no less) and the government interests were weak and arguably incoherent. The Court still applied the full strict scrutiny analysis.[82] The Court has used strict scrutiny in other cases as well, specifically, cases more similar to *303 Creative*, *e.g.*, *Boy Scouts of America v. Dale* and *Roberts v. United States Jaycees*.[83] If the Court believes that the government compelling speech of a message that the person, group, or business disagrees with relieves the Court of going through *any* balancing, not even strict scrutiny, it has been strikingly inconsistent in its recent cases. Justice Gorsuch does not bother to say why the compelled speech in *303 Creative* is different from *Wooley*, which it otherwise seems to resemble. Even in the very recent 2018 compelled speech case, *NIFLA*, the Court said that strict scrutiny applied and equated compelled speech with content-based regulations (where strict scrutiny always applies).[84]

Moreover, one would think that the Court would make it abundantly clear that strict scrutiny is not the relevant test in compelled speech cases if it intended to shift away from settled law. The Court should not want to hide the ball. It should tell lower courts that *if* there is a law that compels speech and that speech is contrary to the religious or ideological beliefs of the speaker—it must strike the law down. Justices of the Court have made calls like this in similar circumstances (*e.g.*, Justice Kennedy in *Simon &*

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81. *Id.*

82. *See generally* Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. 811, 814 (2022) (noting that in *Barnette* and *Wooley* "[a]ll the Justices weighed conflicting interests, even those who were in dissent and partial concurrence"). *See also* State v. K H-H, 353 P.3d 661, 667 (2015) ("Although these holdings from *Barnette* and *Wooley* may suggest a per se condemnation of any compelled expression of attitude or opinion, that approach was not followed by either opinion").

83. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law."); Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984) ("In applying the Act to the Jaycees, the State has advanced those interests through the least restrictive means of achieving its ends. Indeed, the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association."). I find it hard to see the language in *Jaycees* as anything but a reference to strict scrutiny, although there is disagreement on the matter. For one case that seems to do without strict scrutiny altogether in a manner perhaps similar to *303 Creative*, *see* Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557, 579 (1995).

84. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (compelling disclosures subject to strict scrutiny; no exception for "professional speech").

Schuster[85]). But there is no such call here, or if there is, it is very hard to discern. After all, most lower courts with cases similar to *303 Creative* (including the 10th Circuit in *303 Creative*) ran through the balancing that strict scrutiny requires, or at the very least claimed to be using strict scrutiny.[86] It is not obvious, to say the least, *what* they are supposed to do when analogous but not identical cases arise in the future, when there may be a weaker case because the speaker's interests are not as strong.[87] There is just enough strict scrutiny type language in Gorsuch's opinion for lower courts to still think that they should still apply strict scrutiny. But there is an equal chance that lower courts will think that they should simply invalidate any laws that compel speech.

B. Doctrinal Tests Are Out, Generally Speaking

Another way of explaining the Court's failure to use the strict scrutiny test in *303 Creative* is to view it as part of a broader trend that cuts across constitutional rights. The starting point here is, of course, the now-famous gun-control case *Bruen*, which expressed a broad skepticism that the Constitution requires courts to balance rather than to look solely at "text and history."[88] From the method outlined in *Bruen*, courts do not

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85. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); *id*. at 125 (Kennedy, J., concurring) (suggesting that non-content neutral laws should just be invalidated, without having to go through strict scrutiny).

86. *See, e.g*., Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 379–80 (W.D.N.Y. 2021) ("Accordingly, the Court concludes that New York has a compelling interest in ensuring that individuals, without regard to sexual orientation, have equal access to publicly available goods and services, and that the Accommodation clause is narrowly tailored, as applied to Plaintiff, to serve that interest. As a result, even if the Accommodation clause compels speech or expressive association in a manner that implicates Plaintiff's free-speech and free-association interests, the provision survives strict scrutiny."); Telescope Media Grp. v. Lucero, 936 F.3d 740, 754 (8th Cir. 2019) ("Laws that compel speech or regulate it based on its content are subject to strict scrutiny, which will require Minnesota, at a minimum, to prove that the application of the MHRA to the Larsens is 'narrowly tailored to serve [a] compelling state interest.'"); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 916 (Ariz. 2019) ("We therefore conclude that because the Ordinance as applied to Plaintiffs' creation of custom wedding invitations cannot survive strict scrutiny."); Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cnty. Metro Gov't, 624 F. Supp. 3d 761, 792 (W.D. Ky. 2022) ("Because the Accommodation Provision both compels and restricts Nelson's speech based on content, the City may enforce it only if the law survives strict scrutiny.").

87. Prior to *303 Creative*, Eugene Volokh wrote that there was "no black letter law" in cases involving compulsions to create speech. I am not sure there is *clear* black letter law after *303 Creative*, either. *See* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 382–83 (2018).

88. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2129 (2022). I discuss *Bruen* in the First Amendment context in more detail in Chad Flanders, *Flag*

determine whether the right was infringed upon and then go on to balance that right against the State's interest. Instead, as Justice Thomas famously intoned, there is only one step—determining the scope of the right.[89] We may need history to see what the right was, and so we have in a number of recent circuit court cases there is a searching-out-after relevant laws at the time of the founding related to gun regulation. If founding practice shows that the right could be limited in different ways, that is usually good evidence that the right did not extend that far. The First Amendment, after all, says nothing about strict scrutiny or balancing.[90]

So, too, might we dispense with any balancing test in speech cases generally, or especially in compelled speech cases. We instead look to see whether the founding-era practice condoned such compelled speech in the interests of public accommodation and access to all comers or whether we can surmise that the right to free speech was broad enough to forbid certain types of compelled expression or association. Justice Thomas, true to his brand and method in *Bruen*, inquired along these lines in the oral argument for *303 Creative*.[91] He asked about whether public accommodations laws historically applied to speech and whether the lawyer for the state of Colorado knew of anything in "common law treatises" that addressed "public accommodations laws directly or indirectly regulating speech."[92] The lawyer did not have an answer—there were not any cases—but it was unclear which way the lack of history cut.

In any event, Justice Gorsuch's opinion in *303 Creative* is decidedly *not* in this vein. His opinion does not consider any history. He is unconcerned with whether and what founding practices were. He seems to reason as a matter of principle. If there is a move to a different method here, it is almost wholly negative. It is about moving past a method (strict scrutiny) and failing to replace it with a new method. Again, just as there

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Bruen-*ing*: Texas v Johnson *in Light of The Supreme Court's 2021–22 Term*, 2022 U. ILL. L. REV. ONLINE 94 (2022).

89. *New York State Rifle & Pistol Ass'n, Inc.*, 142 S. Ct. 2126–27.

90. For a general, originalist argument against tiers of scrutiny, *see, e.g.*, Jonathan Scruggs, *From Guns to Websites: Clarifying Tiers of Scrutiny for Free-Speech Cases*, FEDSOC BLOG (July 14, 2022), https://fedsoc.org/commentary/fedsoc-blog/from-guns-to-websites-clarifying-tiers-of-scrutiny-for-free-speech-cases [https://perma.cc/5EYV-Q8HK] ("The argument against this approach jumps off the page. The Constitution doesn't mention anything about tiers or balancing. It is atextual, ahistorical, and very discretionary. Justices and scholars alike have criticized it, including Justices Thomas, Kennedy, and Kavanaugh, and Professors Eugene Volokh and Joel Alicea. But *Bruen* is the first majority opinion to do so. And its language is broad.").

91. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2130 (stating that the Government should look to history to determine the contours of a right).

92. Transcript of Oral Argument at 61, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) 2022 WL 17980103, *61.

is no clear signal from the Court in *303 Creative* that there is a special set of rules for compelled speech (*i.e.*, no balancing necessary), there is no sign from the Court that the text and history method is appropriate for First Amendment questions, or to compelled speech cases in particular. From other cases, too, we know that Justice Gorsuch knows how to spotlight the text and history method and say it is the exclusive method of analysis. Indeed, Gorsuch could not have been clearer in *Bremerton* that the way to proceed in free exercise cases was to look to text and history. As he put it there, in no uncertain terms, "[a]n analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some 'exception' within the Court's Establishment Clause jurisprudence."[93] But there is no positive method anywhere in *303 Creative*.

C. Race, Sex, and Sexual Orientation

We might, though, find a more specific reason for the Court wanting to muddy whether and to what extent strict scrutiny applies in a case like *303 Creative*. At oral argument, several Justices raised questions about whether the case's outcome would change if the website designers refused services to an interracial couple rather than a same-sex couple—including a wince-inducing hypothetical from Justice Alito.[94] The question of "what happens if we switch the facts in *303 Creative* to make it about *race*?" also rings throughout the dissent.[95] This question also loomed in the earlier *Masterpiece Cakeshop* opinion. Preventing racial discrimination in the marketplace would seem like a compelling interest if there ever was one.

The discussion of race and sex in the majority opinion in *303 Creative* is perplexing. To the extent the majority addresses race at all, it is to rebut the dissent's claim that the decision in *303 Creative* would "allow law firms to refuse women admission into partnership, restaurants to deny service to Black Americans, or businesses seeking employees to post something like a 'White Applicants Only' sign."[96] The majority's response to this allegation is simply that it is "pure fiction."[97] But why? Is it because the facts are so different in those cases and easily distinguishable from the facts of *303 Creative*, or because there is a greater state interest in

93. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411 (2022).

94. Oral Argument at 1:10:29, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476), https://www.oyez.org/cases/2022/21-476 [https://perma.cc/XC5D-WMR6].

95. *303 Creative LLC*, 600 U.S. at 625 628, 638.

96. *Id.* at 598.

97. *Id.*

preventing race and sex discrimination? Gorsuch does not stick around to elaborate.

This sort of obfuscation may be strategic. Here is one way of thinking about it: Gorsuch makes some strong—and *general*—statements about how public accommodation is a compelling governmental interest. He also talks in somewhat glowing terms about how public accommodation laws have expanded over the years so they cover not only discrimination based on race and sex but also sexual orientation. This is a story of a *good thing*. But Gorsuch does not go on to balance this compelling interest (the good of antidiscrimination) against the compulsion involved—again, he stops the analysis short. There is a compelling interest, but Gorsuch does no further analysis of whether Colorado narrowly tailored the law to promote that interest. In other words, there is no analysis of whether the infringement of the right is acceptable with all things considered.

Why would Gorsuch want to stop short of fully applying the strict scrutiny analysis? If he went on to say that the state's interest was not compelling in this case and that the interest in public accommodation did not justify the compelled expression, he might be expected to explain whether this is the case just with *same-sex* couples or if it extends to *interracial* couples. He would have to explain why the story of expanding protections for various groups was good news *until we got to same-sex couples*. Maybe Gorsuch does not want to go there (although the attorney for 303 Creative seemed willing, at various points, just to bite that bullet).[98] Instead, Gorsuch expresses the state interest only in broad terms and then leaves it as that. Gorsuch does the rest of the test at best *sub silentio* (after he says there is a compelling interest *generally* in public accommodation) because he does not want to have to spell out how race and sex and sexual orientation discrimination might be different.

III. WHY WE MIGHT MISS STRICT SCRUTINY

Based on the last section, I do not find any good reason why Gorsuch should not apply strict scrutiny in *303 Creative*. He is not spelling out a special rule for compelled speech cases, nor is he going all in with the text and history method. He may be trying to hide the ball in an effort to avoid talking about the differences between racial and sexual orientation discrimination, but this is a speculative theory, at best, and it still means the Court was at the very least not being explicit about whether and how to apply strict scrutiny. We get hand-waving statements about the

98. More generally, the Court may be reluctant to stake out a position on what level of scrutiny (strict or intermediate) should apply to discrimination against gays and lesbians. I thank Travis Crum for this point.

importance and development of anti-discrimination laws, but no real application of them to the facts: no real reckoning of how that compelling interest lost.

Regardless of the reason the strict scrutiny test does not play any real role in *303 Creative* (apart from a window-dressing role), if this is the start of a decisive shift away from strict scrutiny, I think we will miss it. In this section, I will explain why. My analysis is less constitutional than political-theoretical. In brief, the strict scrutiny test helps us pick out and recognize "plural and conflicting values"[99] in a democratic society bound by a constitution. When we stop short of this recognition and weighing of values—either by saying that compelled speech is different or that only history and text matter—we lose out.[100] So why support strict scrutiny? Two reasons: (1) it forces an accounting of values, both by the person challenging the law and (especially) by the state defending it, and (2) it forces a weighing of values by the court, making it take sides on which values are more important and forcing it to explain why some values lose out.

A. Picking Out Values

Strict scrutiny begins with the court recognizing the government has infringed on a right. In each case covered in Part I, this was a right to not have to express something: the State's message of "Live Free or Die" or (at least implicitly) the validity of same-sex marriages. Assuming that these beliefs on the part of the Maynards, Jack Phillips, and 303 Creative are sincere, we can say that these rights also protect the value of sticking to one's beliefs; the value of not having to violate one's conscience by promoting a message that one does not believe in.[101] There is no gain in not saying that this is a real value, although there have been many learned commentators expressing puzzlement as to why *precisely* it is a value.[102]

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99. MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES (1990). I have also been influenced in my views about pluralism and value by CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY (1987).

100. I have addressed this issue in another context, and I extend and elaborate on my analysis here. In a previous piece, I stressed the importance of recognizing the burden placed on believers, even when believers lose in the end. Here I emphasize why it is important to recognize the state interest involved, even when the *State* is on the losing side. *See* Chad Flanders & Sean Oliveira, *Whose Conscience? Which Complicity? Reconciling Burdens and Interests in the Law of Religious Liberty*, *in* LAW AND RELIGION IN THE LIBERAL STATE 161 (Jahid Hossain Bhuiyan & Darryn Jensen eds., 2020).

101. For more on tying rights to goods and values, *see* JOHN GARVEY, WHAT ARE FREEDOMS FOR? (1996).

102. Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006); Steven H. Shiffrin, *What Is Wrong with Compelled Speech?*, 29 J. L. & POL. 499 (2014). *But see*

In any event, the strict scrutiny test explicitly recognizes this value by requiring the government to give an especially strong justification—a compelling one—for going against that value.

The strict scrutiny test forces the government to articulate what value the challenged law promotes, just as the person opposing the law has to explain what right the law burdens.[103] Sometimes, the government does not effectively articulate the real values advanced by its laws. In *Wooley*, the compelled speech does not seem in the end to further the State's asserted values. In *Masterpiece*, Justice Kennedy sketches out the type of values that are at play in the case, focusing not just on marketplace values but also on dignitary harms. He spells out at least a possible world in which those values could be at risk if the State did not step in and aggressively enforce its laws against anti-discrimination. The concurring opinions of Gorsuch and Thomas, by contrast, distort and misrepresent those values, reducing the State's interest in protecting people from offensive speech. *303 Creative* might do an even worse job of spelling out values. It offers those values repeatedly as quotations and as part of a descriptive history. But all the same, it does identify those values even though—as we will see in the next section—it may not fully present those values *as valuable*.

The 10th Circuit in *303 Creative* at least tried to do this. It set out the state's two putative interests: protecting the dignity of gays and lesbians and ensuring them equal access to the marketplace. It said both of those values were "compelling," although the second interest came across as a little garbled: it was not just the value of access to the marketplace generally, it was access to something like the *very services* of 303 Creative. The Supreme Court could have at least said these were values before it went on to dismiss them as in play in the case, or to say why they were outweighed, etc. This analysis is what the Supreme Court at least seemed to do in other cases involving anti-discrimination laws and compelled speech or association.[104]

Even when some values that the State wants to promote lose out, there is an independent value to making the government step up and say why it is doing something and for the Court to describe those values as best it can. This is what the strict scrutiny test does: the court must tell the public what it thinks justifies its particular policies; it sets out what values it

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Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert Denial*, 7 ALA. C.R. & C.L.L. REV. 77, 84 (2015) ("A major reason for the prohibition of compelled speech is the public humiliation and demoralization of being forced to say what one does not believe.").

103. I say more about the obligation of a plaintiff to show their rights have been burdened in Flanders & Oliveira, *supra* note 100.

104. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 631–32 (2018).

believes are so important, so compelling, as to make it necessary sometimes to violate a person's rights.[105] This seems to be a useful function even if (as I'll discuss below) those interests are not very weighty or are not weighty enough to justify the rights infringement. Compare strict scrutiny to a different test where we stop after we identified compelled speech, as the Court seems to do in *303 Creative*.[106] The State would just lose, without any further accounting for what might be on the State's side of the argument. This seems to cut short the recognition that the State's purported values have merit.

B. Weighing Those Values

However, this then gets us to the next part of strict scrutiny: a more or less explicit weighing of the State's interest against the value of the right. Does the compelling interest so compel that it justifies the infringement of the right? Is there a proper fit between the goal the State is after and the means it chooses to pursue that interest? Here, we go past just naming what values are at play—what values the state has or might allege are implicated—and the court has to decide what the values *really are worth*. Strict scrutiny requires a statement by the court about which value wins out when there is a conflict of values. I think this is obviously important too.

In *Wooley*, to return again to our central example, the Court says that the State's value as to identifying passenger vehicles is completely non-persuasive, and its goal of promoting statewide unity to be a non-starter.[107] The Maynards not only win because they are being forced to speak a message they disagree with—it is that their right is worth *more* than the State's professed interest.[108] Strict scrutiny demands this type of accounting. We *sort* of get this accounting in *Masterpiece*. Kennedy is pretty clear that there are dignitary interests at stake in the case, and that they are important, and valuable.[109] However, the rest of the analysis does not occur—because there was animus in the process that led to the application of the law to Jack Phillips—so, we do not get the balancing that the case seems to have called for. The reckoning in *Masterpiece* is incomplete. There is nothing about the State's interest in the case at hand, and no stab at narrow tailoring.

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105. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163–64 (2015).
106. 303 Creative LLC v. Elenis, 600 U.S. 570, 577–78 (2023).
107. Wooley v. Maynard, 430 U.S. 705, 715–16 (1977).
108. *Id.* at 716–17.
109. *Masterpiece Cakeshop, Ltd.*, 584 U.S. at 623–24.

Also, in *303 Creative*, it doesn't really happen at all. The values are listed and labeled, but they are not balanced; they are not shown or judged to have value at all.[110] The Court seems to suggest the values the 10th Circuit identified are not relevant to their analysis.[111] The value of nondiscrimination is just out there.[112] Nondiscrimination loses against the right to have one's speech compelled, but we do not know why.[113] We do not have a particular rationale because the value of not being compelled to carry another's message is worth *more* than the possible anti-discrimination and accommodation values at play, or that the law is not narrowly tailored. Instead, it is almost as if those values run on parallel tracks. We don't compare them, ever. One side just wins, well, *because*.[114]

If the Court balanced, then the Court would have to explain the values at play or explain them away.[115] It would have to explain why compelling someone to speak a message that they disagree with should always outweigh the dignity and access interests on the other side. This is not easy to do. It is, of course, easy to dismiss the dignitary interests on the other side as just a matter of protecting people from offense; it is easy to dismiss the marketplace interests by saying that there are other places to get websites (one wonders, again, whether the majority would say the same thing if the case involved *racial* discrimination). However, it is hard to balance the actual values in these cases, *i.e.*, the harms and hurts on both sides.[116] It is possible that the expressive interest of web designers *should*

110. *303 Creative LLC*, 600 U.S. at 587–89.

111. *Id.* at 583–84, 588–89.

112. Ambika Kumar, et al., *303 Creative Ruling Sets and Reaffirms Key Precedents for Online Service Providers*, DAVIS WRIGHT TREMAINE LLP (Jul. 18, 2023), https://www.dwt.com/insights/2023/07/303-creative-scotus-online-service-providers [perma.cc/BY9U-MQZ8].

113. *See id.* ("Unlike the Tenth Circuit's decision that assessed whether Colorado's public accommodation law was the least restrictive means to advance a compelling state interest, Justice Gorsuch's opinion simply concluded that the Colorado law compelled speech, and held that violated the First Amendment as-applied to the facts stipulated, seemingly *per se*." (citing 303 Creative LLC v. Elenis, No. 21–476, slip op. at 25–26 (U.S. June 30, 2023))).

114. *Id.*

115. As Tsesis explains, "Judgments should be 'fully reasoned, public explanations that are subject to public and professional scrutiny.' Categorical rules do not accomplish that level of interpretive articulation." Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. 811, 818 (2022) (citing Barry Sullivan, *Law and Discretion in Supreme Court Recusals: A Response to Professor Lubet*, 47 VAL. U. L. REV. 907, 909 (2013)).

116. Douglas Laycock writes "the conscientious objector who is denied exemption does not get to live his own life by his own values. He is forced to repeatedly violate conscience or to abandon his occupation and profession. The harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation, and that far outweighs the one-time dignitary or insult harm on the couple's side." Douglas Laycock, *The Wedding-*

win out in the end. But with the majority failing to go through all the steps to show their work, this acts as a sort of further insult to the losing party: the insult of not just losing but of losing without a good explanation.

C. What Is Lost and What Remains

In a recent concurring opinion in a Second Amendment case, Judge Kevin Newsom inveighed against balancing tests like strict scrutiny.[117] There is nothing in the constitutional text about them, he argued, and in addition, they leave too much to the discretion of judges to assess various values and how to set them against one another.[118] Instead, he suggests, we should stick to text and history.[119] Whatever we might say about giving judges too much discretion, Judge Newsom does not mention two things that a balancing test like strict scrutiny does bring to the table.[120] First, the state has to put forth, and the court has to consider *what* interests there might be, compelling or otherwise.[121] Second, the court has to make a

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Vendor Cases, 41 HARV. J.L. & PUB. POL'Y 49, 65 (2018). But is this true? Why isn't there just a "one time" insult when the wedding vendor makes a cake for the same-sex couple? Why isn't it a lasting dignitary harm when the vendor tells the same-sex couple that they don't approve of their wedding and that they won't serve them? The point is not that these questions have answers, the point is that the answers aren't at all obvious. For an opposite perspective from Laycock's, *see* David Daniel O. Conkle, *Equality, Animus, and Expressive and Religious Freedom Under the American Constitution:* Masterpiece Cakeshop *and Beyond*, *in* LA LIBERTE D'EXPRESSION EN DROIT COMPARE [FREEDOM OF EXPRESSION IN COMPARATIVE LAW] (Gilles J. Guglielmi ed., Les Editions Panthé on-Assas, forthcoming 2020) (manuscript at 23–24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3417932 ("It is true that the discrimination of wedding vendors cause no significant tangible harm to same-sex couples. But they suffer a more serious injury: the indignity of being denied goods or services by a commercial business that serves the general public."). *See also* the analysis in Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly, Through the Lens of* Telescope Media, 99 NEB. L. REV. 58, 81 (2020).

117. United States v. Jimenez-Shilon, 34 F.4th 1042, 1054 (11th Cir. 2022) (Newsom, J., concurring) (criticizing "manipulable means-ends balancing tests").

118. *Id.*

119. *Id.* at 1053.

120. *Id.* at 1050–54.

121. For a good list of interests that have found to be compelling in the past, *see* State v. Hershberger C.A., Nos. 1904, 1905, 1984 WL 6199, at *2 (Ohio Ct. App. May 30, 1984) ("The following cases provide examples of what constitutes a compelling interest. In Gillette v. United States (1971), 401 U.S. 437, the Supreme Court found that the United States government had a compelling interest in procuring the necessary manpower to serve in the military. In Reynolds v. United States (1878), 98 U.S. 145, the Supreme Court found that the state had a compelling interest in prohibiting polygamy. In Prince v. Commonwealth (1944), 321 U.S. 158, the Supreme Court found that the state had a compelling interest in protecting the children within its jurisdiction. In Johnson v. Motor Vehicles Division (Colo., 1979), 593 P. 2d 1363, the Colorado Supreme Court found that

decision as to whether those interests are compelling enough to justify the infringement of the right.[122]

The contrary method seems to leave us with a lot of *ipse dixits*. We get phrases like the First Amendment commands this or the First Amendment decides this for us.[123] I have always viewed these remarks as examples of bad faith judging[124]—as if we only have to conclude that there is an infringement and then there is nothing else left for judges to do because the First Amendment does it for us. This also leads to a kind of absolutism: the First Amendment automatically cancels out any competing values. It is always a trump card. Of course, as I noted above, there *are* values on the other side; thus, when the First Amendment interests win because text and history say so, those values lose out.

Moreover, there is the familiar point that the text and history method does not eschew balancing but only represents the outcome of a prior exercise of balancing. At *some* point, there was a decision that this or that value should win out. The text and history method ossifies this prior balancing, and those who cite the result of that balancing are at best pretending that it was never the result of balancing at all.[125] All of this, of course, supposes that we can easily read off that prior balancing without importing (implicitly) our ideas about what balance should be struck.

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the state had a compelling interest in requiring a driver's license to bear the photograph of a licensee. In State, ex rel. O'Sullivan, v. Heart Ministries, Inc. (1980), 227 Kan. 244, 607 P. 2d 1102, the Kansas Supreme Court found that the state had a compelling interest in requiring a children's home to obtain a state license before it could lawfully operate.").

122. *See* Wooley v. Maynard, 430 U.S. 705, 716–17 (1977).

123. Sometimes the court will frame this balancing as inherent in the First Amendment, so that there is nothing for the court itself to balance—it has already been done. *See e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 196 (2012) ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."); U.S. v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."); Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (stating that the framers "did all the 'balancing' that was to be done," with respect to the Bill of Rights).

124. I mean bad faith in the Sartrean sense, *viz.*, the desire to give up one's autonomy and to be treated as a thing (*i.e.*, something that is acted upon, rather than someone who acts). *See* Jack Reynolds & Pierre-Jean Renaudie, *Jean-Paul Sartre*, STANFORD ENCYCLOPEDIA OF PHIL. (Mar. 26, 2022), https://plato.stanford.edu/entries/sartre/ [https://perma.cc/YP89-6ERY].

125. *See* Chad Flanders, *A Half-Hearted Defense of the Categorical Approach*, 95 WASH. U.L. REV. 1389, 1399 (2018) ("At one point, maybe there was balancing, but, purportedly, *that is not what courts should do now*. The balancing has been done; the list remains. The categories purportedly have been set. Just like one cannot have new old friends, one cannot have a new old tradition.").

That is the problem with cutting short strict scrutiny as a political theory matter: it does not do a good job of working through plural and conflicting values in a transparent manner. It pretends the conflict does not exist on the constitutional level because the Constitution has done all the important balancing already, and courts are not within their power to disturb that determination. However, when values conflict and one side's values must lose, the process matters even more.[126] It matters because you want to be able to say that the losing side's values really were considered by the court and that, in many cases, they really were values. This process is significant, because it not only involves recognizing the losers in a conflict but also helps legitimize the court's decision in the eyes of the losers. It is one thing to lose at the hands of a court, and another thing to lose and *not* feel like your position was taken seriously. If the latter happens, the losers may not be as willing to accept the result as legitimate.

IV. CONCLUSION

303 Creative has been viewed mostly as a case about religious freedom and freedom of speech. It has not been looked at as much as a further example of the Court's retreat from doctrinal tests like strict scrutiny. Scholars have mostly left this argument to the debate over *Bruen*'s methodology. Yet *303 Creative,* despite superficially paying service to the notion of strict scrutiny and compelling interests, does not use that test, and even perverts it. In my opinion, it shows especially clearly the flaws and risks of abandoning strict scrutiny without having something to replace it. Strict scrutiny is not without its problems. But it is also not without its virtues. We will miss it when it is gone.

126. Something similar might be said about other places in the law where the court does not always have to go through all the steps and "show its work," for example, in ineffective assistance of counsel claims (where the court does not have to go through both prongs of *Strickland*) or in the qualified immunity context, where the court can avoid saying a right was violated if it holds that the right was not "clearly established." *See* Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). *See* Thunderhawk v. Cnty. of Morton, N. Dakota, No. 1:18-CV-00212, 2023 WL 7300867 at *8 (D.N.D. Nov. 6, 2023). I thank Ben Levin for this observation.