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Civil Rights vs Creative Expression: Anti-Discrimination and Free Speech in Public Accommodation

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ABSTRACT: In the case of 303 Creative LLC v. Elenis, the US Supreme Court allowed a graphic design business to refuse to create wedding websites for queer couples. The issue of marginalized groups being able to access services and public accommodations without facing discrimination has been a question within US judicial systems for decades now. This paper seeks to examine the historical context of accessible public accommodations, past verdicts relevant to this case as well as the implications of the current Supreme Court decision to analyse the future of the balance between civil rights and creative expression in the United States.

KEYWORDS: US Supreme Court, Public Accommodation, Anti-Discrimination, LGBTQ rights

Historical Context

Both the First Amendment and Civil Rights protections in the United States are critical to ensuring freedom for individuals. However, there are multiple domains where they clash with each other, including the domain of public accommodations. The United States Civil Rights Act grants 'all persons the right to full and equal enjoyment of facilities, goods or services at any place of public accommodation, without discrimination on the grounds of race, color, religion or national origin' (US Department of Justice, 2024). Over the years, this provision and similar ones within state legislation have faced continual constitutional challenges: a majority of them by businesses claiming a right to choose their customers. The first justification for this was the Fifth Amendment. Under this, businesses argued that any attempt to limit the ability of a business to function as it wishes takes away the liberty and property of the business without due process or compensation. That was the basis on which the Heart of Atlanta Motel refused rooms to black Americans in 1964 (Heart of Atlanta Motel, Inc v. United States, 1964). However, the Supreme Court decided that under the Commerce Clause, Congress did have the legitimate power to prohibit discrimination because the unavailability of places for black Americans affected interstate commerce. The establishment of this precedent and the clear commercial impact that any place of public accommodation would have, led to an evolution in the argument businesses were making against anti-discrimination laws: the second justification that arose was then based on the First Amendment. Businesses claimed that they had a right to free speech and a right to decide who they associate with, thereby also granting them the right to refuse services to certain groups. A version of this argument was made in Newman v. Piggie Park Enterprises, Inc. but again, the Supreme Court held the legality of the legislation and found the claim that serving black customers is against the will of God and an impeachment of religious freedom frivolous (Harvard Law Review, 2023). This signaled the importance of anti-discrimination and established that it weighed over corporate free speech.

However, the legal clash between the First Amendment and Anti-Discrimination Laws unfortunately isn't that simple. It becomes significantly harder to resolve and balance the two considerations in the case of expressive speech (which is granted higher protection). Expressive speech refers to verbal/non-verbal conduct that is meant to convey a message and includes symbolic speech (Free Speech Center, n.d.) such as photos, films, artworks or engravings. Cases involving such speech are unique because expressive speech is not a standardized service or product a business is offering. It is instead representative of an individual's beliefs and values. This means that the state trying to regulate what forms of expressive speech are acceptable would be unconstitutional as it would be a form of 'compelled speech' and the state cannot force you to conform to its own beliefs (Vanderbilt Law Review, 2011). Several past cases serve as precedents where discriminatory acts have been allowed to preserve expression. In Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston (Oyez, n.d.) despite a state law that prohibited discrimination based on sexual orientation, the South Boston Allied War Veterans Council was allowed to exclude the group from their St. Patrick's Day Parade. The Supreme Court reasoned that it was illegitimate for the Massachusetts state to force private citizens to include the group when they did not wish to platform its messaging. Similarly, in Boy Scouts of America v. Dale (Free Speech Center, n.d.), the

Supreme Court (in a 5-4 split) held that the Boy Scouts could revoke Dale's membership on grounds of his homosexuality. This is because they have a right to expressive association and the organization did not wish to declare to the world that they were okay with homosexual conduct. There are still constitutional critiques that exist to these two cases as well as the broader right of businesses that are considered public accommodations to be discriminatory in their association. Regardless, it remains established that organizations can decide who they choose to associate with, both in terms of who they include in events they hold or who they retain as members of their organizations. However, what is unclear here is the scope of expressive speech protection: more specifically, whether it extends to even businesses that offer services or products that may be considered expressive in nature.

Queer Rights vs First Amendment

There are two cases out of Colorado that attempt to answer this question. The first is Masterpiece Cakeshop v. Colorado Civil Rights Commission, where Jack Philips, the owner of the cakeshop refused to bake a cake for a gay couple's wedding because of his religious beliefs (Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 2018). This violated the Colorado Anti-Discrimination Act that 'prohibits public accommodations from refusing to provide full and equal enjoyment of services to individuals because of, among other protected characteristics, sexual orientation'. The case, on reaching the Supreme Court was decided in his favor based on the argument that his cakes are his artistic expression and he cannot be forced to use them to support a message he disagrees with. However, the issue with this case is that the ruling was quite narrow in terms of future application (The New York Times, 2018). The judgment, instead of exploring and centering itself around the free speech claim, focuses significantly more on the hostility displayed by the Colorado Commission in the treatment of the case. During the course of this case, Philips' religious beliefs were undermined as a legitimate basis for his views. They were even compared to defenses of the Holocaust and slavery. The Court also claimed that such hostility stemmed from a place of prejudice given that the Commission sided with bakers in other cases when they refused to make cakes with anti-gay messaging. Therefore, this case ended up becoming one about neutral treatment from a government institution and the state's duty under the First Amendment to not base regulations on disagreements with religious viewpoints. This overall meant that this case alone could not allow for businesses with expressive services to discriminate.

The more important case in answering this question then becomes the second rather recent judgment in 303 Creative LLC v. Elenis (Oyez, n.d.). Within this case, the owner of a graphic design firm Lori Smith was looking to expand her business to the creation of wedding websites. However, she didn't wish to create websites for queer couples given her religious objection to same-sex marriage. Fearing prosecution in the future over this and wanting to display a clear message on her website about the kinds of websites she would not be creating, she filed a pre-enforcement challenge. After oppositional verdicts in lower courts, the Supreme Court finally ruled over this case in favor of Lori Smith in a 6-3 split. The majority's argument (303 Creative LLC v. Elenis, 2023) was simple: her work is expressive and original artwork. Asking her to use it to celebrate marriages she objects to would be compelled speech. In supporting this claim, they relied on the past precedents set by Hurley and the Boy Scouts case (that have been discussed above) as well as seemingly progressive analogies, arguing that the logical extension of the reasoning of Colorado would allow them to force artists to create works that they disagree with such as requiring an atheist muralist to accept a commission celebrating Evangelical zeal or a Muslim filmmaker to direct a movie with Zionist messaging. The dissenting opinion ran a bit parallel, focusing on the importance of public accommodations law in protecting people from discrimination. They claimed this was especially important for the queer community given their historic state exclusion. However, on comparing the opinions, there are two noticeable points of divergence. Both of them are important to analyze to determine the future implications this case has when considering the validity of First Amendment claims against public accommodation laws.

Implications of 303 Creative LLC v. Elenis

The first question is whether this is a case of refusal of services based on the content of the website or based on the identity of the customer (American Civil Liberties Union, 2024). The majority opinion claims that Lori Smith's reason for not wanting to create wedding websites for same-sex couples was entirely based on her disagreement with the message: she was entirely willing to make other websites for queer couples but just couldn't endorse this particular view of marriage. Sonia Sotomayor, the author of the dissenting opinion, points out, however, that the law is content-neutral, that is the state doesn't care about the message the company wants to put on its websites. It instead cares that it's willing to provide that service to everyone. That means that the company can refuse to write 'love is love' on any website it offers, but it cannot refuse that to only couples of a particular sexual orientation. However, this case was not based on a specific instance but was a generalized pre-enforcement challenge. The verdict of the case allows Lori Smith to write on her website that she will not create wedding sites for same-sex couples. This means that in the ruling's implementation, it will end up discriminating based on identity. A same-sex couple could ask for the exact same wedding website as a straight couple but would still be denied.

There is uncertainty in how this will likely be interpreted in the future: on the one hand, the majority explicitly refuses the claim that this is akin to letting businesses hang 'only whites' signs because it is based on the message. This should limit the applicability of this judgment to other cases such as the one in Masterpiece Cakeshop. At the same time, it is unclear whether this messaging has

to be explicit. References made to cases of expressive association (such as Hurley/the Boy Scouts) seem to indicate that the Court takes a broader definition of expressive speech. If people within a parade could argue that including queer individuals in their event would send a message they deem undesirable, being a florist for a gay wedding can also be construed as an implicit celebration of same-sex marriages. The vague nature of this is worsened by the lack of a clear distinction on what makes certain speech 'expressive' that courts can rely on. Any service can be expressive if you choose to offer customization based on different clients. The majority here fails to offer clear criteria: instead, they concede that it is actually quite difficult to make that demarcation. This has meant that groups like the Becket Fund for Religious Liberty are already challenging past cases such as Billard v. Diocese which fought against employment discrimination based on sexual orientation (Time, 2023). Dianne Hensely, a Texan judge who's in the past received warnings around her refusal to grant licenses to same-sex marriages also hopes to use this case to strengthen her argument of religious freedom against the state (The Texas Tribute, 2023).

The second significant question here is whether this restriction of speech would meet the standard of strict scrutiny, or whether this speech can be compelled regardless of being expressive. Before this case reached the Supreme Court, the Tenth Circuit Court of Appeals conceded that websites by Lori Smith constitute expressive speech (303 Creative, et al. v. Elenis, 2021). However, they still ruled in favor of Colorado because they thought that it satisfied the strict scrutiny test. This test has two criteria: one, that this must serve a compelling government interest which means that it should be fundamental for governments to prevent this form of discrimination. Two, this must be a narrowly tailored way to achieve said interest. In essence, it must be the least intrusive way to achieve the government's goal. The Court recognized the compelling interest Colorado has in ensuring that even queer communities can access market services and critically, don't have to face the degradation of dignity that comes with discrimination. This is an avenue that even the dissenting opinion explores with the powerful example of Zawadski v. Brewer Funeral Services (Lambda Legal Agency, n.d.). In this case, hours after his husband's passing, Jack Zawadski had to struggle to make arrangements for his spouse's cremation because their previous funeral home refused to even pick the body up after realizing that they were providing services to a gay man. Further, forcing compliance with public accommodations law is the least intrusive way to achieve this interest. As per 303 Creative's own reasoning, their websites are unique which makes this a service unavailable elsewhere: at least in terms of the quality of the website and its nature. This is important because compelled speech can be allowed if it fulfills the highest level of scrutiny. The US compels speech in multiple other areas that it deems necessary, such as forcing factual disclosures by certain types of advertisements (The New York Times, 2022).

The dissent takes a slightly different approach: they would apply an intermediate level of scrutiny (Congressional Research Service, 2023) in the Lori Smith case because of two reasons: first, they claim that this regulation was content-neutral and a critical check on commercial conduct. This, however, tends to dissolve into the first question. The second reason is that any burden created on speech as a result of this legislation is incidental because the purpose of the act is not one directed toward regulating speech. This means the law should also be subjected to a lower degree of scrutiny as established by the precedent of O'Brien. In that case (Oyez, n.d.), David O'Brien had burned his draft card which was a form of expressive speech given that it conveyed his opposition to the war. However, the purpose of the draft laws was never to restrict free speech and as a result, the Court ruled against him after applying a lower test of intermediate scrutiny. Within intermediate scrutiny, the government doesn't have to prove a compelling interest but merely a substantial interest. Given the previously outlined justification for why the Colorado public accommodations law can meet a standard of strict scrutiny, it can very certainly then meet a standard of intermediate scrutiny.

The important thing to note in terms of this second question is that the majority actually seems to remain silent on what standard of scrutiny they apply. Instead, their argumentation seems to be limited to how a state cannot compel speech without recognizing when exceptions may exist to that norm. They further do not respond to the claim that an incidental burden creates a lower level of scrutiny but attempt to challenge if this burden is indeed incidental. However, their reasoning seems to be the same as within the first question, that is they claim that Lori Smith is not selling an ordinary product but is selling her original artwork that has created this telling of a unique love story. Therefore, it's an overreach on the part of the Colorado state to try to compel that speech, but it's unclear why. This also ends up clouding our understanding of how this case is going to impact similar future cases. Judges can claim that a case resembles this one and therefore end up defaulting to ruling on the side of free speech, despite the fact that in some instances restrictions on free speech are not only justified but are essential. The opposite can very well occur: cases could deviate from this precedent by claiming that they're different as a result of the newer case meeting the scrutiny criteria which 303 Creative omits to reference in the Court's Opinion, making the case narrow in its future application.

CONCLUSION

Overall, the two cases that look at expressive speech's interaction with anti-discrimination do not provide us with a sufficient answer about how similar cases are to be resolved. Lori Smith's case, more specifically, leaves greater space for worry. There is a possibility that the case could have minimal impact on future verdicts because of its narrow nature or because it failed to respond to whether this is a compelling government interest. However, the ambiguity it creates can also be dangerous. This is because it has the potential to be weaponized to discriminate and further restrict services to queer communities around America as well as other marginalized groups. It is then critical that we're able to clarify how far free speech can go in the realm of public accommodations. Given the

current composition of the Supreme Court, it's unlikely that the judiciary would be able to restore protections granted to groups in the public market. It is then upon both federal and individual state legislatures to prevent the denigration of dignity for vulnerable individuals by potentially including separate guidelines for businesses that offer expressive services. Both free speech and anti-discrimination are cornerstone values that America seeks to preserve and that shouldn't be violated. Hence, it's important that at least in the long term, we strike a balance between the two.

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