The Constitutional Vices of Compelled Speech: A Normative Theory of Compelled Expression

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This Note analyzes the Supreme Court's recent decision in 303 Creative LLC v. Elenis *and how it should affect public accommodations law. It identifies the relevant values underlying compelled-speech doctrine and extrapolates from those values a test that courts should apply when ascertaining whether a product that a public accommodation is asked to create is expressive. This Note contributes to the scholarship surrounding* 303 Creative *and compelled speech more generally in several ways. First, its account of the autonomy value of the Free Speech Clause in compelled-speech cases builds on other approaches, which generally fail to distinguish between the two major manifestations of the autonomy value: the (mis)attribution sub-value and the self-realization sub-value. Second, it casts a test to determine whether a product is expressive for compelled-speech purposes, since existing scholarship has merely identified several relevant factors without crafting a coherent test. Third, it concludes that courts should evaluate whether a public accommodation is forced to actually create expression by determining whether a request for a product from the public accommodation is closer to a rule or a standard. In so doing, this Note refocuses the discussion surrounding compelled speech on its underlying values, particularly its autonomy-protecting value, as well as its manifestations in sub-values. This understanding of expression harmonizes* 303 Creative *with long-standing public accommodations law and reaffirms American law's concomitant commitments to equality and liberty.*

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Introduction

Many antidiscrimination-law advocates have begun to raise the alarm and beat the drums of war over what appears to be the newfound and formidable foe of public accommodations law: the Free Speech Clause.[1] *303 Creative LLC v. Elenis*[2] has heralded this phenomenon by holding that the government cannot force a company to create expressive products if they do not wish to do so—in this case, wedding websites for gay couples.[3] On some accounts, *303 Creative* threatens to swallow the entire edifice of public accommodations law because of the opinion's lack of a limiting principle, applying to race, gender, and sexual orientation alike and failing to give any indication of what kind of "expression" is sufficient.[4]

1. *See, e.g.*, Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 244, 266 (2023) (raising grave concerns about *303 Creative*'s effects on public accommodations law).

2. 143 S. Ct. 2298 (2023).

3. *Id.* at 2308, 2313, 2321–22; *see* Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of* 303 Creative, 84 LA. L. REV. 565, 590–93 (2024) (describing how *303 Creative*'s expanded view of expression could substantially chip away at public accommodations law).

4. Smith, *supra* note 3, at 590–93; Yoshino, *supra* note 1, at 265–67.

However, this is not the best reading of *303 Creative*, especially since the *303 Creative* majority itself seems secure in its evaluation that public accommodations law is safe (and relatively unchanged) in a post-*303 Creative* world.[5] The dissent, though, is not so optimistic.[6] How, then, can the majority imagine that *303 Creative*'s grasp will be contained to a subset, and not the entire body, of public accommodations law? The answer lies in that the majority considers only a small minority of products sold by public accommodations to be expressive and thus merit the First Amendment's protection.[7] On first glance, only allowing expressive goods or conduct to receive First Amendment protection may seem to maintain antidiscrimination law's traditional domain, e.g., service in restaurants, banks, and laundromats.[8] But even those businesses could circumvent compliance with public accommodations laws under a broad reading of "expressive," since almost "anything"—including seating someone at a restaurant—can be interpreted as an endorsement of a group a customer belongs to, such as race or political affiliation, and therefore expressive.[9] Thus, a more articulate account of constitutionally cognizable expression is necessary to cash in on the *303 Creative* majority's promise.

Indeed, *303 Creative* fully left open how courts should determine whether a product is expressive for purposes of compelled-speech doctrine. In what many, including the dissent, have considered an abdication of the Court's duty to provide clear reasons for its opinions, the Court woodenly relied on the parties' stipulations that the websites at issue were expressive.[10] Thus, while the Court provided no guidance, it also did not bind courts to a capacious view of expression; rather, there is plenty of doctrinal room to

5. *See 303 Creative*, 143 S. Ct. at 2319 (labeling the dissent's string of hypotheticals alleging broad-reaching change for public accommodations law "[p]ure fiction all"); David D. Cole, *"We Do No Such Thing":* 303 Creative LLC v. Elenis *and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 YALE L.J.F. 499, 501–02 (2024) (arguing that the majority believed its holding was narrow and would not destroy public accommodations law).

6. *See 303 Creative*, 143 S. Ct. at 2322, 2340–41 (Sotomayor, J., dissenting) (expressing major doubts that the antidiscrimination law status quo would survive *303 Creative*).

7. *See* discussion *infra* subpart I(A); *see also* Transcript of Oral Argument at 21, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476) (Gorsuch, J.) ("One can view these websites, or last time around we had cakes, as either expressing the maker's point of view or the couple's point of view, and—and that's really at—at the heart of a lot of this.").

8. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1292 (1996) (explaining that federal antidiscrimination law sought to codify the common-law rule requiring "innkeepers" and "common carriers," along with "gas stations" and "restaurants," to serve any comers).

9. *See* Andrew Koppelman, *Sign of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1830 (2002) (explaining how associating with a socially disfavored group can express approval of the disfavored group because doing so transgresses a norm of non-association or non-acceptance); *see also infra* notes 94–95 and accompanying text.

10. *See* discussion *infra* subpart I(A).

pinpoint the source of the constitutional violation in compelled-speech cases involving public accommodations.

This Note makes sense of *303 Creative* by furnishing a normative understanding of what makes a product expressive in the public accommodations setting—it gets at the heart of the constitutional vices at work in compelled-speech cases and fashions a test to identify constitutionally impermissible speech compulsions. In so doing, this Note's test effectively limits *303 Creative* to a small subset of cases that better match both the majority's and the dissent's conceptions about what should be covered by the First Amendment. This Note's understanding of expression leaves us with a robust public accommodations law that, combined with *303 Creative*, provides a more nuanced and principled approach to compelled-speech cases, prizing both the freedom of expression and public equality.

This Note proceeds in three parts. Part I briefly describes compelled-speech doctrine. Compelled-speech doctrine is relatively sparse, but it includes several cases that illuminate the legal principles at work, particularly the autonomy value of free speech.

Part II evaluates several possible understandings of expression in the antidiscrimination setting before discarding them. Some argue that *303 Creative* only applies to "pure speech."[11] Others reason that commercial products cannot be expressive and that compelled speech should be limited to the non-commercial setting.[12] Eugene Volokh and Dale Carpenter have asserted that only customized and unique products are expressive in the compelled-speech setting.[13] While these tests generally trace vital threads or intuitions, they all fail, for one reason or another, to produce a satisfying account of expression.

Part III reaches this Note's suggested test for whether a good or service offered by a public accommodation is expressive in the public-accommodations law setting. It proposes a tripartite test: (i) is the expression communicated via a traditional medium of expression or sufficiently analogous to one; (ii) does the nature of the request made by the customer require the public accommodation to actually create expression of its own; and (iii) would a reasonable third party misattribute the governmentally compelled expression to the public accommodation.

The initial part of this Note's test looks to a theory suggested by free-speech theorist Brian Soucek to determine what type of expression is cognizable by the First Amendment.[14] This Note suggests that courts must,

11. *See infra* subpart II(A).

12. *See infra* subpart II(B).

13. *See infra* subpart II(C).

14. *See* Brian Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. 685, 731–35 (2021) (furthering the descriptive and normative claims that courts should and have followed a traditional mediums-of-expression test).

as a necessary condition, consider whether the expression falls within a traditional medium of expression or can be closely analogized to one. This principle reflects both (a) the descriptive view that the Court has generally limited itself to finding violations of the Free Speech Clause in cases involving either traditional mediums of expression or close analogies to traditional mediums and (b) the normative view that not all types of expression should be cognizable by the First Amendment, rather only those with the pedigree of a tradition that efficiently delivers expression. The first factor of the test thus makes sense of a doctrine that "unquestionably" protects art,[15] but not necessarily elaborate wedding cakes.

The second part of this Note's test argues that courts should consider whether the public accommodation is forced to actually create its own expression by evaluating the customer's request that a public accommodation must abide by in creating a product. If the government forces a public accommodation to actually create expression, the government commandeers a public accommodation's creative faculties and thus severely injures the public accommodation's First Amendment autonomy interest. This factor gauges whether the public accommodation is forced to use its own creative machinery for the government's ends by asking whether the buyer's request for a product is more standard-like ("paint a beautiful mountain") or more rule-like ("make a website with this exact formatting and text"). This inquiry is particularly important in the public accommodations setting because a public accommodation's product can be the expression of either the buyer or the seller—or some combination of the two[16]—and only when forcing the public accommodation to actually create expression does the government violate the "self-realization" aspect of the broader autonomy value that drives the First Amendment in compelled-speech cases.

The third part of this Note's test tasks courts with considering whether the social context causes a product to be expressive for purposes of compelled speech when a reasonable person would attribute expression with which the public accommodation disagrees, and was forced to express, directly to the public accommodation. This factor evaluates the harm done to a public accommodation when the government causes the public accommodation to appear to have said something that it despises, notwithstanding whether the public accommodation actually uses its creative faculties to make the product. In forcing a public accommodation to be perceived as saying something it despises, the government offends the public accommodation's autonomy interest in controlling its own message. Because

15. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995).

16. At oral argument, the Justices were particularly concerned with this question. Transcript of Oral Argument, *supra* note 7, at 21 ("One can view these websites, or last time around we had cakes, as either expressing the maker's point of view or the couple's point of view, and—and that's really at—at the heart of a lot of this.").

compelling such expression contravenes the autonomy value that animates compelled-speech doctrine, this subset of expression is of the type that the First Amendment guards.

In application, this Note's test works in two stages: It identifies if the necessary condition is present and then determines whether one of the two independent constitutional vices is present. The second and third factors of this test pinpoint two different manners in which the government can violate the autonomy value by compelling speech: by injuring the self-realization sub-value or the attribution sub-value. Only one need be present for a public accommodation to win on this test.

By linking whether something is expression to the values undergirding the First Amendment in compelled-speech cases, this Note better zeroes in on the constitutional vice caused by compelling speech and provides a more precise principle guiding the expression inquiry. Thus, it narrows the expression eligible for compelled-speech coverage to the type that lines up with both the majority's and the dissent's accounts of what Free Speech in this context ought to protect.

I. A Foray into Compelled Speech

A. 303 Creative *and* Masterpiece Cakeshop

The story begins with a duo of cases: *Masterpiece Cakeshop*[17] and *303 Creative*.[18] *Masterpiece Cakeshop* is the first in sequence and in some ways portended *303 Creative*, but it was decided on relatively narrow, idiosyncratic grounds. In *Masterpiece Cakeshop*, a religious cakemaker, Jack Phillips, claimed that his cakes were expressive, bordering on art, and thus Colorado's public accommodations law violated the First Amendment as applied.[19] A gay couple had approached Phillips, asking to buy a cake, but when they specified that they were searching for a wedding cake, Phillips notified them that he would not create a cake for a same-sex wedding; Phillips later explained that it would contradict his religious belief that marriage is exclusively between a man and a woman.[20] Notably, Phillips claimed to be willing to create any sort of baked good that did not contradict his religious beliefs.[21]

The Court ultimately held that the Colorado Civil Rights Commission violated the Free Exercise Clause by expressing hostility toward Phillips's

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

18. 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

19. *Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1726, 1728.

20. *Id.* at 1724.

21. *See id.* (noting that Phillips was willing to sell the couple other goods like birthday cakes and shower cakes).

religion and his motivations for refusing to sell cakes to the gay couple.[22] The majority opinion only briefly touched on the substantive free speech claims in the opinion, without marshaling a majority as to whether wedding cakes are sufficiently expressive to trigger the First Amendment's protection.[23] While the majority opinion entertained (but did not ultimately endorse) the claim that Phillips's cakes are in fact expressive, Justice Thomas, with whom Justice Gorsuch joined, wrote a concurring opinion asserting that the cakes were in truth expressive.[24]

By deciding *Masterpiece Cakeshop* on grounds largely confined to its facts, the Court left nearly a blank slate for *303 Creative*. Indeed, both the majority[25] and the Thomas/Gorsuch concurrence[26] set the stage for *303 Creative* by entertaining and endorsing, respectively, the notion that the Colorado antidiscrimination law compelled Phillips's speech by forcing him to bake a cake for a gay couple, even if they did not decide the case on those grounds.

The Court in *303 Creative*, though, was no longer content with a narrow holding confined to the facts. In fact, while the Petition for Certiorari presented both free exercise and free speech questions,[27] the Court only granted the question presented pertaining to the free speech challenge.[28] Some commentators have speculated that the Court granted only the speech challenge because the Court has hit a "logjam" in its free exercise jurisprudence.[29] To make room for some real doctrinal work, the Court

22. *Id.* at 1729–31 (describing statements from the administrative hearing such as, "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust," as indicating "impermissible hostility" to Phillips's religious views and discussing how Phillips's case was treated differently than other cases where bakers objected to making a cake "on the basis of conscience").

23. *See id.* at 1723–24, 1728–29 (mentioning the free speech claim but choosing to focus on the free exercise issue).

24. *Id.* at 1742 (Thomas, J., concurring in part and concurring in the judgment).

25. *Id.* at 1728–29 (majority opinion).

26. *Id.* at 1738 (Gorsuch, J., concurring).

27. Petition for Writ of Certiorari at i, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476).

28. *See* Yoshino, *supra* note 1, at 261 n.204 (noting that the Court only granted the free speech question).

29. *E.g.*, Yoshino, *supra* note 1, at 245. While perhaps a majority of the Justices concur that *Employment Division v. Smith*, 494 US 872 (1990)—which established the current regime of free-exercise law and held that two members of the Native American Church could not receive an exemption from a law of general applicability because they are religious, *id.* at 874, 878–79, 890—needs to go, they fundamentally disagree as to how to dispose of the body. This dispute is evident from *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), where the Court came to a ruling that weakened but did not destroy *Smith*, but the Justices on the conservative bloc fervently disagreed about the relationship between its burgeoning free-exercise regime and the old free-exercise regime. *Compare id.* at 1883 (Alito, J., concurring) ("Even if a rule serves no important purpose and has a

sidestepped its contentious free exercise battles and stepped into the domain of free speech.

303 Creative involved a religious website and graphic designer, Lorie Smith, who wished to enter the wedding website business.[30] Smith claimed that she would not create any website that would violate her beliefs, religious or otherwise.[31] Any acknowledgement of gay marriage's existence or validity would, in her view, violate her religious precepts.[32] Smith, before entering the wedding website market, brought a pre-enforcement challenge to Colorado's public accommodations law, the Colorado Anti-Discrimination Act (CADA), because she faced a "credible threat" that Colorado would seek to enforce the public accommodations law against her.[33]

Furthermore, Smith asserted that the websites she wished to create would be expressive in nature, being themselves "artwork," and that they would be attributed by those who view the websites to Smith as her own speech.[34] And the State of Colorado stipulated to many of these facts and more: that Smith does not discriminate on the basis "of any sexual orientation"; that Smith "will not produce content that 'contradicts biblical truth' regardless of who orders it"; that "the wedding websites [she] plans to create 'will be expressive in nature'"; that the wedding websites "will be 'customized and tailored'" and will "express [her] and 303 Creative's message celebrating and promoting" Smith's beliefs on marriage; and that people who view her websites would identify them as art attributable to Smith and 303 Creative.[35] Since CADA requires places of public accommodation to provide the "full and equal enjoyment" of its goods and services to all customers regardless of sexual orientation, Smith argued that CADA would force her to create wedding websites for gay couples, and that this compulsion would violate her right to free speech.[36]

The Court, relying on the stipulations, held that the application of CADA to Smith's websites would violate the Free Speech Clause, as it would compel her to create expression with which she disagrees and would not

devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination."), *with id.* at 1882–83 (Barrett, J., concurring) (expressing paralyzing uncertainty about "what should replace *Smith*," despite "text[ual] and structur[al]" doubts about *Smith*).

30. *303 Creative*, 143 S. Ct. at 2308.

31. *Id.*

32. *See id.* (noting Smith's concern about having to "convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman").

33. *Id.* (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014)).

34. *Id.* (quoting Petition for Writ of Certiorari, *supra* note 27, app. at 187a).

35. *Id.* at 2309–10 (quoting Petition for Writ of Certiorari, *supra* note 27, app. at 184a, 186a, 187a).

36. *Id.* at 2308–09 (quoting COLO. REV. STAT. § 24-34-601(2)(a) (2022)).

create save for CADA's requirements.[37] The Court also found—in relying on the stipulations—that the expression belonged to Smith because the websites contribute to Smith's larger body of work.[38] The Court framed the case as powerfully implicating the autonomy value of free speech, that one has an entitlement to express what one wishes and to control one's message, citing *West Virginia State Board of Education v. Barnette*,[39] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,[40] and *Boy Scouts of America v. Dale*[41] numerous times throughout the opinion.[42] The opinion takes a categorical approach to compelled speech, holding that, when a statute compels speech, the application of that law is per se unconstitutional.[43]

Commentators have expressed grave concerns surrounding *303 Creative*'s potential effects on public accommodations law. One major complaint is that the Court failed to give any guidance on how to apply *303 Creative*'s directive to other sets of facts.[44] Because the Court relied totally on the stipulations and thus the analysis was completely localized to the facts, the Court in *303 Creative* gives little to no aid to lower courts trying to apply it—particularly in determining whether something is expressive.[45] Justice Sotomayor pursues a powerful line of reasoning in her dissent: The majority's reasoning cannot be rationally limited to certain kinds of "legitimate" discrimination, nor does the majority's reassurance that *303 Creative* will only apply to "expressive" goods or services provide much solace.[46] Expression writ large is an impossibly vague and broad category that needs specification.[47] Rather than generic "expression," the Court meant that *303 Creative* applies to constitutionally relevant expression, which the majority balked at specifying. Because the Court clearly meant that *303*

37. *Id.* at 2313.

38. *See id.* at 2309, 2313 ("The websites and graphics Ms. Smith designs are 'original, customized' creations that 'contribut[e] to the overall messages' her business conveys 'through the websites' it creates." (quoting Petition for Writ of Certiorari, *supra* note 27, app. at 181a–82a)).

39. 319 U.S. 624 (1943).

40. 515 U.S. 557 (1995).

41. 530 U.S. 640 (2000).

42. *See, e.g.*, *303 Creative*, 143 S. Ct. at 2310 ("The framers designed the Free Speech Clause of the First Amendment to protect the 'freedom to think as you will and to speak as you think.'" (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000))).

43. Yoshino, *supra* note 1, at 280–81.

44. *E.g.*, *id.* at 275.

45. *Id.*

46. *See 303 Creative*, 143 S. Ct. at 2342 & n.16 (Sotomayor, J., dissenting) (noting that a "website designer could equally refuse to create a wedding website for an interracial couple" and that a veritable host of businesses could stop providing services to individuals because of their characteristics if the businesses' goods are deemed expressive by a court).

47. *See* Smith, *supra* note 3, at 592 (outlining the consequences of a broad definition of "expressive conduct").

Creative should apply to the subset of all possible types of expression that is constitutionally relevant and yet failed to provide any guidance for how to uncover the contents of that subset, those who wish to clarify *303 Creative* must divine the content of constitutionally cognizable expression.

B. What Is Compelled Speech?

The anatomy of a compelled-speech case is simple. The government forces a person to express something that the person does not believe or would otherwise not say if they had the choice.[48] The Supreme Court has held that a negative right not to speak is the corollary of a positive right to free speech—that a right to say what one wants implies the right not to say anything at all.[49]

Though speech as a concept may be on its face impossibly vague, interpreters can discover its content by looking to the fundamental values it serves. Some of the most prominent are: the "truth-seeking" value, the "democracy-guarding" value, and the "autonomy-protecting" value.[50] The truth-seeking value justifies protecting speech on the ground that protecting speech best allows individuals to seek and come to truth.[51] Essentially, this position asserts that truth "is better reached by free trade in ideas": that governmental interference with speech gets in the way of truth working itself out.[52] The democracy-guarding value posits that speech ought to be protected because free discourse is necessary for maintaining a healthy democracy.[53] In essence, this position prizes speech's facilitation of the political process because free speech results in an informed people that can make educated decisions in the electoral process.[54] The autonomy-protecting value of free speech asserts that the Free Speech Clause is undergirded by a respect for individual liberty to shape one's own expression.[55] But the autonomy value can be understood in two distinct manners.

First, one has an entitlement to "self-rule" or "self-realization" when it comes to speech, in that one has a liberty interest in hearing others' speech and creating speech of one's own because the two are essential to human

48. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797–98 (1988).

49. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

50. *See* David S. Han, *Compelled Speech, Speaker Perception, and Plausibility*, 77 FLA. L. REV. (forthcoming 2025) (manuscript at 4–5) (on file with author) (outlining some of the main First Amendment values).

51. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

52. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

53. Redish, *supra* note 51, at 596.

54. *Id.*

55. *Id.* at 619–21.

well-being, the creation of a worldview, and the self.[56] The government commits the *self-realization vice* when it invades this entitlement. Second, one has a right to be the master of their message, such that the government does not force a person to express something they despise and that others attribute to them.[57] This branch of autonomy stems from the right to self-formation, meaning that one has the right to craft their own message and promulgate it—to place one's "stamp on the world and maintain[] that world."[58] When the government forces a person to say something that others will falsely attribute to the compelled person, the government commits the *misattribution vice*.

Under the self-realization flavor of autonomy, the government inflicts harm when it bends a person's expressive faculties to its will. Certain types of expression are a "manifestation of the self" and thus deserve protection "even if [they are] not used to communicate with others."[59] When the government compels a person to express something of this sort, it commits a grave harm: It invades the most intimate recesses of oneself. For example, a police officer commits this type of harm by forcing a painter who is making an anti-police painting to instead depict police officers as heroes on pain of a raised baton. But not all speech compulsions fall into this category. Take, for example, a judge threatening to hold an accused in criminal contempt of court because the accused refuses to acknowledge the court's existence or authority. The former example invades the most private and independent aspects of a person's faculties; the latter does not.

Under the misattribution view of the autonomy value, a person suffers harm from not being able to control their message. In essence, this harm is being seen as having said something one despises. Imagine a police officer in Houston forcing a die-hard Astros fan to say that they love the Rangers to a crowd of Astros fans immediately following the Astros' defeat at the hands of the Rangers in the World Series; or consider an officer forcing a pastor to say that they have renounced their god in front of their congregation. Since one's expression is essentially a representation or manifestation of oneself, being seen as having expressed something one disagrees with is a grave harm—even if one does not "express" anything under the self-realization view.

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56. *See* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 6 (1976) ("Speech is central to the individual's activity of discovery and creation; it is necessary for the individual's choice or habit in maintaining the social world."); *see also* Tara Smith, *What Good Is Religious Freedom? Locke, Rand, and the Non-Religious Case for Respecting It*, 69 ARK. L. REV. 943, 967 (2017) (detailing how intellectual freedom, of which freedom of speech is a subset, is integral for human well-being and thus morally justified).

57. *See* Han, *supra* note 50, at 7–8 (describing a view of the autonomy value concerned with others falsely attributing a message compelled by the government to the individual).

58. Baker, *supra* note 56, at 7.

59. *Id.* at 8.

These two understandings of the autonomy value pervade compelled-speech law. The self-realization sense of the autonomy value is especially prevalent in *Barnette*—in which the Court held that the government could not compel students to salute the American flag in school—where the Court found that compelling an "affirmation of a belief and an attitude of mind" violates the constitutionally protected entitlement to "speak [one's] own mind."[60] The Court proclaimed that the real issue in the case was one of "self-determination in matters that touch individual opinion and personal attitude."[61] *303 Creative*'s language tracks this emphasis on the self-determination view of autonomy. The majority asserted that the right to free speech is an end in itself because "the freedom to think and speak is among our inalienable human rights."[62]

Indeed, the Court was concerned that Lorie Smith would have to suffer the harm that accompanies "forc[ing] an individual to 'utter what is not in [her] mind' about a question of political and religious significance."[63] But in *Wooley v. Maynard*, where the Court held that New Hampshire could not compel citizens to display the state slogan—"Live Free or Die"—on their license plate, the other conception of autonomy dominated: The vice in that case was forcing the plaintiff to serve as a "'mobile billboard' for the State's ideological message."[64] In *Wooley*, the primary constitutional vice was having to carry the government's message for all to see because the "State 'invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'"[65]

Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (*FAIR*)[66] synthesizes these two autonomy harms. In *FAIR*, the Court held that forcing law schools to host and promote recruiting events put on by the military by threatening to withhold federal funding was not compelled speech because (a) the expression the government forced the schools to create—emails and notices—was not expressive because it lacked substance other than being "plainly incidental to the . . . regulation of conduct,"[67] and (b), objectively,

60. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34, 642 (1943).

61. *Id.* at 631.

62. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2310–11 (2023) (citing 4 ANNALS OF CONG. 934 (1794) (statement of Rep. Madison)).

63. *Id.* at 2318 (quoting *Barnette*, 319 U.S. at 634).

64. Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977).

65. *See id.* at 715 (quoting *Barnette*, 319 U.S. at 642) (pinpointing the harm as having to "display" New Hampshire's slogan "to hundreds of people each day").

66. 547 U.S. 47 (2006).

67. *Id.* at 62. While this does not exactly align with this Note's language, the substance is much the same: The speech is regulable because it is more akin to conduct and thus does not implicate the values underlying the Free Speech Clause. *See id.* ("Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as

"[n]othing about recruiting suggests that law schools agree with any speech by recruiters."[68] Consequently, providing the same recruiting information and advertising that information did not rise to the level of constitutionally cognizable expression.[69]

Ordinarily, the "instrumental" free speech values—including the truth-seeking and democracy-guarding values—reign supreme in animating free-speech doctrine.[70] But in compelled-speech cases, that hierarchy is flipped on its head: The autonomy value becomes the most important because the harm suffered is done primarily to one's autonomy interests, under either view of the autonomy value, rather than the truth-seeking process or democracy.[71] In fact, compelling speech in violation of the First Amendment invariably harms autonomy interests but could conceivably benefit the truth-seeking process or democracy by, e.g., requiring news broadcasts to allocate significant quantities of time to both sides of controversial political issues (assuming this violates the First Amendment).[72]

The autonomy value thus informs compelled-speech doctrine. The two different varieties of the autonomy value pave two paths to a compelled-speech violation: (1) forcing someone to actually create expression or (2) requiring someone to bear a message that others attribute to the one being compelled. With these guiding principles in mind, this Note wades into realizing these values by ascertaining what types of expression compelled-speech doctrine guards.

C. How Do We Know If Speech Is Expressive?

Whether a product is expressive is the most interesting and relevant piece of this compelled-speech puzzle because this question pierces to the

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forcing a student to pledge allegiance . . . and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is."). This Note takes an extra step by providing an explanation for Justice Roberts's appeal to intuition. In this Note's view, the primary reason why some speech is protected but other speech, like an administrative email, is not lies in that certain speech involves a creative act—the engagement of the creative faculties—while an administrative email does not.

68. *Id.* at 55, 65–66.

69. *Id.* at 65–66.

70. Han, *supra* note 50, at 7.

71. *See id.* at 7–8 (arguing that autonomy is the value most implicated in compelled-speech cases).

72. This hypothetical is rooted in the FCC's Fairness Doctrine, which was aimed at ensuring that viewers got both sides of political arguments in news broadcasts—this perhaps helped viewers come to more informed and truthful views and, thus, contributed to the health of democracy. *See* Dylan Matthews, *Everything You Need to Know About the Fairness Doctrine in One Post*, WASH. POST (Aug. 23, 2011, 4:25 PM), https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ_blog.html [https://perma.cc/5S28-3BH6] (explaining the Fairness Doctrine and some of the constitutional challenges it faced). The Fairness Doctrine was voluntarily retired by the FCC in 2011, though it had not been enforced for many years. *Id.* This hypothetical assumes that the Fairness Doctrine violates the First Amendment, which is not a foregone conclusion.

heart of the First Amendment claims themselves—and it has caused more than a few headaches for judges and their clerks. Plus, the expression question is by far the most important part of the test, as the Court has adopted a categorical approach to compelled speech, eschewing the tiers of scrutiny.[73] Indeed, the Court has declared that the "painting of Jackson Pollock, music of Arnold Schoenberg, or *Jabberwocky* verse of Lewis Carroll" are "unquestionably shielded" by the First Amendment.[74] But none of these works articulate a "particularized message,"[75] nor do they contribute something concrete to a marketplace of ideas or the health of American democratic values. Though the Court's examples are truly "unquestionably shielded" by the First Amendment, they evade any court-approved rationale for why they are expressive.

The Supreme Court has not provided a satisfying answer to how courts should determine whether a product is expressive for purposes of compelled speech. There is no clear throughline in the Court's cases shining light on expression's nature. The Court has held an array of conduct to be expressive: a flag burning,[76] a flag salute,[77] a license plate slogan,[78] a parade,[79] and the raising of a flag in front of a city hall.[80] Some of this conduct, including a flag burning and salute, is considered "symbolic speech," meaning that the conduct is so clearly and essentially expressive that the conduct is a "short cut from mind to mind" in "communicating ideas."[81] Some of these cases also cover "pure speech,"[82] including an objection to the forced inclusion of a slogan on one's license plate and banners or songs in a parade.

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73. While there is some confusion as to whether the tiers of scrutiny apply to compelled-speech cases, many of the landmark cases in the field have applied a categorical approach. *See* Yoshino, *supra* note 1, at 276, 280–81 (discussing the Court's decision not to apply the tiers of scrutiny in *303 Creative*); *but see* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (noting that freedom of speech can only be restricted when there is "grave and immediate danger to interests which the State may lawfully protect," requiring more than the rational basis or any other tier of scrutiny in existence at the time). This is particularly conspicuous in *303 Creative*, where Justice Gorsuch made no mention of strict scrutiny and opted for the categorical approach. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2317–18 (2023). Eugene Volokh has described the Court's approach to compelled-speech cases as such: "Government coercion is presumptively unconstitutional . . . when it compels people to speak things they do not want to speak . . . ." Eugene Volokh, *The Law of Compelled Speech*, 97 TEXAS L. REV. 355, 368 (2018).

74. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995).

75. Spence v. Washington, 418 U.S. 405, 410–11 (1974).

76. Texas v. Johnson, 491 U.S. 397, 399, 406 (1989).

77. *Barnette*, 319 U.S. at 626, 633–34, 642.

78. Wooley v. Maynard, 430 U.S. 705, 707, 713 (1977).

79. *Hurley*, 515 U.S. at 561, 568.

80. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022).

81. *Barnette*, 319 U.S. at 632.

82. "Pure speech" is a term of art that is often assumed to have a clear meaning but has rarely received precise explication. Black's Law Dictionary defines pure speech as "[w]ords or conduct

Perhaps the furthest the Court has gone in stretching what may be considered expressive is its holding in *Dale* that, in certain instances, mere association with an individual can constitute speech covered by the First Amendment—and that an antidiscrimination law forcing an organization to engage in such association can violate the Free Speech Clause.[83] But the thrust of *Dale*, holding that antidiscrimination laws could not prevent the Boy Scouts from excluding a scoutmaster because he was openly gay,[84] has dulled with the years and its infrequent use, perhaps because, if taken seriously, *Dale* could completely undermine antidiscrimination law. The court of time has favored *Hurley* for guidance on freedom of association, and for good reason. In *Hurley*, the Court found that an LGBTQ group could not require organizers to approve their participation in the parade because doing so would alter the parade's message.[85] Instead of reasoning that associating with LGBTQ persons endorses their sexuality, *Hurley* held that incorporating the LGBTQ group's float would fundamentally alter the content of the expression, i.e., the parade itself.[86] Instead of licensing refusals to deal with persons because they seek to purchase a service while gay, the Court has generally required the complained-of compulsion to alter the expression itself—latent animus against LGBTQ persons is not sufficient to trigger First Amendment protection.[87]

But *Spence v. Washington*,[88] holding that the display of an upside-down, altered flag was constitutionally protected speech,[89] provides the clearest (attempt at an) articulation of a test to determine what conduct counts as expressive. The *Spence* test asks whether (1) the expression "convey[s] a particularized message" and (2) "the likelihood [is] great that the message would be understood by those who viewed" the expression.[90] But this test has drummed up substantial controversy, as it does not "express a sufficient condition for bringing 'the First Amendment into play.'"[91] Indeed, *Jabberwocky* and Jackson Pollock's paintings do not express a particularized message—and the message, if there even is one, is unlikely to be articulated

limited in form to what is necessary to convey the idea." *Speech*, BLACK'S LAW DICTIONARY (12th ed. 2024); *see also* Watts v. United States, 394 U.S. 705, 705, 707 (1969) (finding that a statute prohibiting mere rhetoric about harming the president "ma[de] criminal a form of pure speech").

83. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

84. *Id.* at 659.

85. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572–73 (1995).

86. *Id.* at 572–73.

87. *See* Yoshino, *supra* note 1, at 268–69 (remarking that *Dale*'s inclusion with *Hurley* and *Barnette* as the cases the majority in *303 Creative* repeatedly cited is "striking," since it signals a turn toward recognizing a right of expressive association and its accompanying breadth).

88. 418 U.S. 405 (1974).

89. *Id.* at 406, 414–15.

90. *Id.* at 410–11.

91. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995).

or understood by many who encounter these works. This shortcoming was recognized in *Hurley*, where the Court set aside the *Spence* test.[92] Without any court-sanctioned guiding principle or any more direction than a couple discrete data points, courts risk operating on feel rather than reason.

And what "feels" expressive can entrench majority viewpoints at the expense of the views and rights of those in the minority. While the Court hailed its defense of the refusal to serve gay persons as a victory for "unpopular" viewpoints in *303 Creative*,[93] relying on "feel" may instead create a right to refuse for those with popular or at least socially acceptable viewpoints—but not those viewpoints that are *truly* unpopular.[94] Professor Koppelman has argued that the concept of "endorsement" is "parasitic" on what is considered "normally appropriate": A subversion of normal activity, for example, providing a service to a gay wedding, can send a signal that the provider endorses the activity that contravenes the norm.[95] This explains why seating a Black family in 1950s Birmingham sent a message but why seating the same family in 2024 would not. By allowing public accommodations to refuse to serve people because that action may "send a message" that the business supports something unpopular, courts entrench a right for socially popular groups to refuse service to truly "unpopular" groups. This perverse reality further highlights the need for a more workable test than bare feel.

In essence, the Supreme Court has created many questions and provided few answers. This Note, in the next Part, examines some potential theories for ascertaining what is expressive for purposes of First Amendment challenges to public accommodations law, as provided by important commentators and thinkers.

II. Some Proposed (Yet Illusory) Answers

Scholars have proposed several theories of how courts should ascertain whether a product is expressive since the beginning of the so-called "wedding

92. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) (noting that "a narrow, succinctly articulable message is not a condition of constitutional protection" and that the *Spence* test fails to account for certain "unquestionably" protected art).

93. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2321 (2023).

94. *See* Koppelman, *supra* note 9, at 1830 ("The question of whether the Scouts have 'endorsed' homosexual conduct, then, depends on one's background assumptions about what sort of action is normally appropriate. If one is behaving appropriately, then one is behaving neutrally and avoiding improper favoritism. . . . Only departing from the norm sends a message."). Koppelman describes the concept of endorsement through action as "parasitic" on social norms, in the sense that conformity with an "unspoken norm" is a shibboleth to distinguish those who act appropriately from those who do not. *See id.* ("Baseball teams are not now understood to be making a statement when they add well-qualified players to their rosters—that's just what baseball teams do—but the Brooklyn Dodgers necessarily and inevitably made a statement when they decided to hire Jackie Robinson in 1947."). And acting inappropriately in this sense sends a message about the transgressor's opinion on the quality of the norm—i.e., that it is a defective norm.

95. *Id.*

vendor cases."[96] While some have furthered legal realist claims about *303 Creative*'s limited reach,[97] this Note is interested in furnishing a normative, doctrinally sound limiting principle. Accordingly, this Note does not address legal realist or sociological claims. This Note instead addresses several of the more prominent or potent (yet incorrect) theories: (1) that *303 Creative* is limited to "pure speech" cases; (2) Justice O'Connor's commercial–noncommercial distinction from *Roberts v. United States Jaycees*;[98] and (3) Eugene Volokh and Dale Carpenter's suggestion that products must be customized and unique to be expressive.

A. 303 Creative *Is Only Limited to "Pure Speech" Cases*

The most basic view of *303 Creative* is that it only applies to pure speech—that *303 Creative* extends no further than the use of words, pictures, or representational drawings.[99] This view myopically relies on the facts the Court adjudicated in *303 Creative*, specifically the stipulation that 303 Creative's websites were expressive.[100]

But this view is untenable. There is nothing in *303 Creative*'s logic or precedent that even indicates that *303 Creative* is limited to pure speech.[101] Justice Gorsuch—who authored the majority in *303 Creative*[102]—and Justice Alito would have held that the wedding cake in *Masterpiece Cakeshop* was expressive.[103] Whatever the expressive status of a wedding cake, it is a longshot to claim that it constitutes pure speech—cakes play a dual role in weddings, symbolizing a couple's love and commitment but also providing

96. *See, e.g.*, Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 243–44, 260 (2015) (analyzing whether a wedding cake and wedding photographs should be covered speech).

97. *See, e.g.*, Carlos A. Ball, *First Amendment Exemptions for Some*, 137 HARV. L. REV. F. 46, 46–47, 63 (2023) (arguing that *303 Creative* will not expand exemptions to conduct motivated by racial prejudices since the conservative Justices think that racial discrimination is morally indefensible while opposition to same-sex marriages could be based on sincere, non-invidious views).

98. 468 U.S. 609 (1984).

99. Ryan L. Bangert, Senior Vice President, Strategic Initiatives & Special Couns. to President, All. Defending Freedom, The State of Free Speech in a Tolerant Society: Examining *303 Creative, LLC v. Elenis* (Oct. 3, 2023); *see* Caleb Kunde, *Mitigating Discrimination by Businesses: Adopting a "Substantial Amount of Expression" Test in the Wake of the Court's* 303 Creative *Decision*, 56 ST. MARY'S L.J. (forthcoming) (manuscript at 12–13, 19–20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4668284 [https://perma.cc/SP58-WQZM] (proposing a test the lower courts should use to determine whether something is "pure speech," the trigger for the Court's holding in *303 Creative*).

100. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2309 (2023).

101. *See* Yoshino, *supra* note 1, at 275–76 ("[T]he majority [in *303 Creative*] planted the seed for this expansion into expressive association claims . . . .").

102. *303 Creative*, 143 S. Ct. at 2307.

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

sustenance to guests. And the Court found that *303 Creative* was an easy case because of the pure-speech stipulation—it nowhere confined its holding to pure speech, nor does a compulsion to express rationally limit itself to pure speech.[104] Since neither *303 Creative* nor the context give any indication that this Court will stop at pure speech, the Court almost certainly does not hold that only pure speech is protected by the compelled-speech doctrine.

B. Justice O'Connor's Commercial–Noncommercial Distinction and Its Offshoots

Some commentators and courts have adopted the view that commercial speech is categorically not covered by the First Amendment.[105] Perhaps the most prominent voice raised in support of this theory is Justice O'Connor, in her concurring opinion in *Roberts v. United States Jaycees*.[106] Other courts have given this test significant face time, including the New Mexico Supreme Court, which rejected a challenge to New Mexico's public accommodations law from a wedding photographer,[107] and the dissent in *303 Creative*.[108] Dale Carpenter, a prominent scholar in the compelled-speech space, has adopted this view in the past as well.[109]

This position emanates from the view that the government has a legitimate interest in compelling some kinds of commercial speech, as most would agree that an "ordinary commercial law practice" and "a . . . boycott for purposes of maintaining a cartel" do not constitute expression covered by the First Amendment; but "[l]awyering to advance social goals" and "[a] group boycott or refusal to deal for political purposes may be speech" covered by the First Amendment.[110] In other words, the purpose of the speech matters in determining whether it is expressive: The government has the power to regulate commercial activity, but it does not have the power to regulate an individual's ideological speech.[111]

But this approach is flawed in that it creates an arbitrary limit that does not explain *why* commercial conduct is not expressive—commercial status is

104. *See 303 Creative*, 143 S. Ct. at 2311 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000) for the principle's application to non-pure speech).

105. *See, e.g.*, Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1564 (2001) (suggesting that "commercial associations" are fundamentally and legally different from "expressive associations").

106. 468 U.S. 609, 634–35 (1984) (O'Connor, J., concurring).

107. Elane Photography, LLC v. Willock, 309 P.3d 53, 65–66 (N.M. 2013).

108. *303 Creative*, 143 S. Ct. at 2332–33 (Sotomayor, J., dissenting) (discussing Justice O'Connor's *Jaycees* concurrence).

109. Carpenter, *supra* note 105, at 1517.

110. *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring).

111. Carpenter, *supra* note 105, at 1567.

"only a rough proxy for" expressiveness.[112] For starters, it fails to account for the two species of autonomy harms. This theory overlooks the self-realization harm in that creators may make goods that (a) provide information that helps consumers in their self-realization and (b) aid the creators' own self-realization.[113] Justice Gorsuch, in *303 Creative*, expressly and resoundingly rejects cabining compelled-speech analysis to noncommercial activity because uncontroversially expressive products, such as novels, are often "created with an expectation of compensation," setting aside the (very valid) notion that the vast majority of such work does not fall within the scope of public accommodations statutes.[114] And compelling speech may cause others to misattribute expression to the creator, potentially causing them harm under the misattribution vice—the constitutional vice that occurs when the government violates the second understanding of autonomy identified by this Note.

This theory does not trace what makes much of commercial activity immune to the First Amendment's coverage: It looks to certain manifestations, not the cause, of the harm to classify what is and what is not expressive. Consequently, this test fails to provide an adequate explanation for what makes expression.

C. Customized and Unique Products Are Expressive

Professors Eugene Volokh and Dale Carpenter have put forward a more nuanced view of expression: It covers unique and customized goods that are part of a historically and traditionally recognized or "inherently expressive" medium of expression.[115] This test is closer to the mark than the other two tests, but it similarly fails, at least in part.

This test considers two things: whether the product (1) is communicated via a traditional or inherently expressive medium of expression and (2) is customized and unique. In this test, both are necessary conditions, and once both are satisfied, they are sufficient to constitute a compelled-speech violation. This Note adopts a version of the first prong of this test, albeit in a

112. Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1500 (2001).

113. *See* Redish, *supra* note 51, at 620–21 (describing how the "*receipt*" of information can help consumers self-realize).

114. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2316 (2023).

115. Dale Carpenter, *How to Read* 303 Creative v. Elenis, REASON: THE VOLOKH CONSPIRACY (July 3, 2023, 2:11 PM), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/9SUT-ZW3A]; *see also* Brief of Prof. Dale Carpenter, Prof. Eugene Volokh, Ilya Shapiro, American Unity Fund & Hamilton Lincoln Law Institute as Amici Curiae Supporting Petitioners at 12, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476) [hereinafter *303 Creative* Amicus Brief] (noting that *303 Creative* presented the Court with the opportunity to confirm that the First Amendment applies to "unique" commercial goods).

more nuanced form as developed by First Amendment scholar Brian Soucek.[116] The second prong of this test, though, is where things go awry.

The second prong of this test misses the mark because it does not distinguish between or even help courts identify the types of harm that result from compelling speech. First, the test fails because it does not sufficiently carve out a path for recognizing harm to the self-realization value of autonomy. Though customization and uniqueness are proxies for identifying when the speaker shifts from being the customer to the company, they are only rough proxies that do not recognize that the use of creative faculties is the trigger for this harm, not bare customization or uniqueness.

For example, photography is a sufficiently expressive medium to receive the coverage of the First Amendment according to Volokh and Carpenter.[117] Let's say that a person hires a photographer to take pictures at a special location, from angles specified by the subject, with props and design provided and dictated completely by, and at the prompting of, the customer. The photographer does so on condition that the photos are not attributed to them. This photoshoot is clearly, and solely, the expression of the customer—not the photographer—despite the photos being customized, unique, and expressive. Even if the photographer objects to the message in the photos, the photographer is not experiencing the same harm as a "Muslim movie director" who is forced to "make a film with a Zionist message."[118] The photographer in the hypothetical isn't being forced to create, while the Muslim movie director is, though both are fashioning customized and unique goods that express something via a traditional medium of expression; thus, the former isn't harmed in the relevant sense while the latter certainly is.

This test also fails because it does not make any room for the misattribution vice—when the government violates the second sense of the autonomy value. While the customization and uniqueness requirement in Volokh and Carpenter's test may at least anticipate the self-realization view of autonomy, it does not seem to anticipate the misattribution vice, unless the test implies that there is no risk of misattribution without customization because people will assume the customer bought the item off the shelf. But this does not hold true for products that seem to assert the maker's approval of the customer[119] or products that may seem custom, though they are not in

116. *See* discussion *infra* subpart III(A).

117. Brief of Cato Institute, Prof. Dale Carpenter, and Prof. Eugene Volokh as Amici Curiae Supporting Petitioner at 15–16, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33,687) [hereinafter *Elane Photography* Amicus Brief].

118. *303 Creative*, 143 S. Ct. at 2314 (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1199 (10th Cir. 2021)).

119. Imagine a Muslim storeowner named John is forced to sell otherwise standard balloons that say, "John of John's Store Blesses This Food!" to a person who makes it clear that they will be tying the balloon to pork for all to see.

fact. But even if this assumption is correct, that only custom goods result in misattribution, the test does not account for misattribution harms for customized goods—especially for customized goods that are in reality the expression of the customer. While this test may identify strong likelihoods of whether misattribution will occur, it's only a rough proxy, not sufficiently precise to serve as the test courts should deploy.

In addition, this test begs the question. For Carpenter and Volokh, the "customization" must "communicate[] protected expression" to receive First Amendment coverage.[120] While their test does narrow the set of covered products to customized products from pre-made goods, it essentially restates the question it sets out to answer—whether the public accommodation creates expression in making certain products. Indeed, customization is relevant to the expression question, but the result is baked into the measurement itself: To determine whether there's expression, courts must consider whether the product is sufficiently unique and customized to merit expression. For example, imagine a painter is asked to paint a portrait and refuses to do so. A court would have to determine whether the painter's paintings are expressive by asking whether the paintings are customized and unique enough to create expression. Though this test narrows the inquiry better than the other proposed methods, this test is unhelpful in the expression inquiry because it is circular once it has narrowed to that (still broad) subset.

Lastly, this approach lends itself to inconsistency and overinclusion. For example, Dale Carpenter, in an article published in the immediate aftermath of *303 Creative*, applied this test to "a photographer offering to take standard school photos, corporate headshots, passport photos, or pictures with a mall Santa," but he dismissed them out of hand, arguing that these examples do not "customize[] the product or express[] something to a degree that warrants constitutional protection."[121] Carpenter rejects that the First Amendment protects the foregoing examples despite his test only requiring that these photos be customized and unique and despite the possibility that the photographer in each could have been given leeway to take the photos how they wanted—in a customized and unique manner for every photo. Thus, for his theory of expression to maintain a semblance of consistency in the public accommodations setting, Carpenter's theory ineluctably leads to the outcome that the First Amendment requires that the mall Santa discussed by Justice Jackson at oral argument be able to exclude Black children from sitting on his lap if there's a photographer who is taking and "customizing" photos of the children with Santa.[122]

120. *303 Creative* Amicus Brief, *supra* note 115, at 18.

121. Carpenter, *supra* note 115.

122. *See* Transcript of Oral Argument, *supra* note 7, at 26 (describing a mall Santa hypothetical where "they are customizing each" photo).

Because it does not provide a sufficient outlet for core First Amendment values, is overinclusive, and is at heart circular, Volokh and Carpenter's suggested test fails.

III. A Test for Whether a Product Is Expressive in the Public Accommodation, Compelled-Speech Setting

Since other commentators' theories have failed at providing a satisfying account for whether and why certain products are expressive in compelled-speech cases, we are still in need of a normative theory of expressive conduct. This Note fills this void by way of a three-part test.

The first part of the test is a threshold question: If the alleged expression falls within a traditional medium of expression or it can be readily and clearly analogized to one, then the expression may be covered by the First Amendment. If the alleged expression does not fall within a traditional medium of expression and cannot be readily analogized to one, then it is definitively not the type of expression that the Free Speech Clause covers. The second part determines to whom the speech belongs based on the nature of the buyer's request of the public accommodation. Specifically, this part of the test looks at the degree to which the product reflects the discretion of the customer or the public accommodation by asking whether the buyer's request of the public accommodation is more rule-based or standard-based. If the task that the public accommodation is asked to perform at the request of a customer is more rule-based, then the expression emanating from the product or service is more likely to be that of the buyer because the public accommodation lacks discretion to actually create expression; if the task is more standard-based, then the expression is more likely to be that of the seller, as it more involves the business's discretion and creativity to actually craft the product. The third part considers to what degree a reasonable person would attribute the expression to the public accommodation.

This test is performed in two stages. First, the traditional mediums-of-expression question addresses whether the product is the type of thing that is covered by the First Amendment. Once the product is in play as First Amendment eligible, we reach the second stage: Does the government's conduct offend First Amendment values such that the government commits one of the constitutional vices compelled-speech doctrine is tasked with combatting? The second and third parts of this test map onto the two main types of constitutional vices at work in compelled-speech cases. Particularly, the second part pinpoints whether the compulsion commits the vice that flows from violating the self-realization sub-value of the autonomy value, and the third part isolates whether the compulsion commits the misattribution vice. While the two vices are related in that they separately amount to a violation of the same First Amendment value—autonomy—they are separate in that they take discrete paths to arrive at that destination. Since the harms

described by the two factors are distinct and not cumulative, this test accords the two different inquiries separate places.

This test improves on the tests described in the last Part. Particularly, this test provides a more principled explanation for determining whether conduct is expressive in the public accommodations setting; in so doing, it cabins the reach of *303 Creative*'s categorical protection of compelled expression by more accurately describing what can be categorized as expressive. The ease with which this Note's test dispenses with the hypotheticals posed by the majority and dissent in *303 Creative* displays how this Note successfully fulfills its goal.[123]

In addition, the test does not allow public accommodations to easily circumvent antidiscrimination law. For public accommodations to circumvent antidiscrimination law by invoking the First Amendment under this test, they must (1) create goods within a traditional medium of expression, and (2) either wrest most of the control over the details of the product—by only accepting more standard-like requests—or make goods that others would attribute to them. This is more than what the vast majority of public accommodations are willing to do: It would fundamentally change the nature of many businesses' products and business models as well as require them to more closely associate their reputation with the quality of individual products. Such changes may even force a business to change markets, e.g., from merely hosting wedding websites to actively crafting and taking creative control over wedding websites and then plastering a logo over it. Accordingly, this test does not present significant concerns of this sort.

A. Traditional Mediums of Expression

Not all expression, writ large, triggers the First Amendment.[124] Rather, courts determine whether the expression in any particular case is even of the type the First Amendment is concerned with protecting.[125] And courts have made—and should make—this threshold determination by looking at whether the product falls within a traditional or inherently expressive medium of expression.[126] This inquiry is relevant, at least in the compelled-speech context, because it provides a workable standard that pinpoints the

123. *See infra* subpart III(D).

124. Post, *supra* note 91, at 1255–57.

125. *See id.* at 1255–56 ("There are thus two independent kinds of considerations that have in fact triggered First Amendment scrutiny. The first involves the question of what is being regulated, and it turns on the issue of whether the regulation at issue seeks to restrict a recognized medium for the communication of ideas.").

126. *See* Soucek, *supra* note 14, at 731–35 (arguing descriptively that the Supreme Court has deployed and normatively that it should deploy a version of the traditional mediums-of-expression test).

mechanism through which expression occurs, thus identifying the relevant subset of expression for compelled-speech purposes.

One particularly instructive type of expression to examine for determining what subset of expression writ large the First Amendment covers in compelled-speech cases is art. Art is often uncontroversially free from regulation not because art *qua* art is exempt from regulation, but because artistic works are the exemplar of pure, essentialized expression. The reason that *Jabberwocky*, Jackson Pollock paintings, and Arnold Schoenberg's music are prime examples of speech is because these works create "aesthetic experiences" characteristic of especially expressive works.[127] Rather than serving practical or non-aesthetic goals in any meaningful way—verse could convey factual information, paintings could dutifully portray an object's appearance, and music could prompt dance—these exemplar artworks eschew practicality and solely serve expressive ends by solely expressive means. If there's any doubt about this proposition, one should attempt to dance to Arnold Schoenberg's music,[128] and the point will quickly become apparent.

But adopting an art *qua* art rule is a bad idea for one prominent reason: Courts would need to adopt a unified theory of art.[129] And that's a problem since artists, museumgoers who believe anyone could create modern art, and philosophers all fundamentally disagree about what art is—and they've been disagreeing at least since Aristotle. So, this line of reasoning will not bear fruit. Allowing an exception for "the arts" similarly does not work, as what falls within the domain of "the arts" is just as contested as rallying around a theory of art.[130] Deciding whether artful tattoo artists and workman-like seventeenth-century portrait painters are correctly categorized among the arts can tie an aesthetic philosopher—much less a judge—in a knot.

Rather, from both a normative and descriptive perspective, the inquiry is, and should be, whether something falls into a traditional medium of expression.[131] This method explains why art is so solidly covered by the First Amendment. Some mediums, such as the "opera, symphony, ballet, or novel," are "uniquely efficient at delivering aesthetic experiences" and are

127. *See id.* at 730–31, 733 ("Like the other theories, aesthetic theories of art say something important about why we might be tempted to offer art exemptions: mediums of expression that have evolved solely to provide aesthetic experiences and nothing else are unlikely subjects for legitimate legal regulation.").

128. Schoenberg's music is famous for its dissonance and its departure from traditional musical styles. *See, e.g.*, ARNOLD SCHOENBERG, *Five Pieces for Orchestra, Op. 16*, *on* MERCURY LIVING PRESENCE (Mercury 1990) (demonstrating this unique style).

129. Soucek, *supra* note 14, at 722.

130. *Id.* at 724.

131. *Id.* at 731–35 (arguing that the Supreme Court has descriptively deployed, and normatively should deploy, a version of the traditional mediums-of-expression test).

good for little, if anything, else.[132] Intuitions that abstract art is undoubtedly covered are thus easily explained: There is little to no good reason to regulate a medium of expression that systematically packages crystallized expression, since there is nothing to regulate but pure expression itself.[133]

And this categorization as a medium of expression is not limited to what is conventionally considered art or to pure speech. The mediums-of-expression inquiry essentially identifies the tools—the mediums and conventions local to such mediums—that people use to create expression, and that are primarily used for creating expression. Accordingly, once we peel back the art molding, the real framework shows itself: The medium-of-expression question plays the same role for all types of expression, not just artistic expression. For example, a march or parade produces concentrated expression, as there is little reason to engage in such conduct without the underlying expression.[134] Certain sorts of advocacy or targeted non-profits too are laser-focused on serving a public-service-oriented goal and thus may work within a traditional medium.[135] A stump speech may also fall into a "political discourse" medium. Photography, though it is arguably not an art form, is a traditional medium of expression because it frequently seeks to express something via photograph.[136] Words—spoken and written—may fall into one of these traditional mediums of expression much easier than conduct, and that is by design: Words are the mode of choice for human communication.

Further, in the expression inquiry, past the threshold question, the medium-of-expression question sets the table nicely for determining whether conduct is expressive by providing a set of tools to evaluate the expressiveness of the conduct. These tools are the "conventions" of the medium:[137] metaphor and symbolism in prose, the choice of a particular poetic form, different techniques for creating brushstrokes in painting, and a filmmaker's choice of what film to use and whether to shoot in color or black and white. An example of a convention used to express something other than what the expression may on its face suggest is an idiom in a rap song: "[G]etting 'body-bagged' takes on a different meaning in a rap lyric than in

132. *Id.* at 730.

133. *Id.* at 730 & n.294 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559 (1995)).

134. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 568 (1995) ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.").

135. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648–50 (2000) (describing how the Boy Scouts' nonprofit characteristics make its association more expressive).

136. *See Elane Photography* Amicus Brief, *supra* note 117, at 8 (describing photography as "visual expression" and noting that it is "fully protected by the First Amendment").

137. *See* Soucek, *supra* note 14, at 742–43 (describing how conventions can help determine an expression's meaning).

a police report" because the artist takes advantage of the shared understanding of their audience and peers to convey something metaphorical, whereas the police report exists without the context of a tradition steeped in the exploitation of language and motifs to create non-literal meaning.[138] The choice itself of using charcoal, as opposed to watercolors, to make a self-portrait carries significance in the mood and message the artist conveys to the audience; no such message is communicated when the same choice is made when using charcoal to scribble a will because that is the only utensil available. In this sense, the manipulation of conventions internal to a medium contribute to and, to a degree, dictate the content of the expression.[139] *Moby-Dick* certainly would not be considered half the novel it is but for its use of an intricate extended metaphor and symbolism, elevating a leviathan-like whale into a symbol for fate (among other things).[140] Thus, once a product has been found to fall within a traditional medium of expression, courts should look to how the product manipulates conventions internal to that medium.

While the category question—whether a specific product or good falls within a traditional medium of expression—is an external question of First Amendment coverage, an analysis of the use of conventions is part of the self-realization inquiry, as it gets at the intentional use of a creator's expressive faculties, not whether others would attribute the expression to the creator. Accordingly, when this consideration is given weight, it is given weight alongside the second factor of this test.

B. Does the Request Require the Public Accommodation to Exercise Its Creative Faculties and Create Expression?

For the government to unconstitutionally compel speech, that speech would have to belong to the plaintiff. Thus, courts must ask: To whom does the expression belong?[141] This Note proposes that courts determine the answer to this question by essentially determining whether the public accommodation is forced to exercise its discretion in creating a product such that the public accommodation actually engages its creative faculties in making the product. This Note suggests that courts should do so by analyzing whether the request that a public accommodation must follow in creating a

138. *Id.* at 743.

139. *See* Post, *supra* note 91, at 1254 ("This transformation is made possible because artists and spectators share conventions that establish the medium of art exhibitions, and these conventions can by themselves generate forms of human interaction that are acknowledged as 'ideas' within the jurisprudence of the First Amendment.").

140. *See generally* HERMAN MELVILLE, MOBY-DICK; OR, THE WHALE (Constable & Company Ltd. 1922) (1851).

141. *See* Transcript of Oral Argument, *supra* note 7, at 21 ("One can view these websites, or last time around we had cakes, as either expressing the maker's point of view or the couple's point of view, and—and that's really at—at the heart of a lot of this.").

product is more rule-like or standard-like, though this approach is not exclusive of other methods of divining the source of the compelled speech.[142] This part of the test is aimed at detecting the constitutional vice that results from violating the self-realization sub-value, since the harm caused by this vice increases proportionately with the degree to which a person is actually forced to express something.

In the type of case to which *303 Creative* will apply, a customer inevitably asks a public accommodation for a good or service.[143] The nature of that request dictates the ownership of the back-end expression, as the agreement governs what the public accommodation will do or make. One particularly useful way of thinking about this question is whether the request comes packaged in a more rule-like or a more standard-like form. For instance, the answer to this question differs when a man asks a company to transcribe a love poem that the customer wrote to another man versus when a man asks a company to create a poem for him to give to another man. In the former example, the poem is clearly the speech of the customer, while in the latter the poem is clearly the speech of the company; the former example consists of a request for a company to faithfully transcribe words according to the customer's specifications, while the latter consists of a request for a company to create a poem from scratch, in reference to an abstract concept.

Several examples illustrate this notion. Asking a portrait photographer for a portrait with a blank blue background, a certain outfit, and a specific pose would clearly result in the photo being the expression of the person photographed, while asking a photographer to create and plan the portrait of a president and, in so doing, represent the majesty and grandeur of the United States would create a product that more closely represents the expression of the photographer. A certain floral arrangement ordered according to precise

142. While inquiry into whether the government commandeers a person's creative faculties takes this specific form for public accommodations cases, the inquiry may take a very different form in a case involving only private persons or outside of the business context, e.g., in a school. The form that this text gives to this factor relies heavily on the public accommodation context and what such businesses will inevitably encounter in the cases to which *303 Creative* will apply.

143. For purposes of this subpart, "request" means what the customer asks the public accommodation to do. This requires a meeting of the minds, resulting in agreement about what the public accommodation must make. But the formation of such a request does not have to follow the hornbook conception of offer and acceptance, and such a process does not even require a formal request by a customer and acceptance by a producer. For example, in a scenario in which an employee of the public accommodation asks, unsolicitedly, whether a browsing customer would like a wedding cake that resembles the Millenium Falcon, we can repair to the familiar mutual assent doctrine in contract law that distinguishes between preliminary negotiations and a contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 26 (AM. L. INST. 1981) ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). And even if the customer thinks that such an idea is a wonderful cake design and enters into a contract for the cake, the "request," as defined for purposes of this Note, is to create a wedding cake resembling the Millenium Falcon.

instructions is the speech of the person ordering the arrangement, but a floral arrangement ordered in a classical style to celebrate the concept of life and without specification by the customer is closer to the expression of the arranger. Asking an employee at a copy store to faithfully type out every word from *The Great Gatsby* by hand generates a product that is the expression of neither the employee nor the customer,[144] while asking the same employee to write an original novel would generate a product that would be clearly considered the speech of the employee.

Indeed, this principle flows from the relationship between the ownership of a product and the rule-like or standard-like nature of the request—a common legal framework for categorizing different directives based on whether any particular directive is more "empirical" (every car traveling *over seventy miles per hour* gets a ticket) or "evaluative" (every car traveling *too quickly* gets a ticket).[145]

Rule-like statements reflect "entrenched generalization[s]" to which fidelity is the overarching point: These generalizations must be followed even if the "resultant decision is not one that would have been reached by direct application of the rule's justification."[146] When a parent creates a rule banning the kids from eating candy after dinner, the rule reflects a generalization—the kids will become too hyper close to bedtime—that does not take into account, for example, the time the kids must wake up the following morning: The rule applies regardless of the circumstances surrounding the application.

More standard-like statements, however, are "indicator[s]" that serve only to reference the "underlying justifications" of the statement; the statement itself has "no normative pressure of its own," but the person following the standard must rather consult the "underlying justifications" for its content.[147] Standard-based statements are "open-ended," and rather than providing the specifics of what someone obeying the request must follow, a standard is the "criterion by which particular circumstances presented in a case are judged to be relevant or not."[148] A decree banning the kids from

144. Hunter S. Thompson famously was said to have typed out every word of *The Great Gatsby* by hand to simulate what writing a Great American Novel felt like. *See* DAVID S. WILLS, HIGH WHITE NOTES: THE RISE AND FALL OF GONZO JOURNALISM 11 & n.4 (2021) (describing how Thompson's admiration of the prose led him to reproduce pages from the book).

145. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381–83 (1985) (distinguishing and defining the general concepts of rules and standards). The debate surrounding whether certain laws would be more effective as rules or standards has existed at least since Justices Holmes and Cardozo sat on the Supreme Court. *Id.* at 379.

146. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 51–52 (1991).

147. *See id.* at 51 (describing the differences between rules and standards).

148. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974).

eating candy too close to bedtime, accordingly, requires the party applying the rule to consider the justification for the decree—that the kids may have trouble falling asleep once in bed—when deciding whether to allow the kids to eat candy.

More rule-based requests thus require a public accommodation to do something that reflects the entrenched generalization of the customer—requiring them to create something merely reflective of the customer's judgment. The more rule-based a request is, the more the product will reflect value or content judgments made by the customer, and less by the public accommodation, e.g., telling a waiter not to allow the kids to order dessert after dinner. Conversely, more standard-based requests ask for a product that connects only to a generalized idea, not the concrete judgments of the customer, e.g., telling the waiter not to let the kids order anything for dessert that is so sugary they won't fall asleep. Rule-based requests require an iron fidelity to their specified requirements; standard-based requests require that the product or conduct comports with the motivating principle(s) behind the request.

Because a request's rule-like or standard-like nature reflects the degree to which the public accommodation exercises its own creative faculties—since it dictates the level of discretion afforded to the public accommodation—this factor quantifies the constitutional vice that results from violating the self-realization manifestation of the autonomy value. This vice occurs when the government requires a person to express something that they do not wish to express, violating their entitlement to think what they want and say what they think and invading their ability to form themselves and their vision of the good.[149] By measuring how much a particular request requires a public accommodation to exercise its own creative faculties, and thus create expression, this factor gauges whether the government commandeers a person's ability to determine what to think and to express those thoughts accordingly.[150]

Expression occupies a particularly essential place in the quest for self-realization because of its proximity to intellectual freedom—which some believe to be a "prerequisite of rational thought and human knowledge"[151]—and it being a "manifestation of the self."[152] In forcing a person to carry out a standard-based request within a traditional medium of expression that results in the significant exercise of artistic discretion, the government effectively harnesses the person's expressive faculties and directs those

149. *See supra* notes 56–62 and accompanying text.

150. Note, however, that this right is not unqualified: It is bounded by the medium-of-expression threshold requirement. Thus, the right only exists when the speech is packaged in a medium that efficiently delivers expression.

151. *E.g.*, Smith, *supra* note 56, at 946.

152. Baker, *supra* note 56, at 6–7.

faculties to its own ends—thus, meddling with a person's capacity for rational thought and self-manifestation.

To demonstrate how this factor works to gauge the self-realization vice, imagine a painter being asked to copy a specific landscape provided by a picture the customer took, in the exact style, lighting, and paint dictated by the customer. This painting is completely governed by the customer's rules and reflects almost solely the customer's expression because the rule-based request requires strict adherence to the judgments "entrenched" in the directions and requests of the customer. Hence, the expression belongs more to the customer because the painting reflects their entrenched judgments. But if a customer asks the painter, "Paint pretty pictures of me and my husband," then the judgment as to what a pretty painting consists of is up to the painter and thus reflects the painter's judgment calls in reference to the more abstract concept of a pretty painting. Accordingly, the painting in the latter scenario contains the expression of the painter while the painting in the former scenario does not.

This prong of the test possesses a close intellectual-property analog—the made-for-hire test from *Community for Creative Non-Violence v. Reid*.[153] *Reid* provides a list of factors relevant to determining to whom a work belongs between an employer and a hired party:

> the skill required; the source of the instrumentalities and tools; . . . the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; [and] whether the work is part of the regular business of the hiring party . . . .[154]

Because *Reid*'s test was fashioned against the backdrop of copyright law and the special policy considerations inherent to copyright and copyright's legal landscape,[155] it does not provide an appropriate stand-alone set of factors in the test for determining whether conduct is expressive for purposes of public accommodations law. But it does provide an autonomy-based analog in an adjacent domain with an apposite set of considerations to borrow and take into account in performing this Note's test—especially in identifying other facts that may be relevant to the self-realization sub-value of the First Amendment.

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153. *See* 490 U.S. 730, 737 (1989) (explaining the copyright exception where the person who commissions a work "made for hire" owns the work's copyright instead of the creator).

154. *Id.* at 751–52 (citations omitted).

155. *See id.* at 748–50 (discussing the statutory and precedential backdrop unique to copyright law).

Another relative of this factor appears in *Shurtleff v. City of Boston*.[156] In *Shurtleff*, the City of Boston allowed people using a public event space to provide a flag for the city to (almost always) raise on a public flagpole next to the Massachusetts and United States flags; the question was whether this practice amounted to governmental or private speech.[157] The Court found that the "most salient feature of th[e] case" was the extent to which the city "controlled the[] flag raisings and shaped the messages the flags sent."[158] While this example does not directly apply this Note's standard–rule approach, its analysis factors in the basic animating principles behind that approach: Expression may or may not belong to a party according to the degree of discretion they have in shaping the end product. Clearly, the Supreme Court is no stranger to considering the degree of autonomy a party has in carrying out another's design in determining to whom the expression belongs. Thus, this standard–rule approach is not a departure from the Court's doctrine but a refinement of it that adapts autonomy considerations from other areas of law to compelled-speech, public accommodations doctrine.

This part of the proposed test could be seen as vulnerable to the same charges that this Note leveled at Eugene Volokh and Dale Carpenter's customized and unique test.[159] But the standard–rule part of the test does not similarly fall prey to fatal overinclusion because it pinpoints the reasons *why* certain customized and unique products are covered by the First Amendment. This factor of this Note's test considers the degree of freedom that a public accommodation may exercise, and thus the degree to which the creator is engaging in organic creation versus creating a good to the specifications of the customer. This factor finds that some customized and unique goods are expressive, but not due to the fact they are customized and unique; rather, they are expressive because the creator had sufficient freedom to determine the details and thus engage in creation.

Perhaps the critical difference is that this factor takes into account the constitutional vice that occurs when the public accommodation's expressive faculties are commandeered by the state, but Volokh and Carpenter's theory only does so obliquely—by using a rough proxy, not trying to measure the real thing.[160] Indeed, this factor succeeds where Volokh and Carpenter's test fails because this factor is grounded in and performed with a mind to the constitutional vice it sets out to detect.

156. 142 S. Ct. 1583 (2022).
157. *Id.* at 1587–89.
158. *Id.* at 1592.
159. *See supra* subpart II(C).
160. *See* subpart II(C).

Further, an objector may be tempted to criticize this prong of the test for unduly requiring a public accommodation to create something that violates one of the creators' consciences. The freedom of conscience is a cherished freedom, long recognized by the American legal system.[161] But the freedom of conscience is not violated if the government does not compel expression.[162] True, there are legitimate free speech concerns in a case where one is forced to mouth words or perform symbolic conduct, the message of which one does not believe.[163] But even if the speech is not that of the individual or the public accommodation in the same sense that this subpart details, this Note's test encompasses such cases by taking into account speech attribution. When the government forces a person to say, "I love the government, it does no wrong" on a website requested by a private person, the speech is attributed, both by a reasonable person and the individual, to the individual. Indeed, the third factor of the test may well take hold in such a case. Thus, the multifarious nature of the test contemplates and accommodates situations in which a rule-like request results in a product that is still expressive.

C. Third-Party Attribution Can Also Render Expression Constitutionally Cognizable

Finally, the degree to which a reasonable person would attribute the expression to the public accommodation should play a significant role in determining whether conduct is expressive. The Supreme Court has treated this factor as dispositive or as a substantial factor in many of its compelled-speech cases.[164] The Supreme Court often worries about misattribution in its compelled-speech cases because expression is inherently cooperative between speaker and listener. This factor evaluates the constitutional vice that results from the government interfering in this cooperative enterprise by forcing an individual to speak and others attributing such speech to the individual, known as the misattribution vice. Since individuals have a robust autonomy interest in controlling their own expression, they also have a robust

161. *See* Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) ("The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government.").

162. *See* W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a compelled flag salute and pledge were unconstitutional because the government cannot "force citizens to confess [certain beliefs] by word or act").

163. *Id.* at 633–36.

164. *See*, *e.g.*, Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty, as Maynard already has."); Shurtleff v. City of Boston, 142 S. Ct. 1583, 1589–91 (2022) ("[W]e consider whether the public would tend to view the speech at issue as the government's."); Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR), 547 U.S. 47, 65–66 (2006) ("An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military . . . .").

autonomy interest in being able to craft what they intend to express to others—the "stamp" they place on the world.[165]

While some commentators and courts have argued that courts should consider subjective—in addition to objective—speech attribution from a reasonable third party's perspective,[166] subjective speech attribution is superfluous: The plaintiff would not have brought a suit unless they believed they were compelled to speak. It would be strange if a plaintiff did not believe that they were being compelled to say or do something expressive and yet still brought a compelled-speech suit. Thus, the relevant and interesting factor is whether a reasonable third party would attribute the expression flowing from the product to the plaintiff.

The Supreme Court's cases demonstrate the usefulness of this consideration. In *FAIR*, the Court held that forcing a law school to advertise and host military job listings, interviews, and recruiting receptions was not expressive and thus not covered by the First Amendment—even though the law schools were forced to say something they did not wish to say.[167] In the Court's view, "[n]othing about recruiting suggests that" a reasonable person would perceive a law school's messages advertising a military recruiting event to mean that the "law school[] agree[s] with any speech by recruiters."[168] In *Shurtleff v. City of Boston*, the Court heavily factored whether a reasonable third party would attribute a message to the City of Boston into its analysis of the City of Boston rejecting a request to fly a Christian flag when it frequently allowed people who used a public space to fly a flag of their choosing.[169] Even in *Wooley v. Maynard*, perhaps the Court's main concern was that a license plate featuring a phrase with which the plaintiffs ideologically disagreed made the Maynards into a "mobile billboard" in the "public view" for something they despised.[170] Indeed, the Court worried that people like the Maynards would be harmed by having to choose between driving legally and choosing their own message—and this was an untenable choice.[171]

Notice that the harm, or lack thereof, in these cases has to do with the lack of ability to control the end product, the actual expression that others perceive, not the use of one's creative faculties to create expression. The harm is in the loss of the ability to put one's stamp on the world, not in the

165. *See supra* subpart I(B).

166. *E.g.*, Han, *supra* note 50 (manuscript at 2–3); Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000).

167. *FAIR*, 547 U.S. at 61–65, 70.

168. *Id.* at 65.

169. *Shurtleff*, 142 S. Ct. at 1588–91.

170. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

171. *See id.* ("As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display 'Live Free or Die' to hundreds of people each day.").

government forcing one to toil and create. For example, if Company X sold custom posters to the public that included a message made by the customer and then "and Company X Endorses This Message," the business likely would be seen as expressing the message included before the endorsement.[172] Even though informative posters fall into a traditional medium of expression and Company X has little to no control over how to achieve the request, the message on the posters is probably expressive for purposes of the First Amendment, meaning that Company X could probably refuse to make a poster that reads: "Gay Marriage is Sanctioned by God, . . . And Company X Endorses This Message." Thus, evaluating to whom a reasonable third party would attribute an instance of expression marks the second path down which the autonomy value can travel in compelled-speech cases.

D. Application

To illustrate how the factors of this Note's proposed test work in concert, this subpart will run through several hypotheticals posed at oral argument and in the majority and dissenting opinions. This subpart demonstrates that this Note's test delivers on the majority's understanding that *303 Creative* creates a healthier free-speech environment that also does not tear down public accommodations law. In particular, this subpart specifies how *303 Creative*, under color of this Note's test, does not have to destroy public accommodations law and, instead, can lead to a regime that recognizes and addresses the distinct First Amendment harms suffered by plaintiffs. The first fact pattern this Note addresses is *303 Creative* itself, as this test must also make room for *303 Creative*, being the most recent compelled-speech, public accommodations case.

First, the prospective websites at issue in *303 Creative* are expressive under the test described in this Note. As a threshold matter, the websites must be conveyed via a traditional medium of expression—which they are. The websites that Lorie Smith intended to make for weddings would have involved "text and graphics" that were completely "original" and "customized."[173] And these sorts of graphics, videos of the couple, and text are contained within a traditional medium of expression because they contain drawn images, composed videos, and prose aimed at telling a story.[174] While 303 Creative's wedding websites likely would not manipulate the

172. This assumes that Company X is not well known for creating these posters with humorous phrases that Company X purportedly endorses.

173. 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308 (2023) (quoting Petition for Writ of Certiorari, *supra* note 27, app. at 187a).

174. *See 303 Creative* Amicus Brief, *supra* note 115, at 7 ("Films and graphic designs published on websites are a 'significant medium for the communication of ideas' ranging from 'direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.'" (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952))).

conventions of graphic design and prose to make anything spectacularly creative, they nonetheless pass the threshold question—and, to give 303 Creative the benefit of the doubt, likely would create a video and text with sufficient manipulation of conventions to weigh in favor of 303 Creative.

Then, we evaluate the extent to which the requests by which 303 Creative's hypothetical websites would have to abide are more rule-like or standard-like. It seems as though, given the degree of "tailor[ing]" Ms. Smith envisioned her websites featuring, 303 Creative would likely retain much discretion to achieve standard-based requests to create wedding websites.[175] This is especially true since 303 Creative seemingly intended to use the websites to create a message of its own—and it would be odd if this element of the websites was dictated by the customer, who has no stake in 303 Creative's independent message.[176] Thus, this factor weighs significantly in favor of 303 Creative.

Lastly, we consider to what degree the product would be attributable to 303 Creative. This factor does very little work in the analysis of this case. While "the name of the company she owns and operates by herself will be displayed on" every website,[177] it is altogether unclear to what extent a reasonable third party would attribute the expression contained within the website as belonging to 303 Creative and Lorie Smith. Potentially, Lorie Smith's status as a loud-and-proud Christian combined with her company's name on a website announcing a gay marriage could send a message of what type of Christian Smith is.[178] But a reasonable third party could just as likely think that Smith was simply making a website for a customer, not expressing her views. Thus, this factor is agnostic as to whether it favors 303 Creative.

While the factors do not unanimously favor 303 Creative, the websites pass the threshold question and involve sufficient use of 303 Creative's own faculties to, in fact, create expression. Accordingly, since the necessary condition and a sufficient condition are present, 303 Creative's websites are expressive according to this test.

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175. *See 303 Creative*, 143 S. Ct. at 2308 (quoting Petition for Writ of Certiorari, *supra* note 27, app. at 187a) (detailing the extent to which 303 Creative would control the creative process and have leeway to inject its own creative discretion into the process).

176. *See id.* (describing how 303 Creative intended to create websites that would express a particular message).

177. *Id.*

178. Lorie Smith, indeed, entered into the wedding website industry in order to answer God's call to "explain His true story about marriage." *Id.* at 2333 (Sotomayor, J., dissenting) (quoting Brief for Petitioners at 7, *303 Creative*, 143 S. Ct. 2298 (No. 21-476)). The degree to which a practice or concept is controversial or contested affects whether it sends a message. *See* Koppelman, *supra* note 9, at 1830 (theorizing that "endorsement" is "parasitic" to what is considered abnormal or not considered "normally appropriate"). For Smith, the likelihood that creating a wedding website for a gay couple is expressive is potentially increased due to her status as a fervent Christian. But it is not altogether clear that this is the case, as it only matters what a reasonable person would believe for this factor, not a reasonable Christian observer.

Second, Justice Sotomayor, in her dissent, described a set of facts in which a cemetery refused to inscribe "beloved life partner" next to the name of a deceased's same-sex partner.[179] This case would easily fail this Note's test. While an epitaph is likely to be considered a medium of expression cognizable by the Constitution,[180] this epitaph does not manipulate any epitaph conventions to create an expressive—rather than merely functional—message (like poetry). This set of facts similarly does not provide any creative space in a standard-based request for the funeral home to inject its creativity; rather, the request—to plant a headstone and bury a loved one—is remarkably rule-based and requires no creative or expressive effort on the part of the funeral home. And no person would attribute the words to the funeral home. Quite the opposite: The words on one's epitaph are among the most personal one will ever write. Thus, this set of facts easily fails this Note's test.

Third, Justice Jackson's mall Santa hypothetical also provides an illuminating example.[181] Specifically, Justice Jackson asked Lorie Smith's counsel to imagine a photography company—which is open to the public—that wishes to take highly customized photos with only white children because doing so creates a certain aesthetic, and thus refuses to take photos with Black children.[182] Applying this Note's test to these facts, photography is a traditional medium of expression, so this scenario passes the threshold question. The real question here is whether forcing the company to take photos with Black children commandeers the company's expressive faculties. The answer is no, because the request is remarkably rule-based, since the photographer is only asked to swap one child out for another in the same context, with the same photo set, clothing, and cast of North Pole characters as the white children. The company does not need to engage its creative faculties to create the government's message because swapping the children doesn't require the photography company to change its practices or its process at all. And they also fail the attribution factor because no reasonable person would look at mall Santa photos featuring a Black child, no matter how "nostalgi[c],"[183] and assume that the photographer believes in racial equality; the more likely assumption is that they were just doing their job. Thus, this set of facts also fails this Note's test.

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179. *303 Creative*, 143 S. Ct. at 2342 (Sotomayor, J., dissenting) (quoting NANCY J. KNAUER, GAY AND LESBIAN ELDERS 102 (2011)).

180. *See, e.g.*, WILLIAM WORDSWORTH, THE PROSE WORKS OF WILLIAM WORDSWORTH 26 (W.J.B. Owen & Jane W. Smyser eds., Humanities-Ebooks 2013) (1974) (relaying a late-eighteenth-century epitaph written in poetic form).

181. *See* Transcript of Oral Argument, *supra* note 7, at 26 (describing a hypothetical where a company is taking nostalgic photos of white children, but not black children, and "they are customizing each" photo).

182. *Id.* at 26–27.

183. *Id.* at 26.

Lastly, Justice Gorsuch reasoned that Colorado's view of public accommodations law would force "an unwilling Muslim movie director to make a film with a Zionist message" or "an atheist muralist to accept a commission celebrating Evangelical zeal."[184] Both easily pass this Note's test. They both clearly fall within traditional mediums of expression,[185] and they presumably manipulate the conventions in those mediums to a significant degree, as films and murals created by professionals.[186] The request to make a film inherently falls far on the standard-based side of the spectrum: It asks a director to translate an idea, either from a script or mere idea, onto film. The same goes for a mural, but perhaps with more variance, as a muralist may be asked to paint a pre-designed advertisement on the same building, and copying is a very rule-like request with little opportunity for the muralist's creative activity to predominate. But this case seems to implicate an original mural, so it falls on the standard-based side. And a reasonable third party would be strongly inclined to attribute the works to the director and the muralist. Thus, these two examples pass this test with flying colors and are expressive.

Conclusion

In exploring the autonomy value's centrality in compelled-speech cases, this Note provides a theory that pinpoints exactly how and why certain products are expressive. This Note's main contribution, thus, is refocusing the compelled-speech inquiry: Rather than operating on feel, the emphasis should be on the species of the autonomy value. And this Note's test does exactly this by providing two parallel avenues through which courts can give effect to the species of the autonomy value. In so doing, it has fashioned a more measured rationale for classifying some products as expressive and others as unexpressive.

A happy consequence of this test is that it comports with common intuitions about what is and is not expressive and thus makes good on the *303 Creative* majority's promise that it would not upend public accommodations

184. *303 Creative*, 143 S. Ct. at 2313–14 (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1199 (10th Cir. 2021) (Tymkovich, C.J., dissenting)).

185. Film is undoubtedly a traditional medium of expression. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) ("It cannot be doubted that motion pictures are a significant medium for the communication of ideas."). If one needs convincing that murals are a traditional medium of expression, the Sistine Chapel—though a fresco, which is close enough for the comparison's purposes—is all that needs to be supplied as evidence. *See Sistine Chapel*, MUSEI VATICANI, https://www.museivaticani.va/content/museivaticani/en/collezioni/musei/cappella-sistina/storia-cappella-sistina.html [https://perma.cc/W4X8-NWSF] (describing the frescoes in the Sistine Chapel).

186. This Note assumes that Justice Gorsuch was referring to professional and creative muralists and directors because the hypothetical does not seem to make much sense when the muralist is the equivalent of a billboard maker, exactly copying a pre-made advertisement.

law. By following this Note's test, or a similarly structured test, the Court will not only limit the reach of *303 Creative*, but also achieve a more nuanced view of what it deems expression in compelled-speech cases. And reaching a more precise understanding of compelled speech benefits everyone. This Note's test maintains public accommodations law's robust promise of public equality while also ensuring that those who are actually forced to say or appear to say something they despise are covered by the First Amendment—holding two of our Constitution's most important commitments in the same hand and guaranteeing that they coexist in peace.