EXCLUSIONARY EXPRESSIVE CONDUCT

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Abstract: The First Amendment has become one of the most effective weapons in the conservative movement's legal assault on progressive public policy and the regulatory state. Although the First Amendment safeguards speech, expressive association, and religious belief, exclusionary conduct is rapidly earning constitutional protection across doctrinal areas.

This Article is the first to examine and critique the inconsistency and bias with which the Supreme Court has responded to expressive conduct claims in each doctrinal area through both a historical and contemporary lens. One theme across doctrinal areas is the Court's selective use of deference—in evaluating claimants' assertions regarding the expressive nature of their exclusionary conduct, the expressive nature of an association's exclusionary policies, or the burden that compliance with civil rights laws would impose on their asserted associational message or religious exercise.

The First Amendment should not be as manipulable as a tool for judges to handpick winners and losers based on favored or disfavored views reflected in the exclusionary expressive conduct, associational practices, or religious practices at issue. In the past, the Supreme Court laid the groundwork for an objective, evidence-based approach for assessing the expressive nature of conduct, the burden of compelled inclusion on an association's exclusionary interests, and the burden legal compliance would impose on religious exercise. Lower court judges should revive this analytical tradition. The judiciary's failure to perform that role today in cases primarily involving conservative First Amendment objections to civil rights statutes suggests an ideological agenda that erodes public trust, threatens democratic norms, and dismantles antidiscrimination law. It does not have to be this way.

INTRODUCTION

Since the ratification of the Reconstruction Amendments and the incorporation of the Bill of Rights into the Fourteenth Amendment as rights-protective

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limitations on state and local power, courts have been tasked with granting constitutional protection to a wide array of "expressive conduct."[1] Expressive conduct is, of course, an inherently broad concept that potentially implicates the full breadth of human behavior.[2] For a pluralistic society to function under the rule of law, there must be some constitutional parameters surrounding what and when conduct is sufficiently expressive to become rights-bearing. As Justice Scalia famously warned for the Supreme Court in the 1990 decision, *Employment Division v. Smith*, which involved the use of a controlled hallucinogen as religious practice, immunizing too much individual conduct from the reach of generally applicable law would "permit every citizen to become a law unto himself."[3] In other words, a maximalist theory of constitutionally protected expressive conduct could effectively guarantee individual exemptions or accommodations from any number of laws and policies.

Despite this prescient warning from one of the Court's most conservative members about the risks of too much legal individualization, constitutional law is currently trending toward this dangerous direction. Determining what and when conduct is sufficiently expressive to earn constitutional protection raises difficult questions that evade simple answers. Yet the need for consistent and predictable legal guidance has become increasingly urgent in the modern era of constitutional litigation, where diverse ideological stakeholders present starkly different and often oppositional claims about which conduct warrants legal solicitude. How courts resolve these competing claims fundamentally affects the scope of individual liberty regarding speech, association, religion, and private decision-making. Which individuals enjoy the ability to exercise these liberties, in turn, has profound consequences for equity and inclusion in the United States.

The Supreme Court has never provided a clear definition or single test sufficient to ground the many legal disputes centered around the expressive

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[1] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (acknowledging that the First Amendment has been incorporated and thus imposed a limitation on state action); *see, e.g.*, Virginia v. Black, 538 U.S. 343, 358 (2003) (discussing whether cross-burning is expressive conduct and citing to past exemplary cases). The Court stated that "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." *Id.* (first citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); then citing Texas v. Johnson, 491 U.S. 397, 405–06 (1989); then citing United States v. O'Brien, 391 U.S. 367, 376–77 (1968); and then citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969)).

[2] *See* John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOK. L. REV. 1, 46 (2023) (noting that "symbolic speech" is a "nebulous category" that "arguably expands to any human action" (first citing Spence v. Washington, 418 U.S. 405, 410–11, 416 (1974); then citing MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT 6 (2017); and then citing FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 50–56 (1982))).

[3] 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709 (2005).

elements of individual actions and behaviors.[4] The phrase "expressive conduct" and similar terminology appear in many of the Court's First Amendment cases, and the Court has occasionally—albeit inconsistently—attempted to offer some guidance.[5] Historically, expressive conduct as a First Amendment right was deployed to empower individuals to criticize the government. For example, in 1969, in *Tinker v. Des Moines Independent Community School District*, the Court protected students' right to wear black armbands in protest of the Vietnam War,[6] and in 1989, in *Texas v. Johnson*, it protected a political activist's right to burn the U.S. flag at the Republican National Convention in protest of the Reagan Administration.[7]

Things have changed. In 2024, in *Spectrum WT v. Wendler*, for example, the Court denied emergency review in a case seeking injunctive relief regarding a Texas university's ban of drag shows on campus.[8] In the lower court opinion, Trump-appointed judge Matthew Kacsmaryk explained: "because men dressed in attire stereotypically associated with women is not 'overtly political' in a category of performative conduct that runs the gamut of transvestitism . . . it is not clearly established that all drag shows are inherently expressive . . . ."[9] This opinion is shocking for a number of reasons: its offensive and reductive description of drag performances and transgender persons as a class; its incorrect suggestion that only political expression warrants First Amendment protection; its seeming disinterest in evidence tending to show that the university banned drag shows because it disagreed with their message; and its cherry-picked application of expressive conduct jurisprudence to reach its preferred outcome.

These flaws raise suspicion about why the Supreme Court was silent on the emergency petition. How could a Texas federal judge conclude that a traditional lesbian, gay, bisexual, transgender, and queer (LGBTQ) form of art, entertainment, and political resistance is not sufficiently expressive to warrant First Amendment analysis?[10] This aberrant outcome makes sense only against the backdrop of decades of Supreme Court First Amendment jurisprudence that is internally inconsistent and appears increasingly ideologically motivated.

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[4] Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of "Speech*,*"* 1993 WIS. L. REV. 1525, 1531 (explaining that, under free speech principles, "the Court has never articulated a fully satisfactory test for demarcating speech from noncommunicative conduct").

[5] *See* 16A AM. JUR. 2D *Constitutional Law* § 528, Westlaw (database updated Oct. 2024) (summarizing the Court's jurisprudence on expressive conduct).

[6] 393 U.S. 503, 505–06 (1969).

[7] 491 U.S. 397, 406 (1989).

[8] 144 S. Ct. 1053 (2024) (mem.), *denying petition for writ for injunction pending appeal in* 693 F. Supp. 3d 689 (N.D. Tex. 2023).

[9] *Wendler*, 693 F. Supp. 3d at 704.

[10] *See Understanding Drag: As American as Apple Pie*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/understanding-drag [https://perma.cc/Z4VT-NQ2G] (emphasizing the importance of drag performance as a space of visibility for the LGBTQ community).

In claims regarding purportedly expressive conduct as an individual free speech right, the Court in 1974 in *Spence v. Washington*[11] once offered a workable, contextual, and evidence-based approach for analyzing threshold questions about whether the conduct at issue is sufficiently expressive to trigger First Amendment analysis. In the early years of its application, this test primarily led to constitutional protection for political dissidents to criticize the government.[12] Since the 1990s, however, in disputes about LGBTQ rights and antidiscrimination principles, the Court has either ignored *Spence*, applied a deferential version to claims rooted in queer exclusion, or applied a rigorous version to claims rooted in queer inclusion.[13]

Another species of expressive conduct claim under the First Amendment goes beyond the individual liberty to speak or not speak[14] and extends to the liberty of persons to associate together to disseminate messages. Since the 1980s, the Court has heard a series of high-profile cases involving private nonprofit associations seeking to exclude certain individuals and groups from membership due to the alleged burden that compelled inclusion would impose on the association's message.[15] The outcomes in these cases pose consistency problems, and this body of law continues to spawn scholarly critique.[16] In some cases the Court carefully searches for evidence regarding the nature of the association's message and whether compelled inclusion would burden that message, while in other cases the Court wholly defers to the association's as-

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[11] 418 U.S. 405, 409–10 (1974) (per curiam).

[12] *See, e.g.*, Diahann DaSilva, Note, *Playing a "Labeling Game": Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 775 (2015) (noting the difficulty in identifying a "universal rule" sufficient to determine which forms of conduct are protected under the First Amendment, but highlighting early expressive conduct victories regarding both picketing and unconventional uses of the U.S. flag).

[13] *See infra* Part I (discussing expressive conduct and free speech claims).

[14] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634, 642 (1943) (reasoning that the Free Speech Clause protects both the liberty interest of an individual to "speak his own mind" and to be free from state compulsion "to utter what is not in his mind").

[15] *Compare, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 628–29 (1984) (rejecting an expressive associational right to exclude women from full membership in a nonprofit organization primarily centered around developing male leadership), *with* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559 (1995) (ruling in favor of a nonprofit organization claiming an expressive associational right to exclude an LGBTQ group from marching in its permitted parade), *and* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (ruling in favor of the nonprofit Boy Scouts organization claiming an expressive associational right to exclude openly gay individuals from leadership positions).

[16] *See, e.g.*, Rebecca L. Brown, *Common Good and Common Ground: The Inevitability of Fundamental Disagreement*, 81 U. CHI. L. REV. 397, 408 (2014) ("At the risk of oversimplifying, these cases seem at least arguably inconsistent."); Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2169 (2001) (suggesting that one possible explanation for the inconsistency between *Boy Scouts of America v. Dale* and prior expressive association cases is that the Boy Scouts "had avoided sullying their hands with commerce," but also acknowledging that the Court "did not rely exclusively on the distinction").

sertions regarding the nature of its message and the alleged burden of compelled inclusion.

Adding a new dimension to this doctrinal quagmire is the Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* in which it overruled the Court's 1973 decision, *Roe v. Wade*,[17] overruled the Court's 1992 decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[18] and eliminated constitutional protection for abortion rights.[19] In the lead-up to and immediate aftermath of *Dobbs*, lower courts have begun to more aggressively advance expressive associational claims to new terrain by holding that employers and entities engaged in the provision of goods and services also have exclusionary expressive associational rights notwithstanding applicable antidiscrimination law.[20] For example, in several recent cases, courts have broken new ground by holding that employers and religious service providers who assert an anti-abortion message have expressive associational rights to exclude employees who hold pro-abortion views.[21] These rulings indicate that courts are increasingly categorizing law-breaking as an act of expressive association, and the application of antidiscrimination law to the association is thus inherently and impermissibly burdensome.[22]

Finally, expressive conduct also finds a home in contemporary religious liberty claims. Similar to the associational context, the factual nucleus of recent religious liberty claims includes conduct that would otherwise violate applicable antidiscrimination law or policy. The Supreme Court has shown a recent eagerness to wade into these disputes, but so far in ways that punt the central issue of whether certain religiously expressive conduct warrants special constitutional consideration. For example, in 2018, in the Supreme Court's *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* decision, a

[17] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022); Roe v. Wade, 410 U.S. 113, 166 (1973), *overruled by Dobbs*, 597 U.S. at 215. In *Roe v. Wade*, the Court held that the Fourteenth Amendment's liberty guarantee protects an individual's right to seek abortion-related care largely unfettered from state restrictions prior to the point of fetal viability. 410 U.S. at 154.

[18] *Dobbs*, 597 U.S. at 231; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion), *overruled by Dobbs*, 597 U.S. at 215. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court modified *Roe* by permitting abortion restrictions prior to the point of fetal viability unless they imposed an undue burden on abortion access. 505 U.S. at 873–74.

[19] *Dobbs*, 597 U.S. at 231.

[20] *See, e.g.*, Slattery v. Hochul, 61 F. 4th 278, 283 (2d Cir. 2023) (deferring to a crisis pregnancy center's assertions that hiring employees who have had abortions would impermissibly burden the employer's anti-abortion message); Darren Paterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163, 1171 (D. Colo. 2023) (deferring to a private preschool's assertions that hiring LGBTQ employees would impermissibly burden the employer's message centered on a "Christian worldview").

[21] *See generally* Elizabeth Sepper, *The Return of* Boy Scouts of America v. Dale, 68 ST. LOUIS U. L.J. 803, 815–19 (2024) (discussing the doctrinal development).

[22] *See id.* at 826 (observing a "troubling tendency" for courts to find "that the violation of the law—or desire to violate the law—itself is the expression that transforms an entity into an expressive association").

Christian businessowner sought an exemption from a Colorado antidiscrimination law that adjudicating bodies below found would require him—a for-profit baker—to bake a cake for a same-sex wedding.[23] While ruling in favor of the Christian baker, the Court famously avoided answering the central question: when might conduct assertedly required or forbidden by an individual's sincerely held religious beliefs warrant free exercise protection? In free exercise jurisprudence following *Masterpiece Cakeshop*, the Court's rhetoric and doctrinal expansions suggest a forthcoming maximalist approach reflecting the kind of free exercise individualism that Justice Scalia once warned.[24]

Recognizing that expressive conduct resides within multiple constitutional doctrines, this Article's focus is not limited to the Free Speech Clause. Indeed, this Article is the first to examine and critique the inconsistency[25] with which the Supreme Court has responded to expressive conduct claims in each doctrinal area through both a historical and contemporary lens. Although the problem of inconsistency is not new,[26] the Court's haphazard treatment of ex-

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[23] 584 U.S. 617, 621–23 (2018).

[24] *See, e.g.*, 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2321–22 (2023) (citing *Masterpiece Cakeshop*, 584 U.S. at 663–64) (Thomas, J., concurring in part) (highlighting another decision in which the Court upheld a website designer's free exercise protection in declining to create wedding websites for same-sex couples); *see also* David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 328–29 (1994) ("Public expression of same-sex intimacy is as important a critique of gender assumptions and gender roles in American society as any published treatise. . . . The fact that gestures like kissing and hand-holding are symbolic of ideas and attitudes rather than literal statements of position in a debate does not diminish their importance."). Expressive conduct is also often quietly lurking in many of the Court's Fourteenth Amendment cases regarding the meaning of substantive "liberty" and decisional privacy. Scholars have long made arguments regarding the expressive nature of individual acts as an additional factor supporting robust conceptions of individual liberty—particularly as those acts relate to sexuality, gender, and family formation. *Id.* As Laura Portuondo illustrates, however, Fourteenth Amendment liberty claims sounding in gender or sexual expression have had little traction at the Court when unanchored from the First Amendment. *See generally, e.g.*, Laura Portuondo, *Gendered Liberty*, GEO. L.J. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4755198 [https://perma.cc/U56P-RQSS] (explaining that, although religious expressive conduct is receiving enhanced protection under the First Amendment, courts are increasingly hostile to protecting expressive conduct with gendered and sexual connotations under the Fourteenth Amendment).

[25] *See* William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1276 (2011) ("Constitutional theory, it is generally agreed, should not be driven by results. The test of the validity of any constitutional theory should be in its internal integrity.").

[26] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1878) (rejecting a First Amendment challenge to a federal bigamy conviction brought by a polygamist member of the Church of Jesus Christ of Latter-day Saints). The Court reasoned that, although the Free Exercise Clause prohibits the government from "interfere[ing] with mere religious belief and opinion," it does not prohibit the government from regulating "practices"—i.e., *conduct* that may implicate religious belief and opinion. *Id.* Unlike in contemporary cases brought by conservative Christians who are finding success in claims seeking protection for various facets of religiously expressive conduct, the *Reynolds v. United States*

pressive conduct across doctrines demonstrates a more troubling outcome motivated inconsistency.

This Article synthesizes the Court's expressive conduct cases in ways that demonstrate judicial bias. Legal determinations about which conduct is sufficiently expressive and whether compelled inclusion burdens an association's message or an individual's religious exercise have become opaque exercises in which judges omit evidentiary analysis through a series of mechanisms that achieve desired conservative ends. These mechanisms include assuming an issue without deciding, taking judicial notice of legislative and adjudicative facts, relying on stipulations agreed to by the parties below without meaningful review of the interplay between questions of fact and law, declining to answer questions altogether, and deferring to claimants' assertions about the expressive nature of their exclusionary conduct and the burden that legal compliance would impose. As this Article shows, the selective use and application of *deference* across doctrines is perhaps the most ubiquitous and therefore the most problematic. The lack of clear guidance from the Court has ushered in judicial bias in ways that may raise concerns of ideological favoritism—concerns that can further erode democratic trust in the federal judiciary as a neutral arbiter tasked with upholding the rule of law.[27]

To resolve these expressive conduct problems, this Article does not advocate for a universal "expressive conduct" test or definition that would apply across doctrinal boundaries. Context matters,[28] and such a narrow version of consistency may be unworkable given the different private and public considerations at play in speech, associational, and religious exercise claims. Instead, this Article points to early legal precedent in each doctrinal area that envisions an objective analytical component. A distinct objective inquiry is an important mechanism for minimizing the role of judicial bias. For example, courts should require at least some evidence regarding the nature of a claimant's expressive message. If evidence suggests that a claimant's conduct is indeed sufficiently expressive to warrant further constitutional analysis, courts should similarly require evidence that compliance with the law at issue will pose an impermissible burden on that expression.

This may at first blush sound like a modest or even trivial proposal. It is not. Omitting an objective element in claims rooted in exclusionary conduct

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Court seemed disinterested in seriously engaging with the expressive religious liberty interests associated with conduct central to those of a minority religious faith.

[27] *See Trust in U.S. Supreme Court Continues to Sink*, ANNENBERG PUB. POL'Y CTR. UNIV. OF PA. (Oct. 2, 2024), https://www.annenbergpublicpolicycenter.org/trust-in-us-supreme-court-continues-to-sink/ [https://perma.cc/M538-DJBN] (exploring declining public trust in Supreme Court).

[28] *See, e.g.*, Jason A. Cade, *"Water Is Life!" (and Speech!): Death, Dissent, and Democracy in the Borderlands*, 96 IND. L.J. 261, 280 (2020) ("It is this kind of judicial engagement with social context that helps establish whether something like mere presence in a particular place takes on expressive significance.").

has played a decisive role in the transformation of the First Amendment into one of the most effective instruments of conservative legal activism. Evaluating expressive conduct claims absent evidentiary proof regarding the nature of the asserted message and the alleged burden of legal compliance allows judges to bend the First Amendment to political whims and handpick legal winners and losers. Importantly, continuing down this jurisprudential path could mean transforming a potentially endless array of exclusionary conduct rooted in conservative ideology into constitutionally protected expression—often at the expense of LGBTQ people, reproductive freedom, and the broader regulatory state.

This Article proceeds as follows. Part I discusses expressive conduct and free speech claims, focusing first on the *Spence* test and its objective component, followed by the Court's subsequent departure from *Spence* in cases implicating LGBTQ rights.[29] Part II examines expressive association claims.[30] Part II.A begins by discussing an early objective application of the relevant test in the Court's 1984 decision, *Roberts v. U.S. Jaycees*.[31] Part II.B then turns to the purely deferential approach on display in cases implicating LGBTQ rights, primarily focusing on the Court's 2000 decision *Boy Scouts of America v. Dale*.[32] Part II.C ends with a window into a possible future as expressive association claims become increasingly available to employers and providers of goods and services who seek to engage in exclusionary conduct.[33] Part III focuses on exclusionary expressive conduct as it relates to religious liberty.[34] Part III.A first explores religious conduct under free exercise principles, highlighting an early objective component to questions of whether the law substantially burdens religious exercise.[35] Part III.B then turns to contemporary claims brought under statutory Religious Freedom Restoration Acts wherein religious adherents successfully secure protection for exclusionary conduct; these claims are emblematic of the judiciary's unwarranted impulse towards absolute deference in answering the threshold question of when the law imposes a substantial burden on religious exercise, and they portend where the current Court may soon take the law of free exercise.[36]

I. EXPRESSIVE CONDUCT AND FREE SPEECH

The logical place to begin any discussion of "expressive" conduct is in the First Amendment's Free Speech Clause. It is in this context that the Court

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[29] *See infra* notes 37–192 and accompanying text.
[30] *See infra* notes 193–295 and accompanying text.
[31] 468 U.S. 609, 609 (1984); *see infra* notes 202–227 and accompanying text.
[32] 530 U.S. 640, 640 (2000); *see infra* notes 228–260 and accompanying text.
[33] *See infra* notes 261–295 and accompanying text.
[34] *See infra* notes 296–359 and accompanying text.
[35] *See infra* notes 301–329 and accompanying text.
[36] *See infra* notes 331–359 and accompanying text.

has come closest to articulating a workable test, commonly referred to as the *Spence* test for its namesake,[37] to determine when conduct is sufficiently expressive to trigger constitutional analysis. While promising at its inception, the Court has never consistently applied the *Spence* test. In fact, the Court has only meaningfully invoked the *Spence* test as originally articulated in three major cases. Since the Court lost interest in *Spence*, it has oscillated between restrictive and permissive approaches to evaluating expressive conduct claims—often in ways hostile to LGBTQ people by both allowing their exclusion and impeding their expression.

This Part discusses the Supreme Court's unprincipled handling of expressive conduct claims under the Free Speech Clause, moving chronologically from past to present.[38] Section A discusses early examples of expressive conduct jurisprudence.[39] Section B highlights the inconsistency of the doctrine of expressive conduct.[40] Section C puts exclusionary expressive conduct in the context of antidiscrimination law.[41] Section D discusses expressive conduct and drag.[42] It joins those who defend the original *Spence* test as a good compromise framework that can be repurposed with greater clarity,[43] but largely because of its call for an objective, evidence-based analysis regarding the asserted expressive nature of the conduct at issue. The problem is not the *Spence* test itself but the lack of clarity regarding when and how it should apply. "Lower courts are in almost hopeless confusion"[44] regarding how to answer these questions. The Court's distortion of *Spence* has created a legal landscape amenable to manipulation via the selective use of deference and other legal mechanisms.

A. Early Expressive Conduct Jurisprudence

An emblematic example of how conduct can potentially transform into rights-bearing expression is the canonical Supreme Court decision from 1968, *United States v. O'Brien*,[45] decided at the tail-end of the liberal Warren Court

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[37] Spence v. Washington, 418 U.S. 405, 405 (1974) (per curiam).

[38] *See infra* notes 45–192 and accompanying text.

[39] *See infra* notes 45–88 and accompanying text.

[40] *See infra* notes 90–134 and accompanying text.

[41] *See infra* notes 135–170 and accompanying text.

[42] *See infra* notes 171–192 and accompanying text.

[43] *See, e.g.*, James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 79 (2008) ("The fact that *Spence*'s requirement of a particularized message is attacked on both sides makes it appear to be the appropriate balance between competing choices."). McGoldrick further argues that "it would [not] require much for the Supreme Court to give it some meaning." *Id.* at 78.

[44] James M. McGoldrick, Jr., United States v. O'Brien *Revisited: Of Burning Things, Waving Things, and G-Strings*, 36 U. MEMPHIS L. REV. 903, 925 (2006).

[45] *See* 391 U.S. 367, 372 (1968) (deciding whether a statute prohibiting mutilating a draft card unconstitutionally infringes on First Amendment protections).

era. In *O'Brien*, the claimant was convicted for burning his draft card on the steps of a courthouse in front of a crowd.[46] The conviction stemmed from a federal statute criminalizing the conduct of anyone who "forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes" their draft card.[47] The claimant argued that the statute was facially unconstitutional and unconstitutional as applied to him under the First Amendment's Free Speech Clause.[48] In essence, the argument was that the statute in both its purpose and application was designed to suppress the speech of anti-war and anti-draft protesters.[49] This Section discusses the Court's early effort to regulate expressive conduct.[50]

At this point in constitutional history, the Court's free speech jurisprudence had not yet evolved into the current facial and intent-based apparatus for distinguishing between content-neutral and content-based speech regulations,[51] nor had the Court developed any version of a test designed to evaluate expressive conduct or symbolic speech. Perhaps anticipating the legal quagmire that such claims might create, the Court issued the following cautionary statement: "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[52] Instead, the Court, without formally deciding, assumed that burning a draft card in the context of this public protest might be sufficiently expressive to warrant free speech analysis.[53] It then continued with a rudimentary application of the intermediate scrutiny test that now applies to content-neutral regulations of speech.[54]

The Court's tacit recognition in *O'Brien* that some conduct might be expressive enough to trigger free speech analysis undermines its hesitancy to articulate a workable test, and the Court would inevitably be forced to address this simmering issue head-on. Six years later in 1974, the Court seized the opportunity in *Spence v. Washington*.[55]

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[46] *Id.* at 369.

[47] *Id.* at 370 (quoting 50 U.S.C. § 3811(b)(3)).

[48] *Id.* at 376.

[49] *See id.* (highlighting the claimant's argument that the statute suppressed free speech).

[50] *See infra* notes 51–88 and accompanying text.

[51] *See, e.g.*, *O'Brien*, 391 U.S. at 383 ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Since at least 1976, following the Court's decision regarding intentional race discrimination under the Equal Protection Clause in *Washington v. Davis*, 426 U.S. 229 (1976), evaluating governmental intent has been a hallmark of constitutional adjudication across doctrinal areas.

[52] *O'Brien*, 391 U.S. at 376.

[53] *Id.*

[54] *See id.* at 377 (noting that a regulation is constitutional if it within the ambit of a "substantial governmental interest").

[55] *See* 418 U.S. 405, 405–06 (1974) (deciding whether a statute that prohibits affixing other materials to the U.S. flag infringed on an individual's First Amendment right).

At issue in *Spence* was an as-applied challenge to a Washington statute that made it unlawful to desecrate the flag by attaching or superimposing "figures, symbols, or other extraneous material."[56] The claimant taped a peace sign to the flag, hung it upside down from a window in his apartment, and was subsequently prosecuted and convicted.[57] The Court began its legal analysis by citing *O'Brien* and noting the necessity of first determining whether the claimant's "activity was sufficiently imbued with elements of communication to fall within the scope of" constitutional protection.[58] From this admission was born a new constitutional test.

The *Spence* test is commonly understood as embodying two mandatory elements. First, a court must determine whether the claimant had a subjective "intent to convey a particularized message."[59] Second, a court must determine whether "the likelihood was great that the message would be understood by those who viewed it."[60] The second inquiry is best understood as objective, and the Court in *Spence* outlines least three evidentiary factors to guide this analysis: "the nature of [the] activity, the factual context of the activity, and the environment in which the activity was undertaken."[61] Only if both elements are satisfied does the claimant step through the constitutional door and trigger traditional free speech analysis. The combination of subjective and objective inquiries into a workable test is a common feature of criminal law,[62] and *Spence* hews closely to this well-worn legal structure.

Ultimately, *Spence* never fully took hold. In fact, the Court next invoked it a full decade later in 1984, in *Clark v. Community for Creative Non-Violence*,[63] and, even then, its appearance does little substantive work. With facts evocative of pro-Palestinian student protests in 2024,[64] the case in *Clark*

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[56] *Id.* at 405.

[57] *Id.* at 406.

[58] *Id.* at 409.

[59] *Id.* at 410–11; *see also* Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 249 (2015) (noting that, under *Spence*, the claimant's view, or "the speaker's intent," is the subjective component; it is not the only component, however, given that, objectively, "[t]he audience must also understand the message communicated").

[60] *Spence*, 418 U.S. at 411.

[61] McGoldrick, *supra* note 43, at 35; *accord Spence*, 418 U.S. at 409–10 (listing three factors considered by the Court in making its final determination about whether an action was a protected expression).

[62] *See, e.g.*, Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1042 (2011) (describing the provocation defense to violent crimes as "consisting of a subjective requirement and an objective requirement," with the subjective requirement focused on whether a defendant was "in fact subject to the heat of passion" at the time of the alleged crime and the objective requirement focused on the "adequacy" of the provocation through a "reasonable[ness]" lens).

[63] *See* 468 U.S. 288, 294 (1984) (citing *Spence* in explaining the legal framework).

[64] *See* Laura Meckler & Hannah Natanson, *Massive Pro-Palestinian College Protests Bring Rare Surge in Discipline*, WASH. POST (May 6, 2024), https://www.washingtonpost.com/education/2024/

involved a National Park Service regulation "prohibiting camping in certain parks."[65] The legal question centered on whether this regulation could be constitutionally applied under the Free Speech Clause to demonstrators who set up encampments on the National Mall and Lafayette Park to "call attention to the plight of the homeless."[66] Before engaging in the relevant free speech analysis, the Court was required to decide whether "sleeping" in tents "in connection with the demonstration" was sufficiently expressive conduct.[67] On this question, the Court took the easy way out: it assumed, but did not formally decide, that the conduct at issue was sufficiently expressive to fall under the First Amendment.[68] Nevertheless, this "assumption" did not resolve the case because symbolic speech and expressive conduct are subject to permissive "time, place, and manner" restrictions—assuming the government's intent is not to censor the content of message.[69] The Court went on to conclude that the anti-camping regulation falls under this category because it relates to the "manner in which the demonstration could be carried out."[70]

The Court's assumption about the expressive nature of camping on government property is almost certainly correct. The problem with the Court's analysis is that it does not meaningfully engage with *Spence*'s subjective and objective components. By contrast, the dissent by Justices Marshall and Brennan does. Applying the evidentiary factors articulated in *Spence*, Justices Marshall and Brennan discuss the nature of the demonstrations, their factual context, and the environment in which they occurred.[71] They note, among other details, the "location" of the demonstrations near the White House, the specific "mode of communication," the "satirical names" given to the demonstrations, and the extensive media coverage.[72] By omitting this contextual discussion, the majority muddies the *Spence* waters and gives license to judges in future cases to "assume" conduct is either expressive or not, or to simply defer to claimants' assertions on the matter. The *Clark* Court thus opens the door to a freewheeling expressive conduct jurisprudence unmoored from evidentiary considerations.

05/06/college-protests-suspensions-expulsion-arrests/ [https://perma.cc/A85V-HCY6] (noting the presence of "encampments" and "tents" on college campuses designed to draw attention to the plight of Palestinians caught up in the Israeli conflict with Hamas).

[65] 468 U.S. at 289.

[66] *Id.*

[67] *Id.* at 293.

[68] *Id.*

[69] *Id.* at 294. *See generally* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that laws regulating the "time, place, or manner of . . . speech" are subject to intermediate scrutiny).

[70] *Clark*, 468 U.S. at 294.

[71] *Id.* at 305 (Marshall & Brennan, JJ., dissenting).

[72] *Id.*

The Court's final application of *Spence* as originally articulated comes in its 1989 decision in *Texas v. Johnson*.[73] Factually, *Johnson* dealt with another instance of symbolic speech involving the U.S. flag.[74] During the 1984 Republican National Convention, the claimant participated in a demonstration using the moniker, "The Republican War Chest Tour."[75] Objecting to certain Reagan Administration policies, the demonstrators, including the claimant, engaged in political activism by marching through the streets of Dallas, yelling political chants, and staging "die-ins."[76] At the finale of the demonstration at Dallas City Hall, the claimant poured kerosene on a U.S. flag and lit it on fire.[77] The claimant alone was criminally charged and convicted under a Texas law prohibiting "the desecration of a venerated object."[78] The claimant took his case to the Supreme Court, arguing that Texas's application of this law as applied to him violates the Free Speech Clause.[79]

The Court's analysis in *Johnson* largely focused on whether Texas had a permissible purpose for criminally pursuing a person who burned the U.S. flag as part of a political protest.[80] Specifically, Texas argued it could prosecute the claimant's conduct to prevent a breach of the peace,[81] and, more controversially, to preserve "the flag as a symbol of nationhood and national unity."[82] The Court rejected both arguments.[83]

Regarding *Spence*, *Johnson* departs from *Clark*'s assumptive approach and at least cursorily engages in a contextual evidence-based analysis. The Court's job, however, was perhaps less difficult because, like in *Spence*, the conduct at issue concerned the U.S. flag.[84] Drawing from its past flag-related expressive conduct cases, the Court began by noting that the flag is "[p]regnant with expressive conduct."[85] But not "any action taken with respect to [the] flag

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[73] *See* 491 U.S. 397, 403 (1989) (citing *Spence* in articulating the analytical components).

[74] *Id.* at 399.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 400.

[79] *See id.* at 402 (noting that the Court granted certiorari on the question of whether the statute was unconstitutionally applied).

[80] *See id.* at 407–20 (evaluating and rejecting Texas's stated governmental interests).

[81] *Id.* at 407.

[82] *Id.* at 410.

[83] *Id.* at 408, 415. The Court finds no evidence that a breach of the peace either had occurred or was imminently likely to occur, and it characterizes Texas's first asserted interest as impermissibly seeking to punish expressive conduct merely because the audience might take "serious offense." *Id.* at 408–09. Regarding Texas's second asserted interest in preserving the flag's meaning, the Court finds this interest tantamount to an admission that Texas sought to censor the claimant precisely because of the content of his message—violating the basic rules governing principles of free speech. *Id.* at 410–14.

[84] *Id.* at 399.

[85] *Id.* at 405.

is expressive," the Court clarified, and thus the "context in which it occurred" remains a paramount question.[86] The Court then highlighted Texas's concession in the proceedings below that the claimant's conduct was expressive in nature, but it did not treat this concession as dispositive; instead, it drew key facts from the record to independently find that the "expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."[87]

Although *Johnson* addresses the subjective and objective elements of expressive conduct head-on rather than skirting them as in *Clark*, there in retrospect were signs that the perceived usefulness of *Spence* may have been waning. Like in *Clark*, the Court was almost certainly correct in its finding that the conduct at issue was expressive enough to get through the First Amendment door. Characterizing the flag as "pregnant" with meaning, however, sounds in the register of a Court taking judicial notice of a legislative fact.[88] Whether appropriate here or not, this rhetorical language could suggest a greater judicial power to unilaterally decide when conduct is inherently expressive in other cases where the message is less clear. That invitation looks even more inviting considering the Court's characterization of the expressive nature of flag-burning in *Johnson* as "overwhelmingly apparent,"[89] hinting that some messages are self-evident and not subject to reasonable dispute. This was likely evidentiarily sound in *Johnson*, but the nod towards judicial absolutism is concerning. Indeed, the Court's more recent expressive conduct cases under the Free Speech Clause exemplify this impulse towards an aggrandizement of judicial power, specifically relying on *Johnson*'s language.

B. Expressive Conduct in Flux

Since its first appearance, *Spence* and its progeny have been critiqued on a variety of grounds. For example, one scholar argues that *Spence* is "almost impossible to apply," highlighting lower court chaos in its application.[90] Another scholar critiques that the contemporary chipping away of *Spence* has

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[86] *Id.*

[87] *Id.* at 405–06.

[88] *Cf.* Carl A. Auerbach, *Legislative Facts in* Grutter v. Bollinger, 45 SAN DIEGO L. REV. 33, 43–45 (2008) (highlighting instances in which the Justices deciding *Grutter v. Bollinger* relied on legislative facts in their decision). A legislative fact includes "the factual generalizations invoked by courts and administrative agencies to justify the laws they make" and to which they sometimes take judicial notice. *Id.* at 34 (citing THE LEGAL PROCESS 90–137 (Carl A. Auerbach et al. eds., 1961); Carl A. Auerbach, *The Anatomy of an Unusual Economic Substantive Due Process Case:* Workers' Compensation Insurers Rating Association v. State, 68 MINN. L. REV. 545, 581–612 (1984)).

[89] *Johnson*, 491 U.S. at 406.

[90] McGoldrick, *supra* note 44, at 925.

been too restrictive, excluding too much conduct from constitutional concern.[91] Others argue that *Spence* was originally too permissive, permitting courts to assign too much constitutional weight to a potentially endless array of conduct.[92] And others argue that *Spence* is "both over- and under-inclusive of free speech coverage."[93] Regardless of the specific doctrinal path forward, a general scholarly consensus has emerged that something is wrong.

By the early 1990s, it became apparent that the Court was losing interest in *Spence*, and its internal divisions were on display. This Section discusses the Court's inconsistent application of the *Spence* test.[94] In 1991, in *Barnes v. Glenn Theatre, Inc.*, for example, the Court concluded that nude dancing "is expressive conduct within the outer perimeters of the First Amendment"—somewhat gratuitously adding that it is "only marginally so."[95] The Court relied for its conclusion on several prior cases involving nude dancing, but it never engaged with the two-prong *Spence* test nor even cited it.[96] In his concurrence in the ultimate judgment, Justice Scalia did discuss *Spence* but voiced general discomfort with the very idea of expressive conduct as an offshoot of free speech sufficient to trigger traditional First Amendment analysis.[97] For Scalia, only when the government regulates conduct with the impermissible intent to censor its communicative element does such conduct deserve constitutional protection.[98] *Barnes* thus demonstrates that the Court is at a crossroads, and its tone is decidedly more restrictive of protection than in *Spence*, *Clark*, or *Johnson*.

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[91] *See, e.g.*, John Fee, *The Freedom of Speech-Conduct*, 109 KY. L.J. 81, 99 (2020–21) (noting that the FAIR test, a test designed to limit *Spence*'s application, is problematic because "it leaves an enormous range of actually communicative behavior vulnerable to content-based regulation").

[92] *See, e.g.*, David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841, 864 (2022) (arguing that the *Spence* test "does not work as a meaningful basis for distinguishing protected speech from unprotected conduct" because it is "too broad" and could give constitutional significance to "countless examples of communicative conduct" (citing Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250–60 (1995))); Post, *supra*, at 1252 (characterizing the *Spence* test as "transparently and manifestly false" because, in part, "any action can at any time be made communicative in a manner that satisfies" the test).

[93] Cade, *supra* note 28, at 265 n.15.

[94] *See infra* notes 90–134 and accompanying text.

[95] 501 U.S. 560, 555–66 (1991) (plurality opinion).

[96] *See id.* at 565–66 (citing prior nude dancing cases and utilizing the *O'Brien* test to elicit a conclusion). In *City of Erie v. Pap's A.M.*, the Court affirms this holding in another nude dancing case, and again neglects to cite *Spence*. *See* 529 U.S. 277, 283 (2000) (plurality opinion) (agreeing with the decision in *Barnes v. Glenn Theatre, Inc.* by employing the test articulated in *O'Brien*).

[97] *See* 501 U.S. at 576–77 (Scalia, J., concurring) ("It cannot reasonably be demanded . . . that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny, or even—as some of our cases have suggested—that it be justified by an 'important or substantial' government interest." (citation omitted)).

[98] *Id.* at 577 ("Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.").

Shortly after *Barnes*, *Spence* makes a passing appearance in 1993 in *Wisconsin v. Mitchell* where the Court upheld a sentencing enhancement for racially motivated violent crimes.[99] The Court cited *Spence* to support its proposition that not all conduct is effectively speech simply because "the person engaging in the conduct intends thereby to express an idea."[100] It then explained that "a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment."[101] That may be true, but not necessarily because of the facile categorical approach the Court implies. Violent conduct may very well send a message, but it is the government's legitimate, important, and even compelling interests that render expressive violent conduct unprotected. The Court appears to blur the preliminary question of whether conduct is sufficiently expressive to trigger the First Amendment with the modes of usual judicial analysis regarding governmental interests that typically follow. This conflation deviates from what *Spence* requires or permits. The Court's concerns about constitutional protection for violent expression are ill-founded, given the strong governmental interests at stake. Consequently, the invocation of *Spence* in *Mitchell* functions as a seemingly restrictive rather than permissive function unmoored from its roots.

The Court's pessimistic attitude towards expressive conduct abruptly shifted in 1995 when it decided *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*[102] *Hurley* represents the Court's first major foray into legal and cultural clashes between LGBTQ protective antidiscrimination laws and First Amendment objections to such laws. *Hurley* bears the markings of an expressive association case, but, analytically, it also fits neatly into the Court's growing compelled speech jurisprudence.[103] In this way, *Hurley* serves as an important precedent for contemporary disputes around the application of LGBTQ-inclusive antidiscrimination laws to those who object to LGBTQ inclusion on either free speech or expressive associational grounds. It is the Court's discussion and application of *Spence*, however, that gives it outsized importance for speech-based claims and why the Article situates it here.

Hurley arose when private parade organizers, equipped with a permit from the government, rejected a request from a local gay, lesbian, and bisexual

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[99] 508 U.S. 476, 484, 490 (1993).

[100] *Id.* at 484 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)) (first citing R.A.V. v. St. Paul, 505 U.S. 377, 385–86 (1992); then citing Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam); and then citing Cox v. Louisiana, 379 U.S. 536, 555 (1965)).

[101] *Id.* (first citing Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984); and then citing NAACP v. Clairbone Hardware Co., 458 U.S. 886, 916 (1982)).

[102] *See* 515 U.S. 557, 569 (1995) (allowing symbolism in a parade to be expressive conduct).

[103] *See id.* at 573 ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986))).

group to march in their annual parade.[104] The factual record developed below showed that the group specifically formed to march in the parade, and their intended message was to "celebrate" openly queer people, "show that there are such individuals in the community," and to "support" similar efforts by queer people to march in a New York parade.[105] Because the parade qualified as a public accommodation under state law, the parade was also subject to state law that prohibits discrimination on the basis of sexual orientation.[106] As the Court put it, the parade organizers claimed that compliance with the antidiscrimination law—compelled inclusion of "a group imparting a message the organizers do not wish to convey"[107]—would violate the First Amendment.

The Court began with some definitional work, characterizing a parade as embodying "marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[108] With this definition in hand, the Court seemingly took judicial notice of the fact that the conduct of marching in a parade is "inherent[ly] expressive[]."[109]

Even if these definitions and factual findings are sound, the important question still remains: what is the message the marchers in *this* parade are expressing? Now faced with the difficult questions under *Spence* regarding whether the organizers subjectively intended to convey a particularized message, and whether observers would objectively understand that message, the Court seemingly expanded *Spence*'s subjective element. Almost in passing, the Court explained: a "narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message[]' . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[110]

If controlling, this language effectively collapses *Spence*'s subjective and objective elements into something closer to pure subjectivity. It becomes unclear how courts should evaluate whether the audience would objectively understand a message if that message subjectively need not be particularized. The *Hurley* Court thus paved the way for a purely deferential approach to assertions of conduct's expressive nature. This shift becomes even more evident in the Court's subsequent application of the relevant expressive association legal framework.

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[104] *Id.* at 560–61.
[105] *Id.* at 570.
[106] *Id.* at 561.
[107] *Id.* at 559.
[108] *Id.* at 568.
[109] *Id.*
[110] *Id.* at 569 (citation omitted).

First, in analyzing this parade's subjective message, the Court acknowledged that the parade organizers cast a wide net regarding the marchers they admit, include "multifarious voices," and never settled on "an exact message as the exclusive subject matter of the speech."[111] No matter: the parade organizers were an expressive association with a message regardless of the eclectic nature of that message. As this Article more fully discusses below,[112] the next legal question in an expressive association claim is whether compelled inclusion would substantially burden the association's message. On this question, the Court agreed with the organizers that mandatory inclusion of an LGBTQ unit "carrying its own banner" would require the organizers to "alter the expressive content of their parade"[113]—no matter how amorphous or incoherent that message may be. Though the parade "may not produce a particularized message, each contingent's expression in the [organizers'] eyes comports with what merits celebration on that day," and the organizers "clearly decided to exclude a message it did not like from the communication it chose to make."[114]

The Court supported its holding by noting that excluding a pro-gay *message* is different from excluding queer *people*, and the record here demonstrated that queer people were free to march in the parade—as long as they did not do so in ways that signaled support for LGBTQ rights or drew attention to LGBTQ identities.[115] As other scholars have noted, however, the slippery slope is obvious.[116] If the parade organizers asserted that the mere presence of a queer person altered its expressive message, would their exclusionary conduct similarly warrant constitutional protection? Given the *Hurley* Court's exceptionally broad understanding of expressive conduct and the deference it grants claimants to define their own message, it is easy to see how contemporary constitutional claims based in the right to exclude those who dilute a conservative message have become so successful.

The deference to the claimants' asserted message in *Hurley* marks a dramatic departure from the objective evidence-based approach first developed in *Spence*. This shift opened the door for judges to apply their own biased anal-

[111] *Id.* at 569–70.

[112] *See infra* Part II (discussing the seminal Supreme Court cases regarding expressive association).

[113] *Hurley*, 515 U.S. at 572.

[114] *Id.* at 574.

[115] *See id.* at 572 ("Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march.").

[116] *See, e.g.*, James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 IOWA L. REV. 75, 80 (2001) (noting that the Court has effectively left open the issue of whether status *is* speech, and posing the question: "Does being gay say anything?"); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 19–20 (2000) (explaining that a professed identity embodies a variety of messages and noting that the *Hurley* Court avoids answering the question of whether "identity itself may be inseparable" from views).

yses in future cases, picking free speech winners and losers depending on how deferential they feel inclined to be. Indeed, it is difficult to ignore how the sociopolitical backdrop of 1995 may have affected the Court's permissive approach in *Hurley*. At the time, same-sex sodomy was still fair game for criminalization due to the Court's own draconian and restrictive decree on sexual liberty in the Court's 1986 decision *Bowers v. Hardwick*.[117] Only the Hawaiian Supreme Court had recognized same-sex marriage as a constitutional right under its own Constitution,[118] and public sentiment was overwhelmingly disapproving of LGBTQ relationships and rights.[119]

As public sentiment shifted towards greater LGBTQ tolerance in the early 2000s, however, the expressive conduct landscape likewise evolved. Instead of waving the banner of free speech to engage in the exclusion of LGBTQ people like the claimants in *Hurley*, law schools exercised an asserted free speech right to exclude those who exclude LGBTQ people. Suddenly, the Supreme Court no longer seemed interested in granting deference to assertions of expansive non-particularized messages. Instead, the Court deployed a more dramatically restrictive view of expressive conduct to resolve this hot-button dispute of the day in a way that still ultimately protected anti-LGBTQ interests.

In the Court's 2006 decision, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), law schools and faculties fought back against the military's "Don't Ask Don't Tell" (DADT)[120] policy of excluding openly gay, lesbian, and bisexual persons from military service.[121] Their fight exhibited traits reminiscent of a boycott;[122] they formed an association, adopted policies prohibiting discrimination, and restricted military recruitment on their campuses to purportedly express opposition to DADT.[123] Because law schools banded together in this way to collectively send a message, *FAIR*, like *Hurley*, is best known as an expressive association case. Also like in *Hurley*, however, the *FAIR* Court took the opportunity to opine on the broader speech related ques-

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[117] 478 U.S. 186, 190–91 (1986) (holding that the Fourteenth Amendment's substantive "liberty" guarantee did not include the right to engage in "homosexual sodomy").

[118] *See* Baehr v. Lewin, 852 P.2d 44, 74 (Haw. 1993) (recognizing that denying same-sex marriage may violate the Hawaii constitution's equal protection clause).

[119] *See generally* ANDREW FLORES, THE WILLIAMS INST., NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-LGBT-US-Nov-2014.pdf [https://perma.cc/TF6Y-EXPB] (showing the trends on opinion towards LGBTQ people).

[120] 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

[121] *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (*FAIR*), 547 U.S. 47, 52 (2006) (noting that the law schools and faculties association aimed to limit military recruiting that took place on their respective campuses in response to the DADT policy in the military).

[122] Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807, 809 (1993) ("When a number of persons combine together in an organized effort to withdraw and induce others to withdraw from social or business relations with another, it is sometimes called a boycott.").

[123] *FAIR*, 547 U.S. at 52.

tion of when conduct is sufficiently expressive to warrant First Amendment analysis.

In response to law schools' concerted efforts to make a statement about the military's sexual orientation discrimination, Congress passed the Solomon Amendment.[124] This legislation stipulated "that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[125] In response, the association challenged the Solomon Amendment as an unconstitutional condition on the receipt of federal funds under free speech and expressive association principles.[126] Like in *Hurley*, the crux of the association's claim was that compelling law schools to include military recruiters would force them to convey a message with which they disagreed.[127] Unlike in *Hurley*, however, the law schools sought to send a message of LGBTQ inclusion rather exclusion.[128]

The Court began the expressive conduct analysis by summarily concluding that the Solomon Amendment "neither limits what law schools may say nor requires them to say anything."[129] Instead, in the Court's view, "the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."[130] Although technically true as a textual matter, the same threshold presumption should apply with equal force to laws prohibiting businesses and places of public accommodation from discriminating on the basis of certain traits—like sexual orientation—in access, employment, and the provision of goods and services. Yet this is not the presumption from which the *Hurley* Court began; *Hurley* instead began with the presumption that the antidiscrimination law by its very nature interfered with the parade organizers' message.

As the *FAIR* Court continued its analysis of compelled associational expression, it abandoned the deference granted to claimants in *Hurley* to define their parade's own broad and diffuse message. Key to this factually distinct treatment was the Court's conclusion that, unlike a parade, "a law school's decision to allow recruiters on campus is not inherently expressive."[131] The Court thus treated the inherent expressiveness of conduct as a prerequisite for First Amendment protection—a factual determination the judiciary is seemingly

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[124] Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1773 (2007); 10 U.S.C. § 983 (2006).

[125] *FAIR*, 547 U.S. at 51.

[126] *Id.* at 53.

[127] *Id.*

[128] *See id.* at 52 (highlighting that the association's intent was to boycott the military's anti-gay policy).

[129] *Id.* at 60.

[130] *Id.*

[131] *Id.* at 64.

empowered to make absent any specific objective evidence-based analysis. Indeed, in a revisionist move, the Court then cited *Johnson* in reasoning that conduct is *only* sufficiently expressive to warrant First Amendment analysis when that conduct is "inherently expressive" or "overwhelmingly apparent."[132] The Court omitted any discussion of how *Johnson* applied the two-part *Spence* test in reaching that conclusion. Perhaps as a tacit acknowledgment of *Spence*'s objective element, the *FAIR* Court concluded that observers to the presence or absence of military recruiters on law school campuses have "no way of knowing" what the school's message is[133] absent "explanatory speech."[134]

Missing in *FAIR* is a meaningful discussion of the evidentiary factors laid out in *Spence* for assessing a subjective message and the objective understanding of that message: the nature of the conduct, its factual context, and the environment in which it occurred. Instead, the Court answered these questions based on little more than its own intuition. Also missing in *FAIR* is deference to the law school claimants in defining their own message—in this case, an asserted message of antidiscrimination and LGBTQ inclusion. If *Hurley* was too permissive of expressive conduct, *FAIR* is too restrictive. When viewed together, the outcomes in these cases seem motivated by a special solicitude for anti-LGBTQ ideology rather than consistent logic. An honest application of *Spence* in both cases may or may not have led to the same outcomes, but a rigorous evidence-based analysis might at the very least inspire confidence that courts are indeed impartial arbiters rather than partisan operatives.

C. Exclusionary Expressive Conduct and the Future of Antidiscrimination Law

In recent years, expressive conduct claims have come roaring back into fashion. This Section discusses the renewed interest in expressive conduct claims and its future in antidiscrimination law.[135] Although these modern claims take many discrete forms, the social and legal landscape regarding reproductive and LGBTQ rights serves as the backdrop for an overwhelming share of relevant disputes. Many expressive conduct claims today are packaged as expressive association or religious liberty claims, and this Article discusses the Court's specific approaches to these variations below.[136] In short, the growing appeal of other doctrinal anchors is likely attributable to similar judicial machinations that permit individualized conservative legal safe harbors. Courts now have a wide variety of tools at their disposal for resolving disputes in ways that

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[132] *Id.* at 66 (citing Texas v. Johnson, 491 U.S. 397, 406 (1989)).

[133] *Id.*

[134] *Id.*

[135] *See infra* notes 136–170 and accompanying text.

[136] *See infra* Parts II and III (discussing the seminal Supreme Court cases regarding expressive association and the Court's revitalized interest in the Free Exercise Clause).

reflect preferred policy outcomes. When claimants rely specifically on the Free Speech Clause, selective judicial deference dominates legal analysis.

The expressive conduct renaissance began in earnest as states began to legalize same-sex marriage. As in *Hurley*, many modern claims stem from efforts to engage in exclusionary conduct that would otherwise violate applicable antidiscrimination laws. Rather than suffering a criminal or civil consequence for uttered speech, these claimants tend to argue that their First Amendment rights are violated because mandatory compliance with applicable antidiscrimination law would compel them to express a message with which they disagree. Thus, many of today's expressive conduct claims have become classified under the manipulable category of "compelled speech,"[137] and specifically the strain of compelled speech doctrine in which the law arguably compels a person to "create speech."[138] Most famously, the factual landscape of these claims often involves for-profit businesses that sell wedding-related goods and services but object to doing so for same-sex couples and weddings.

Lower courts are split on whether applying antidiscrimination law to business ventures like these impermissibly compels their speech. Some have held that such services are not sufficiently expressive under *Spence*, *Hurley*, and *FAIR* to warrant further First Amendment analysis.[139] Others have characterized such services as tantamount to pure speech and are thus protected from governmental attempts to alter the underlying message.[140] Still others have found certain conduct associated with the wedding industry to be sufficiently imbued with subjective and objective expressive components to warrant further First Amendment analysis.[141]

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[137] *See* Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881, 885 (2022) (noting that there is "no single compelled speech doctrine," but, rather, many different strains).

[138] *See* Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 382 (2018) (noting that the Court "has not yet decided how to classify compulsions to create speech").

[139] *See, e.g.*, State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1225 (Wash. 2019) (holding that application of an LGBTQ inclusive antidiscrimination law to a for-profit wedding floral arrangement company does not impermissibly compel speech because, objectively, floral arrangements do not express a message to the public at large); Gifford v. McCarthy, 23 N.Y.S.3d 422, 432 (App. Div. 2016) (holding that application of an LGBTQ-inclusive antidiscrimination law to a for-profit wedding venue company does not impermissibly compel speech nor violate other constitutional rights because, objectively, observers would not view the claimant's venue-based involvement in a same-sex wedding as a message of endorsement); Elane Photography, LLC v. Willock, 309 P.3d 53, 65, 77 (N.M. 2013) (holding that application of an LGBTQ-inclusive antidiscrimination law to a for-profit wedding photography company does not impermissibly compel speech nor violate other constitutional rights because of the claimant's for-profit nature).

[140] *See, e.g.*, Telescope Media Grp. v. Lucero, 936 F.3d 740, 752 (8th Cir. 2019) (holding that application of an LGBTQ-inclusive antidiscrimination law to a for-profit wedding video production company impermissibly compels speech); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 908, 926 (Ariz. 2019) (holding that application of an LGBTQ-inclusive antidiscrimination law to a for-profit wedding invitation design company impermissibly compels "pure" speech).

[141] *See, e.g.*, Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 557 (W.D. Ky. 2020) (enjoining the application of an LGBTQ inclusive antidiscrim-

The Supreme Court has addressed the cultural debate surrounding wedding-related services and their implications for the constitutionally protected dimensions of expressive conduct on only two occasions. In both cases, the Court failed to offer meaningful guidance to mediate future disputes, omitted any meaningful discussion of *Spence* or the subsequent line of expressive conduct cases, and relied on various doctrinal and procedural tools to rule in favor of businesses seeking a constitutional carve-out to laws mandating equal treatment in commercial work. The Court's reticence to wrestle with the hard question of when individual discriminatory conduct can trump general antidiscrimination law belies its impulse to put a thumb on the scale in favor of conservative religious ideology at the expense of LGBTQ equality. This trend suggests the Court's willingness to destabilize law through judicially biased means favoring individualized conservative desires to escape the law's regulatory reach.

The Court's first bite at the apple came in its 2018 decision in *Masterpiece Cakeshop*.[142] Here, the owner of a for-profit bakery in Colorado "told [a] [same-sex] couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages."[143] The couple went to the Colorado Civil Rights Commission, alleging that the baker's stated refusal violated the Colorado Anti-Discrimination Act's prohibition on sexual orientation discrimination in places of public accommodation.[144] A subsequent investigation revealed that the baker had turned away potential customers seeking baked goods for same-sex weddings and commitment ceremonies on "multiple occasions."[145] This finding prompted a full hearing before the Commissioners.[146] The baker defended on the grounds that complying with Colorado's antidiscrimination law would impermissibly compel his speech under the Free Speech Clause and impermissibly burden his sincerely held religious beliefs under the Free Exercise Clause.[147]

At the outset of its opinion, the Court acknowledged that this dispute requires the "reconciliation of at least two principles:"[148] the government's ability to prohibit certain discriminatory conduct, and individuals' ability to exer-

ination law to a for-profit wedding photography company because, although not "all photography, always and anywhere, is speech," "photography is speech when the photographer's artistic talents are combined to tell a story about the beauty and joy of marriage"), *vacated and remanded*, Nelson v. Louisville-Jefferson Cnty. Metro Gov't, No. 22-5884/5912, 2024 WL 1638860, at *2 (6th Cir. Apr. 16, 2024).

[142] 584 U.S. 617, 617 (2018).

[143] *Id.* at 621.

[144] *Id.* at 621–22.

[145] *Id.* at 628–29.

[146] *Id.* at 629.

[147] *Id.* at 629–30.

[148] *Id.* at 623.

cise their First Amendment rights.[149] The Court, however, declined to take up its own invitation. Instead, it sidestepped the issue, effectively admitting that its holding would not resolve "some future controversy involving facts similar to these."[150] Rather than addressing the need for a substantive legal framework, the Court focused on procedural history, concluding that the Commission below demonstrated anti-Christian bias.[151] This finding on its own is unusual given how reluctant the Court typically is to credit allegations of discriminatory intent and "hurl such accusations at the political branches."[152] Nevertheless, this detour into procedural religious hostility at the time served as a useful judicial offramp.[153]

On the final day of its 2022–23 term, the Supreme Court in *303 Creative v. Elenis*[154] came closer to transforming exclusionary anti-LGBTQ conduct into a constitutionally protected free speech right. In this high-profile case, the Court ruled in favor of a different Christian businessowner who sought an exemption from the same Colorado antidiscrimination law as in *Masterpiece Cakeshop*.[155] In this case, application of the law would require the claimant to design a website for a hypothetical same-sex wedding.[156] As the Court described the facts, the claimant "offers website and graphic design, marketing advice, and social media management services," and recently "decided to expand her offerings to include services for couples seeking websites for their weddings."[157] The nature of the sought remedial relief is odd because the claimant "did not even offer wedding services prior to seeking legal permis-

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[149] *Id.* at 623–24.

[150] *Id.* at 625.

[151] *See id.* at 634–38 (identifying flaws in the Civil Rights Commission's treatment of the baker and his religious beliefs).

[152] Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1236 (2024) (reversing a lower court's finding of impermissible racial gerrymandering under the Voting Rights Act, cautioning lower courts to be sensitive to the "offensive and demeaning" connotations in finding that discriminatory racial intent motivated a districting decision (quoting Miller v. Johnson, 515 U.S. 900, 912 (1995)); *accord* Luke A. Boso, *Religious Liberty, Discriminatory Intent, and the Conservative Constitution*, 2023 UTAH L. REV. 1023, 1050–60 (arguing that the Court's sensitive treatment of alleged discriminatory intent in religious liberty claims is dramatically different from its dismissive treatment of alleged discriminatory intent in racial contexts).

[153] *See* Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of* 303 Creative, 84 LA. L. REV. 565, 571–72 (2024) ("Rather than engaging with the broader question of whether Phillips's free speech and free exercise rights trumped Colorado's protection of gay people and others from discrimination, the Court punted. It held that Colorado's law had not been enforced in a 'neutral and respectful' manner, and that Colorado's Civil Rights Commission had treated Phillips and his claims with hostility." (footnote omitted)).

[154] 143 S. Ct. 2298, 2298 (2023).

[155] *Id.* at 2308, 2321–22.

[156] *Id.* at 2308–09.

[157] *Id.* at 2308.

sion to discriminate against same-sex couples."[158] Rather, the claimant sought advance permission "to publicly announce" its exclusionary business practices if and when it enters this market.[159]

Because the claimant in *303 Creative* was not yet actually in the business of creating wedding websites, the factual record upon which the Court could evaluate her expressive message was notably thin.[160] The choice to hear this case at such a premature stage permitted judicial bias. With no independent critical analysis, the Court simply cited to the factual record developed in prior proceedings to characterize these websites as "expressive in nature" and "designed to communicate a particular message."[161] Specifically, the Court evaded the normal steps of defining expressive conduct or applying any expressive conduct test[162] by relying on the parties' stipulation that the proposed wedding websites at issue would be "expressive in nature."[163] Confusingly, however, the Court then concluded that the claimant's wedding websites would be tantamount to "pure speech" under the First Amendment's Free Speech Clause—unnecessarily blurring the line between speech and expressive conduct.[164] Under this specious version of assumed facts, the only remaining task was for the Court to determine whether Colorado may compel the claimant to express—through the future conduct of creating wedding websites—a message about same-sex marriage with which she disagrees, and to this question the Court says no.

In resolving the claim in favor of the business, the Court eschewed a robust application of the usual free speech analysis that typically follows a finding that the government has regulated speech or expressive conduct: strict scrutiny, intermediate scrutiny, or some other test specific to the type of speech at issue or the governmental context in which it occurs. The Court justified its cursory application of the test by concluding that Colorado's "very purpose" for compelling the claimant's speech was the "elimination of dissenting ideas about marriage," and thus Colorado lacked a requisite compelling interest un-

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[158] Hila Keren, *Market Humiliation*, 56 LOY. L.A. L. REV. 565, 608 (2023) (citing 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (mem.)).

[159] *Id.* at 577.

[160] *See* Hila Keren, *Beyond Discrimination: Market Humiliation and Private Law*, 95 U. COLO. L. REV. 87, 113–14 (2024) (discussing how the record "devoid of examples of previously published websites" rendered it impossible to critically evaluate the expressive nature of the claimant's future conduct).

[161] *303 Creative*, 143 S. Ct. at 2308 (quoting Petition for a Writ of Certiorari at 181a, *303 Creative*, 143 S. Ct. at 577 (No. 21-476).

[162] *See* Amanda Shanor & Sarah E. Light, *Anti-Woke Capitalism, The First Amendment, and the Decline of Libertarianism*, 118 NW. U. L. REV. 347, 356 (2023) (noting that the majority "failed to craft any analysis, rule, or rubric for assessing when an activity is covered by the First Amendment's most searching review").

[163] *303 Creative*, 143 S. Ct. at 2308, 2316.

[164] *See id.* at 2312 (reasoning without elaboration that this conclusion "flows directly from the parties' stipulations").

related to the content of speech.[165] The dissent found this conclusion dubious given well-settled law holding that "the purpose of a public accommodations law, as applied to the commercial act of discrimination in the sale of publicly available goods and services, is to ensure equal access to and equal dignity in the public marketplace" and is thus "textbook viewpoint neutral."[166] The Court's abbreviated test-application further demonstrates the significant weight placed on its preliminary finding of expressive conduct, as the Court readily equates the purpose of applicable antidiscrimination law with an inherent interference of exclusionary conduct's expressive meaning.

The factual stipulation in *303 Creative* appears to have carried nearly the entire weight of the Court's legal analysis. Although courts are entitled to rely on parties' factual stipulations,[167] doing so here enabled the Court to achieve an outcome consistent with its prior free speech jurisprudence that has so far overwhelmingly favored conservative Christian claimants at the expense of the LGBTQ persons those claimants seek to exclude. Although *303 Creative* involved an agreed-upon factual stipulation, the opinion provides no safeguard against future claimants from simply labeling their conduct as expressive and convincing a court to defer to that self-serving assertion.[168]

Further, it is unclear what precedential value *303 Creative* will have—perhaps other than to serve as encouragement for others who seek permission from judges eager to grant constitutional protection for exclusionary anti-LGBTQ conduct. One scholar reads *303 Creative* as limited to "customized and expressive" goods and services for which the claimant's asserted objection relates to the expressive component of that custom good or service rather than the persons or class of persons who may be potential consumers.[169] If correct, this interpretation likely limits the volume of constitutionally protected exclusionary conduct in the marketplace. But, it perpetuates the problem of leaving determinations about *which* goods and services are sufficiently expressive to judicial whims.[170]

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[165] *Id.* at 2313 (internal brackets and quotation marks omitted) (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (2021), *rev'd*, *303 Creative*, 600 U.S. at 2298).

[166] *Id.* at 2340 (Sotomayor, Kagan & Jackson, JJ., dissenting) (internal quotation marks omitted) (quoting Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 695 (2010)).

[167] *See, e.g.*, *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L.*, 561 U.S. at 676–78 (noting that factual stipulations are binding).

[168] *See* Smith, *supra* note 153, at 588 (pointing to the dissent's focus on future controversies "where businesses attempt to apply the label 'expressive conduct' to all types of goods and services" (citing *303 Creative*, 143 S. Ct. at 2342–43)).

[169] Dale Carpenter, *How to Read* 303 Creative v. Elenis, REASON: VOLOKH CONSPIRACY (July 3, 2023), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/FP2B-KPHF].

[170] *See* Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 278 (2023) ("This analysis does not bode well for future cases. For each, the Court will have to engage with the history of the

D. Expressive Conduct and Drag

Although *Spence* may not be perfect, its objective evidence-based approach to conduct's meaning is preferable to the judicial cherry-picking the Court has effectively greenlit over time. *Spence* at least provides structure and the appearance of principle. Cases like *Masterpiece Cakeshop* and *303 Creative* demonstrate the immense power courts now have to selectively ignore or rely on preferred facts, and they build on the legacies of *Hurley* and *FAIR* which emboldened courts to take judicial notice of what and when conduct is or is not "inherently" or "overwhelmingly" expressive. The culmination of the judiciary's expressive conduct anti-LGBTQ preferentialism came into full focus in the Spring of 2024 as the culture war around drag performances finally reached the Supreme Court. This Section discusses expressive conduct and drag.[171]

Since the conservative movement lost the battle over same-sex marriage in the Supreme Court's decision *Obergefell v. Hodges*[172] in 2015, new battle lines have emerged in the ongoing war about LGBTQ tolerance, acceptance, and inclusion. In recent years, conservative states and localities have proposed and enacted a deluge of regulations affecting queer people and queer expression. One subset of these regulations is bans or restrictions on drag performances, typically promoted under the auspice of protecting children.[173] A descriptive accounting of drag and its ever-evolving meanings and functions is well beyond the scope of this Article. In elementary terms, drag often involves "male performers who dress, act, or otherwise present in exaggerated stereotypically feminine ways and female performers who dress, act, or otherwise present in exaggerated stereotypically masculine ways."[174] Suffice it to say, these performances have deep roots in LGBTQ communities and in queer activism giv-

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particular genre of putative expression, becoming historians of the dessert, the epitaph, the birth announcement, and the family portrait.").

[171] *See infra* notes 172–192 and accompanying text.

[172] *See* 576 U.S. 644, 680 (2015) (holding that bans on same-sex marriage violate the Fourteenth Amendment).

[173] *See* Suzanne Nossel, *The Drag Show Bans Sweeping the US Are a Chilling Attack on Free Speech*, THE GUARDIAN (Mar. 10, 2023), https://www.theguardian.com/culture/commentisfree/2023/mar/10/drag-show-bans-tennessee-lgbtq-rights [https://perma.cc/3G7T-JG78] (discussing anti-drag show laws in United States).

[174] Mark Satta, *Shantay Drag Stays: Anti-Drag Laws Violate the First Amendment*, 25 GEO. J. GENDER & L. 95, 98 (2023) (citing Verta Taylor & Leila J. Rupp, *Chicks with Dicks, Men in Dresses: What It Means to Be a Drag Queen*, 46 J. HOMOSEXUALITY 113, 114–15 (2004)); Jeff McMillan, *EXPLAINER: Drag Queens and How They Got Pulled into Politics*, ASSOCIATED PRESS (Oct. 29, 2022), https://apnews.com/article/government-and-politics-a26e7eee15df0bbc2bb98071b683b1f4 [https://perma.cc/5TZQ-Q4QT]; Brett V. Ries, Don't Be a Drag: How Drag Bans Can Violate the First Amendment 5 (May 19, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4439554 [https://perma.cc/YWE3-UCYA].

en their political salience and power to destabilize gender norms.[175] Accordingly, bans on gender non-conforming dress also have deep roots as a once common legal mechanism to regulate LGBTQ people's public lives, erase transgender people, and criminally target possible same-sex sexual conduct.[176]

As of December 2024, six states have enacted laws explicitly restricting drag performances or adult entertainment that arguably implicates drag performances.[177] Four of those six laws have been temporarily or permanently enjoined by federal judges who have viewed these restrictions as fundamentally flawed under free speech principles.[178] These courts correctly determined that the innumerable political, subversive, and fundamentally queer messages conveyed by drag as art and entertainment renders any applicable regulation or ban susceptible to First Amendment constraints. This developing jurisprudence makes the Supreme Court's refusal to weigh in on a different yet similar controversy notable in its own right. Considering the district court's analysis below, however, the Court's silence is even more alarming and further demonstrates the biased and decidedly conservative direction in which expressive conduct claims are currently traveling.

At West Texas A&M University, Spectrum WT (Spectrum) exists as a recognized student organization with a mission to provide a safe space for LGBTQ persons and allies, raise awareness, and "promote diversity, support, and acceptance."[179] As part of its programming, Spectrum began planning a March 2023 drag show fundraiser on campus, open to children and adults alike, to raise money for LGBTQ suicide prevention efforts.[180] That fundraiser

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[175] *See Understanding Drag: As American as Apple Pie*, *supra* note 10 (discussing the history and significance of drag shows).

[176] *See* Robin Maril, *From Liberation to (Re)Criminalization:* Dobbs v. Jackson Women's Health Organization*, Bodily Autonomy, and the Expansion of State Rights*, 76 SMU L. REV. 551, 558–60 (2023) (discussing "cross-dressing bans" and their intended regulation of "dangerous" LGBTQ people).

[177] *Equality Maps: Restrictions on Drag Performances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/criminaljustice/drag_restrictions [https://perma.cc/UD9G-AXL3] (Jan. 19, 2025).

[178] *See* HM Fla.-ORL, LLC v. Griffin, 679 F. Supp. 3d 1332, 1336, 1341, 1345 (M.D. Fla. 2023) (preliminarily enjoining enforcement of a Florida law imposing civil fines on businesses that knowingly admit children to an "adult live performance" because it is an impermissible content-based regulation of speech); Imperial Sovereign Ct. v. Knudsen, 699 F. Supp. 3d 1018, 1028, 1038, 1049 (D. Mont. 2023) (preliminarily enjoining a Montana law criminalizing "drag story hours" in schools and libraries because it is an impermissible content-based regulation of speech); Friends of Georges, Inc. v. Mulroy, 675 F. Supp. 3d 831, 841, 816, 878 (W.D. Tenn. 2023) (striking down a Tennessee law criminalizing the performance of "adult cabaret entertainment" in the presence of minors because, among other reasons, it is an impermissible content-based regulation of speech); The Woodlands Pride, Inc. v. Paxton, 694 F. Supp. 3d 820, 830, 845, 851 (S.D. Tex. 2023) (striking down a Texas law imposing civil and criminal penalties on "sexually oriented performances" in public because it is an impermissible content-based restriction on expressive conduct).

[179] Spectrum WT v. Wendler, 693 F. Supp. 3d 689, 696 (N.D. Tex. 2023), *petition for writ of injunction pending appeal denied*, 144 S. Ct. 1053 (2024) (mem.).

[180] *Id.*

never happened, however, because the University's President sent a letter to Spectrum withholding permission.[181] In his letter, the President analogized drag to the widely condemned practice of "blackface," characterized drag as "misogynistic" and stereotypical in its depictions of women, and expressed his disapproval of any event "exaggerating, stereotyping, mocking, or objectifying a person based on appearance, bias or predisposition."[182] The President further cited the University's legal obligations to ensure an educational environment free of sex-based harassment as an independent yet related reason for withholding permission.[183] In short, the President registered his clear disapproval of the drag show because of the offensive messages he believed the show would convey.

Spectrum filed suit in federal court seeking an injunction prohibiting the University from banning similar events in the future.[184] The Fifth Circuit began its legal analysis by noting that First Amendment rules are sometimes different when taking into account children.[185] Without citing *any* evidence, the court then matter-of-factly characterized drag shows as "sexualized."[186] This depiction of all drag shows as sexual, and therefore assumedly harmful to children, has been a powerful animating stereotype in conservative punditry and activism aimed at eliminating drag and other visible manifestations of gender's instability.[187] The emphasis on imagined harms to children further reflects strategies centered around moral panic recycled from past efforts to criminalize

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[181] *Id.*

[182] *Id.* (internal quotation marks omitted).

[183] *See id.* at 696–97 (noting that the President cited Texas state law and U.S. Equal Opportunity Commissions workplace rules to support his rejection of the drag show).

[184] *Id.* at 697. This suit landed before Judge Matthew Kacsmaryk. Kacsmaryk is a Trump-appointed federal district court judge and former deputy counsel for a conservative Christian law firm, the First Liberty Institute, who has garnered the national spotlight due to his controversial rulings favoring conservative movement causes. Caroline Kitchener & Ann E. Marimow, *The Texas Judge Who Could Take Down the Abortion Pill*, WASH. POST (Feb. 25, 2023), https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision/ [https://perma.cc/YLZ8-DRSX] (describing Kacsmaryk). Most notably, his opinion blocked the Food and Drug Administration's approval of the drug mifepristone that is used in more than half of abortions in the United States. All. for Hippocratic Med. v. U.S. Food & Drug Admin., 668 F. Supp. 3d 507, 546, 560 (N.D. Tex. 2023) (holding that the FDA likely exceeded its authority in approving mifepristone).

[185] *Spectrum WT*, 693 F. Supp. 3d at 698.

[186] *Id.*

[187] *See* Dara E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435, 461 (2024) (noting that "[d]rag queen story hours, public events often held at libraries in which a drag queen reads a book to children, have drawn particularly violent protests with members of the far-right neofascist Proud Boys interrupting the event while wearing T-shirts reading 'Kill Your Local Pedophile'" (citing Jessica Winter, *What Should a Queer Children's Book Do?*, NEW YORKER (July 11, 2022), https://www.newyorker.com/news/annals-of-education/lgbt-books-kids-ban [https://perma.cc/5SXF-HHGN])).

same-sex sexual behavior and prohibit openly gay people from various forms of employment and civic life.[188]

Armed with this false yet powerful description of drag as sexualized, the court then engaged with the relevant expressive conduct case law and cobbled together language from precedent that supports an exclusionary outcome. Citing *Spence*, *Johnson*, and *FAIR*, the court explained that the conduct of a drag performance must be "imbued with elements of communication," "inherently expressive," and the message must be "overwhelmingly apparent" to warrant First Amendment safeguards.[189] Downplaying *Hurley* and its permissive approach to the often diffuse and indiscernible specifics of a group's expression, however, the court found that the proposed drag show would not "obviously convey or communicate a discernable" message absent explanatory speech.[190] Seemingly oblivious to the reality that drag shows also include performances by cisgender women and transgender men and women, and omitting the detail that the proposed drag show would be part of a fundraiser focused on LGBTQ suicide, the court concluded: an "objective viewer observing biological men 'performing' while dressed in attire stereotypically associated with women—without accompanying political speech or dialogue—would not necessarily discern an 'unmistakable' or 'overwhelmingly apparent' communication of 'LGBTQ+ rights.'"[191]

Spectrum WT demonstrates just how easy it is for lower courts to manipulate the morass of expressive conduct doctrine to achieve desired ends. Putting aside the hallmark free speech problem in the University President's overt admission that the show could not proceed because he disapproved of its offensive message, it is difficult to see how this drag show would not be sufficiently expressive under the classic formulation of *Spence*'s subjective and objective elements—particularly in light of its nature, its factual backdrop, and the environment in which it would occur. Nevertheless, the Supreme Court batted away a petition for emergency injunctive relief pending appeal without expla-

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[188] *See* Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 831–43 (2017) (documenting how conservative religious groups have strategically mobilized fears about children's need of protection "to oppose a range of gay rights, including sexual orientation antidiscrimination laws, gay and lesbian teachers, multicultural school curricula, and marriage equality"). *See generally* Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013) (diagnosing and deconstructing how claimed fears about children's well-being motivate anti-LGBTQ advocacy).

[189] *Spectrum WT*, 693 F. Supp. 3d at 699, 702 (first quoting Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam); then quoting Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (*FAIR*), 547 U.S. 47, 66 (2006); and then quoting Texas v. Johnson, 491 U.S. 397, 405–06 (1989)).

[190] *Id.* at 699, 702–03 n.14.

[191] *Id.* at 703 (quoting First Amended Verified Complaint for Civil Rights Violations at 17, *Spectrum WT*, 693 F. Supp. 3d at 689 (No. 2:23-cv-00048)) (first citing *FAIR*, 547 U.S. at 66; and then citing Voting for Am., Inc. v. Steen, 732 F.3d 382, 388 (5th Cir. 2013)).

nation,[192] signaling that government officials can feel free to censor expressive conduct and exclude those who fall on the judicially disfavored side of the political divide.

II. EXPRESSIVE CONDUCT AND FREE ASSOCIATION

A close cousin of expressive conduct as free speech is expressive conduct as free association. This Part discusses the seminal Supreme Court cases regarding expressive association, and it identifies *deference* as the principal problem animating judicial bias in this realm.[193] Section A discusses expressive association in *Roberts v. U.S. Jaycees.*[194] Section B addresses expressive association in *Boy Scouts of America v. Dale.*[195] Section C describes exclusionary expressive association and the future of antidiscrimination law.[196] The Court first recognized an implicit right of expressive association emanating from the Free Speech Clause in the Supreme Court's 1958 decision, *NAACP v. Alabama*, a case in which Alabama sought to compel the NAACP to disclose "the names and addresses of all its Alabama members and agents."[197] Although the word "associate" does not appear in the text of the First Amendment, the Court has reasoned: "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and there is a "close nexus between the freedoms of speech and assembly."[198]

In 1984, the Court clarified that associational rights take two distinct tracks depending on whether the association is "intimate" or "expressive."[199] Intimate association claims involve groups that are relatively small, highly selective, and are "seclu[ded] from others in critical aspects of the relationship."[200] Intimate associations are best understood as private and familial, exercising rights protected by the Fourteenth Amendment's liberty guarantee, and are largely immune from governmental interference in terms of their composition. Expressive association claims, on the other hand, present more difficult problems in both definitional scope and the permissible power of the govern-

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[192] Spectrum WT v. Wendler, 144 S. Ct. 1053 (2024) (mem.), *denying petition for writ for injunction pending appeal in* 693 F. Supp. 3d 689 (N.D. Tex. 2023).

[193] *See infra* notes 194–295 and accompanying text (describing canon of expressive association Supreme Court cases).

[194] *See infra* notes 202–227 and accompanying text.

[195] *See infra* notes 228–260 and accompanying text.

[196] *See infra* notes 261–295 and accompanying text.

[197] 357 U.S. 449, 451, 466 (1958).

[198] *Id.* at 460 (first citing De Jonge v. Oregon, 299 U.S. 353, 364 (1937); and then citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[199] *See* John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 155 (2010) (identifying the Court's 1984 opinion in *Roberts* as where these two categories "first emerged").

[200] Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

ment to compel inclusion. This Article focuses only on expressive associations given their increasingly outsized role in chipping away at antidiscrimination law.

Viewed in isolation, deference as a legal tool is not inherently problematic, and it may in certain circumstances be appropriate and warranted.[201] In the context of expressive association claims, however, the judicially seized power to defer to an association's assertions regarding the message embodied by its exclusionary practices and the law's purported effects on that message is an unnecessary invitation to resolve disputes in an outcome-oriented manner. As this Part demonstrates, courts deploy deference in expressive association claims in at least three ways: determining (1) whether the group is sufficiently expressive to warrant First Amendment analysis, (2) what the group's message is, and (3) whether compliance with an applicable antidiscrimination law would significantly burden that message.

Simply put, the Supreme Court has been inconsistent about when deference is warranted. Perhaps nowhere is this problem more apparent and synergistic than in the context of expressive association claims involving religious objections to the inclusion of LGBTQ persons and groups. Further, this messy body of law has opened the door to new forms of successful expressive association claims from conservative associations seeking constitutional protection for exclusionary employment practices and the provision of goods and services. This evolving version of expressive association claims appears to be on the rise in the latest phase of the ongoing battle over reproductive rights, and its newfound success has concerning implications about the constitutional dimensions of exclusionary conduct in the realm of public-facing enterprises who hold tangible levers of power in the commercial market.

A. Expressive Association in Roberts v. U.S. Jaycees

In the 1970s, the Supreme Court cursorily rejected the argument that expressive associational interests could trump civil rights laws that prohibit race discrimination. This Section discusses the importance of *Roberts v. U.S. Jaycees* in expressive association jurisprudence.[202] In 1976, in *Runyon v. McCrary*, the Court rejected a claim by an association of nonprofit schools, many of

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[201] *See, e.g.*, United States v. Ballard, 322 U.S. 78, 86–87 (1944) ("Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."). In the context of Free Exercise Clause claims, for example, the Court has consistently refused to define "religion" or religious *beliefs*, instead necessarily deferring to claimants' own conception of individual religious belief given that the First Amendment prohibits the government from "establishing" religion. *See id.* (noting the potential idiosyncrasy of an individual's religious beliefs, and refusing to use the law to test those beliefs).

[202] *See infra* notes 203–227 and accompanying text.

which engaged in formal racial segregation, that fought mandatory racial inclusion under the federal Civil Rights Act of 1866 on expressive association grounds.[203] With little fanfare, the *Runyon* Court explained that, even if parents have a fundamental right to send their children to schools promoting racial segregation, excluding racial minorities is not protected.[204] The Court concluded by rejecting the argument that admitting Black students would somehow interfere with the school's teachings or mission.[205] In short, the Court was unwilling to defer to schools' self-assessment about how compliance with federal civil rights law would dilute or alter its race-based message, nor was the Court willing to constitutionalize a collective right to exclude in the face of compelling governmental antidiscrimination interests.

This Court's reticence to entertain theories of associational constitutional limitations on antidiscrimination laws evaporated in 1984 in *Roberts v. U.S. Jaycees*,[206] albeit through application of a rigorous methodology that ultimately resulted in compelled inclusion. *Roberts* involved a national nonprofit organization, the U.S. Jaycees (Jaycees), that had as its mission the "growth and development" of male youths' civic engagement.[207] Jaycees distinguished between regular memberships, for which only young men were eligible, and associate memberships, for which "women and older men" were eligible.[208] Associate members could "not vote, hold local or national office, or participate in certain leadership training and awards programs."[209]

On the heels of the feminist movements of the 1960s and 1970s, alongside legal advances for women in employment and civic life and growing public sentiment for women's full inclusion as essential career opportunities and economic mobility, sex-segregated membership policies in private clubs had begun to look antiquated and out-of-step in the 1980s.[210] Nevertheless, sex-segregation in private clubs persisted, effectively cutting women out of important interactions with "colleagues, clients, and bosses" who "met to dine and deal in a wide array of restaurants, bars, athletic centers, and leisure clubs that closed their doors to women."[211] As robust antidiscrimination statutes and

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[203] 427 U.S. 160, 164, 175 (1976).

[204] *Id.* at 176.

[205] *Id.*

[206] *See* 468 U.S. 609, 623 (1984) (exclaiming that a requirement for a group to accept women infringes on the group's freedom of association, holding that "[f]reedom of association therefore plainly presupposes a freedom not to associate" (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977))).

[207] *Id.* at 612.

[208] *Id.* at 613.

[209] *Id.*

[210] *See* Elizabeth Sepper, *Sex Segregation, Economic Opportunity, and* Roberts v. U.S. Jaycees, 28 WM. & MARY BILL RTS. J. 489, 491 (2019) (describing the socio-legal shifts that led to the dismantling of all-male clubs like the Jaycees).

[211] *Id.* at 492.

ordinances proliferated, the Jaycees and other sex-segregated clubs suddenly found themselves in potential violation of the law given their legal status as a covered public accommodation.[212] In response, the Jaycees argued all the way to the Supreme Court that application of public accommodation laws that prohibit sex-based discrimination "would violate the male members' constitutional rights of free speech and association."[213]

Because of the Jaycees' size and relatively non-selective membership criteria, other than sex and age, the Court easily determined that this private organization is not entitled to the constitutional protections afforded intimate associations.[214] Turning to expressive associations, the Court announced two key principles and rules. First, an expressive association claim is triggered when the government attempts to "interfere with the internal organization or affairs"[215] of a group organized with the "purpose" to engage in activities with First Amendment protection.[216] Second, whatever the specific test applicable to this form of expressive association infringement, that infringement may be permissible if designed "to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[217] Here, the Court with little difficulty found that the Jaycees are a qualifying expressive association,[218] thus saving tricky questions for another day about what other associations are sufficiently expressive to trigger First Amendment analysis.

In assessing the constitutionality of this form of infringement—compulsory inclusion of women as regular members with voting rights—the Court's analysis took a meandering turn that eventually paved the way for judicial bias.[219] Although the "test" is admittedly convoluted in *Roberts*, one clear aspect is the Court's unwillingness to simply defer to the Jaycees' own assessment of how burdensome compliance with antidiscrimination law would be on its ability to express its associational message. First, the Court found that the applicable law is supported by the compelling governmental interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and

[212] *Roberts*, 468 U.S. at 614–16.

[213] *Id.* at 615.

[214] *Id.* at 621.

[215] *Id.* at 623.

[216] *Id.* at 618.

[217] *Id.* at 623.

[218] *Id.* at 622 ("In view of the various protected activities in which the Jaycees engages, that right is plainly implicated in this case." (citation omitted)).

[219] *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 843 (2005) (noting that the majority opinion could be read either as finding strict scrutiny satisfied or as finding strict scrutiny inapplicable because the burden on the Jaycees' message was insufficient).

services."[220] Where the analysis becomes complicated is in the Court's evaluation of whether the law is the least restrictive means for achieving this compelling interest. Here, the Court focused on the law's burdening effect on male members' expression,[221] creating confusion about whether a governmentally imposed burden on expressive interests stands alone as a requirement or is simply part of the means-ends analysis.

Regardless of the specific legal framework, the *Roberts* Court was unpersuaded that granting women regular member status would impose "any serious burden" on expression,[222] and it arrives at this conclusion through an objective evidence-based review of the factual record. Specifically, the Court found that compliance with the law would not require the Jaycees to formally change its mission focused on fostering young men's civic growth and development, nor would it prohibit the Jaycees from excluding members who do not share in that ideological commitment.[223] Most damningly, the Court pointed to portions of the record demonstrating that the Jaycees already included and invited women "to share the group's views and philosophy and to participate in much of its training and community activities."[224] Simply put, there was simply *no evidence* that granting women membership with voting rights would burden the group's male-centric message when women were already seamlessly embedded within that male-centric group. Indeed, the Court characterized the Jaycees' concerns about how women exercising voting rights might impede its associational message as reflecting little more than unsupported stereotypes and assumptions.[225] *Roberts* ultimately paved the way for the Court to reject expressive association claims brought by similar all-male organizations in the latter part of the 1980s.[226]

This Article does not suggest that every all-male or all-female organization is constitutionally problematic. Affinity organizations remain fixtures on college campuses and in workplaces, and many serve important antidiscrimination goals given persistent structural, implicit, and overt forms of discrimina-

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220 *Roberts*, 468 U.S. at 624 (citing U.S. Jaycees v. McClure, 305 N.W.2d 764, 766–68 (Minn. 1981)).

221 *Id.* at 626.

222 *Id.*

223 *Id.* at 627.

224 *Id.*

225 *Id.* at 627–28.

226 *See, e.g.*, N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13–14 (1988) (rejecting a facial expressive association challenge to an antidiscrimination law applicable to many large private clubs because, absent "specific evidence on the characteristics" of the clubs, the law does not "in any significant way" affect the ability of associational organizations to form for First Amendment purposes); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) (rejecting the nonprofit Rotary International's expressive association claim to exclude women from membership because "*the evidence* fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes" (emphasis added)).

tion against historically marginalized groups.[227] Instead, this Article more modestly proposes that it was appropriate for the *Roberts* Court to sharply question and seek evidence regarding how compliance with an antidiscrimination law would impede an organization's message. Absolute deference to an organization's self-serving assertions about how the law might burden its message goes too far towards enshrining a constitutionally protected license to exclude.

B. Expressive Association in Boy Scouts of America v. Dale

Based on the Court's treatment of expressive association clashes with antidiscrimination laws in the 1980s, federal courts were largely reluctant to take this path towards constitutionalizing exclusionary conduct at the expense of inclusive public policy. Courts demanded evidence about the nature of the association's message, they demanded evidence about the significance of the burden antidiscrimination law would impose, and they found that preventing discrimination is typically an overriding compelling governmental interest despite incidental burdens on expression.[228] In 2000, the Supreme Court changed everything in *Boy Scouts of America v. Dale*.[229] This Section discusses that change.[230]

In *Dale*, the claimant—a former Eagle Scout—applied to be an adult member of the Boy Scouts and was approved to be a local scoutmaster for a troop in New Jersey.[231] Shortly thereafter, the claimant personally came out as a gay man.[232] He then quickly became copresident of a university gay and lesbian affinity group, attended a seminar on mental health issues affecting gay and lesbian teens, and was interviewed for and identified in a newspaper article regarding his advocacy around the necessity of out role models for gay and lesbian youth.[233] After serving only a year as a scoutmaster, the local Boy Scouts Council sent claimant a letter notifying him that his adult membership had been revoked.[234] When he asked for an explanation, the claimant received

[227] *See* Linda C. McClain, *"'Male Chauvinism' Is Under Attack from All Sides at Present":* Roberts v. United States Jaycees*, Sex Discrimination, and the First Amendment*, 87 FORDHAM L. REV. 2385, 2415 (2019) (implying that organizations for women and racial minorities may "advance, rather than hinder, freedom from discrimination").

[228] *See* David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 95–101 (2001) (discussing the *Roberts* analysis and criticizing the line of cases stemming from *Roberts* on these grounds and noting that this developing doctrine had "signaled to lower courts that they should try to evade conflicts between antidiscrimination laws and the First Amendment").

[229] *See* 530 U.S. 640, 648–49 (2000) (establishing that the First Amendment protects expressive association).

[230] *See infra* notes 231–260 (discussing *Boy Scouts of America v. Dale* and expressive association).

[231] 530 U.S. at 644.

[232] *Id.* at 644–45.

[233] *Id.* at 645.

[234] *Id.*

a direct, unambiguous, and almost certainly humiliating written response: the Boy Scouts "specifically forbid membership to homosexuals."[235]

Scout Law directs its members to be "brave,"[236] and claimant embodied this value by pursuing legal action against the Boy Scouts for nearly a decade after the revocation of his membership. *Dale* made its way to the Supreme Court after years of legal wrangling and a determination by the New Jersey Supreme Court that the Boy Scouts qualifies as a covered public accommodation under a New Jersey statute prohibiting sexual orientation discrimination.[237] The Court specifically granted certiorari to resolve the conflict between asserted expressive association and antidiscrimination law.

The Court prefaced its First Amendment discussion by noting that it is "obligated to independently review the factual record" because "the ultimate conclusions of law are virtually inseparable from findings of fact."[238] That is a fair and accurate description of how questions of law and fact intersect in expressive conduct and association claims, but, as this Article discusses above,[239] the Court's positions and behaviors in other cases as to its role in factual review belies its judicial bias. Indeed, its "independent review" of the facts in *Dale* is anything but.

As a threshold matter, the Court had to determine whether the Boy Scouts is an expressive association sufficient to trigger further First Amendment analysis. In its inquiry, the Court recited the Scout Oath, Scout Law, and the language of the Boy Scouts' "mission statement" declaring its mission to be one of "instill[ing] values in young people."[240] Noting that the scoutmasters spend time with the youth scouts to "expressly and by example" teach the values represented in the Oath and Law, the Court found it "indisputable" that the Boy Scouts "engages in expressive activity."[241] Citing *Hurley*, the Court further clarified that organizations need not organize for the specific "purpose" of expressing any specific message;[242] they merely must engage in expressive activities, however nebulously self-defined. On this threshold question, then, the Court largely deferred to an organization's own characterization of itself as sufficiently expressive to seek shelter under the First Amendment. This deferential approach hands the keys unlocking the First Amendment door to organi-

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[235] *Id.*

[236] *Id.* at 649.

[237] *Id.* at 645–46.

[238] *Id.* at 648–49.

[239] *See supra* Part I (discussing the Supreme Court's unprincipled handling of expressive conduct claims under the Free Speech Clause).

[240] *Dale*, 530 U.S. at 649.

[241] *Id.* at 649–50 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring in part and concurring in the judgment)).

[242] *Id.* at 655.

zations themselves—a doctrinal move that, as this Article discusses below,[243] has no clear logical boundary and is now being used by employers and service providers in claims seeking an expressive associational right to exclude, with significant consequences for a well-regulated and inclusive marketplace.

Even assuming arguendo that organizations should be entitled some deference in defining their own expressive essence, the *Dale* Court took deference to the extreme in how it both characterized and applied the proceeding test for determining whether antidiscrimination laws compelling inclusion unconstitutionally infringe the association's interest in maintaining exclusionary composition.[244] The first part of the test appears to require analysis of how substantial the burden of inclusion would be on the association's message—a test that itself seems to consist of two separate inquiries. Like in *Roberts*, it is unclear whether this question of burden is a separate element that triggers the means-ends element or is instead a component of the means-ends element. Regardless of the precise doctrinal framework, the *Dale* Court's application of this test is novel and far-reaching—both in terms of the facts of this case and the implications for future controversies.

The first part of the burden inquiry appears to focus on the nature of message allegedly burdened. Acknowledging that neither the Scout Code nor Scout Law expressly mention sexuality, the Court granted the Boy Scouts significant leeway to interpret its own texts.[245] What the Scout Code and Scout Law *do* say is that scouts should be "morally straight" and "clean," and the Boy Scouts "*asserts* that homosexual conduct is inconsistent" with those values.[246] Although the New Jersey Supreme Court found that excluding gay scoutmasters would be inconsistent with the Boy Scouts' other stated values of ensuring "diverse" and "representative" membership to reach "all eligible youth,"[247] the U.S. Supreme Court was unwilling to entertain these logical inconsistencies because the organization "says"[248] inclusion of gay scoutmasters is not what it means by diversity and representation. In spite of strong evidence to the con-

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[243] *See infra* Part II.C (discussing the post-*Dale* landscape).

[244] *Compare* Secunda, *supra* note 124, at 1777 (characterizing the expressive association test as requiring proof of three elements: (1) the "group is an expressive association," (2) compelled inclusion "would significantly affect the group's expression," and (3) "the government's interests do not justify" this form of infringement (citing *Dale*, 530 U.S. at 655–59)), *with* Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 528 (2001) (describing the "traditional approach" to expressive association claims as one of balancing the association's First Amendment liberty interest "in defining its message against the State's equality interest" (citing *Dale*, 530 U.S. at 658–69)).

[245] *See Dale*, 530 U.S. at 650 (focusing on the Boy Scouts' assertions regarding the meaning of the association's values).

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

[247] *Id.* at 650–51 (quoting Dale v. Boy Scouts of Am., 734 A.2d 1196, 1226 (N.J. 1999), *rev'd*, *Dale*, 530 U.S. at 640).

[248] *Id.* at 650.

trary,[249] the Court explained, "[w]e accept the Boy Scouts' assertion" and thus it "need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."[250]

The second part of the burden inquiry appears to focus on the significance of the burden the law would impose on the message. Like the first part of the burden inquiry, however, the second part fails to actually inquire.[251] And according to the Boy Scouts, the claimant's mere "presence" as a scoutmaster would compel it to "send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[252] The Court again cited *Hurley* for support,[253] ignoring that *Hurley* was limited to the exclusion of specific parade banners and was careful not to greenlight the wholesale exclusion of individuals or groups based on identity or protected characteristics.

Finally, in the second part of the test, the Court at least ostensibly transitioned to the traditional means-ends analysis that operates across the constitutional board. But because the Court "already concluded" that the compelled inclusion of a gay scoutmaster would "significantly burden" the Boy Scouts' associational message, the government's interest in preventing discrimination on the basis of sexual orientation did not justify the "severe" infringement on the Boy Scouts' expressive associational interest in exclusionary membership practices.[254] A charitable reading of the Court's opinion leaves undisturbed the longstanding principle that preventing discrimination is a compelling government interest.[255] Rather, the problem lies with the means: The government cannot prevent discrimination *in this way* because the intrusion on expressive association is too severe to be narrowly tailored to any compelling interest.

To reach this result, the *Dale* Court deployed deference to the association claiming a constitutional exemption from antidiscrimination law at three distinct junctures: (1) in defining itself as an expressive association sufficient to

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[249] *See id.* at 668–78 (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting) (carefully parsing the evidence and concluding that the Boy Scouts had not clearly and publicly embraced a policy of excluding openly gay scoutmasters).

[250] *Id.* at 651.

[251] *See id.* at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression." (citing Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 123–24 (1981))).

[252] *Id.*

[253] *Id.* ("*Hurley* is illustrative on this point.").

[254] *Id.* at 659.

[255] *See, e.g.*, Stephen Clark, *Judicially Straight?* Boy Scouts v. Dale *and the Missing Scalia Dissent*, 76 S. CAL. L. REV. 521, 533 (2003) (noting that the *Dale* majority applies a "vigorous, if uncertain, level of scrutiny," but then finds, after "literally providing no analysis whatsoever of the governmental interests," that the interests—"whatever the majority silently imagined them to have been"—are insufficient to support such a severe infringement of the Scouts' associational interests).

trigger First Amendment analysis; (2) in defining the message the law allegedly burdens; and (3) in assessing the severity of the law's alleged burden on the message. The Court effectively gave the Boy Scouts authority to craft its own First Amendment right of exclusion absent any meaningful judicial oversight.[256] This is not the contextual evidence-based approach on display in *Roberts*.[257] Nor is this deferential approach to an organization's message and mission, and the organization's need for exclusion or inclusion, consistent with how the Court has adjudicated other constitutional claims. For example, in the context of students' free speech rights in public schools, the Court reasoned that schools may define their missions—and the attendant values they seek to convey—in innumerable ways that cannot possibly serve as the sole metric for determining the contours of students' free speech rights.[258] Similarly, in the context of race-based affirmative action in higher education, the Court has held that universities are entitled to no deference in their determinations that race-conscious admissions are necessary to achieve the benefits of a diverse student body;[259] in fact, universities are entitled to no deference in their assertions about why achieving diverse enrollments is even an appropriate interest.[260]

The Court's association-friendly approach does, however, track with its propensity to rely on a variety of procedural and substantive maneuvers in ruling against LGBTQ interests in other First Amendment cases: *Hurley*, *FAIR*, *Masterpiece Cakeshop*, and *303 Creative*. The Court's biases against LGBTQ equality in expressive conduct and association cases is worthy of scholarly criticism in its own right. The Court's invitation for conservative special inter-

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[256] *See* Andrew Koppelman, *Signs of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1822 (2002) (arguing that, under *Dale's* deferential logic, it "is hard to imagine an association that is not expressive," and it likewise "follows that an expressive association claim is available to any entity that wants to discriminate at any time for any purpose" (emphasis omitted)).

[257] *See* Darren Lenard Hutchinson, *"Closet Case":* Boy Scouts of America v. Dale *and the Reinforcement of Gay, Lesbian, and Transgender Invisibility*, 76 TUL. L. REV. 81, 85 (2001) (noting that, in its foundational expressive association cases, "the Court rigorously analyzed the organization's expressive association defenses, requiring solid evidence to establish that an institution's discrimination related to a clearly defined and articulable speech interest").

[258] Morse v. Frederick, 551 U.S. 393, 410 (2007) (holding that public schools may punish student speech that promotes illegal drug use because of the unique dangers drugs pose in addition to violating the school's policy). "The opinion of the Court does not endorse the broad argument," however, "that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.' This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs." *Id.* at 423 (Alito & Kennedy, JJ., concurring) (citations omitted).

[259] Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 377 (2016) (emphasizing that "no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals" (citing Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311 (2013)).

[260] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2151 (2023) (holding that a university's interests in the "educational benefits of diversity," while "commendable goals," are "not sufficiently coherent" for constitutional scrutiny).

ests of many flavors to manipulate the Constitution through appeals to individual exceptions, however, is even more alarming given its broader implications for the rule of law.

C. Exclusionary Expressive Association and the Future of Antidiscrimination Law

In the years immediately following *Dale*, courts were by and large unwilling to replicate its deferential absolutism in other expressive association cases. A recent article discussing the post-*Dale* landscape and its renewed contemporary relevance chronicles the limiting principles courts employed to minimize *Dale*'s potential to hobble antidiscrimination law.[261] For example, in other cases involving the Boy Scouts, some courts interpreted *Dale*'s holding as applicable only when the person seeking inclusion engaged in gay "activism" in ways similar to the *Dale* claimant,[262] and other courts interpreted *Dale*'s holding as applicable to only certain "role model" or "communicative" leadership positions within the Scouts.[263] In cases involving different organizations, courts sometimes flunked these claims at the threshold First Amendment inquiry by finding that the complaining association was not sufficiently expressive—either because it took no public stances on controversial issues[264] or because the organization was a "sham" created for litigation.[265] For a time, then, *Dale* seemed like an aberration not meant to be taken at face value. Perhaps *Dale* was just a knee-jerk overreaction from a conservative Court concerned about protecting an avowedly masculine space, uniquely designed to turn boys into men, from the perceived effeminizing forces of queerness.[266] This Section discusses exclusionary expressive association and the future of antidiscrimination laws.[267]

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[261] Sepper, *supra* note 21, at 827–32.

[262] *See, e.g.*, Boy Scouts of Am. v. D.C. Comm'n on Hum. Rts., 809 A.2d 1192, 1201–02 (D.C. 2002) (concluding that the *Dale* Court's repeated use of the phrase "gay activist" in describing the claimant "meant something of legal significance").

[263] *See, e.g.*, Chi. Area Council of Boy Scouts of Am. v. City of Chi. Comm'n on Hum. Rels., 748 N.E.2d 759, 768–69 (Ill. App. Ct. 2001) (remanding for further factual findings regarding expressive versus non-expressive positions within the Scouts).

[264] *See, e.g.*, Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 444 (3d Cir. 2000) (finding that claimant fraternity is not an expressive association, even under Court's de minimis requirements, because it never "took a public stance on any issue of public political, social, or cultural importance").

[265] *See, e.g.*, Taverns for Tots, Inc. v. City of Toledo, 341 F. Supp. 2d 844, 848, 850 (N.D. Ohio 2004) (finding the claimant's ostensibly charitable purpose of "raising money for needy children" pretextual given that the nonprofit formed to challenge an anti-smoking ordinance in bars and restaurants (citing Taverns for Tots, Inc. v. City of Toledo, 307 F. Supp. 2d 933, 944 (N.D. Ohio 2004))).

[266] *See* Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 805 (2023) (characterizing the Court's evolving body of rights jurisprudence as reflecting "solicitude for rights that are coded 'male' and an understanding of men as uniquely endangered and deserving of judicial solicitude and protection"). *See generally* Marc R. Poirier, *Hastening the* Kulturkampf*:* Boy Scouts of America v. Dale *and the Politics of American Masculinity*, 12 LAW &

The culture wars of the past decade around LGBTQ and reproductive rights have offered the perfect opening for claimants to resurrect and breathe new life into *Dale*'s conservative potential. Other articles holistically discuss the many varied cases representing *Dale*'s resurgence,[268] so this Article offers only a modest peek into this developing jurisprudence by organizing its exemplars into two overarching categories.

One new categorical frontier in the law of expressive association involves claims by employers seeking a right to exclude classes of potential employees. This category highlights the burgeoning conservative movement to refuse employment to people who perform abortions, have obtained an abortion, or who simply support abortion rights. This category thus has major implications for antidiscrimination law as it relates to reproductive rights in a world still realigning after the fall of *Roe v. Wade*,[269] and it has sweeping implications for antidiscrimination law more generally. Emblematic of this category is *Our Lady's Inn v. City of St. Louis* from the Eastern District of Missouri in 2018,[270] the first federal case to extend expressive association claims to employment decisions.[271]

Here, the relevant claimants included a crisis pregnancy center providing housing for "low-income women seeking an alternative to abortion" and a nonprofit group of Catholic elementary schools.[272] Both groups of claimants required applicants for employment to embody certain religious values; the crisis pregnancy center requires applicants to "support the pro-life mission of the organization,"[273] and the elementary schools require applicants to sign a statement agreeing to live by the teachings of the Catholic Church—including "the Catholic Church's longstanding and widely known opposition to abortion."[274] Their expressive association claim stemmed from a St. Louis ordinance prohibiting employment discrimination on the basis of an individual's "reproductive health decisions or pregnancy status."[275] In short, claimants

SEXUALITY 271 (2003) (arguing that the *Dale* litigation represented a pitched, fear-laden cultural debate about masculinity and homosexuality).

[267] *See infra* notes 268–295 and accompanying text.

[268] *See, e.g.*, Sepper, *supra* note 21, at 815–27 (discussing the reemergence of expressive association cases, specifically in the context of employers, businesses, and social services).

[269] *See generally* 410 U.S. 113 (1973) (establishing a right to privacy that protected the right to have an abortion), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[270] *See* 349 F. Supp. 3d 805, 822 (E.D. Mo. 2018) (holding that a city ordinance prohibiting discrimination against individuals making certain decisions regarding their reproductive healthcare is invalid when applied to a Catholic institution).

[271] Sepper, *supra* note 21, at 816.

[272] *Our Lady's Inn*, 349 F. Supp. 3d at 812–13 (citing Statement of Material Facts in Support of Plaintiffs' Motion for Summary Judgment ¶ 1, *Our Lady's Inn*, 349 F. Supp. 3d at 805 (No. 4:17-cv-01543)).

[273] *Id.* at 812.

[274] *Id.* at 813 (citing Statement of Material Facts in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 272, ¶ 21).

[275] *Id.* at 810 (quoting ST. LOUIS, MO., ORDINANCE 70459 (Feb. 13, 2017)).

sought a First Amendment right to deny employment to those who hold pro-abortion views.

Applying *Dale*, the court easily found that both groups of claimants are expressive associations given their religious advocacy.[276] Next, with no meaningful independent prodding, the court wholly accepted the claimants' assertions that their anti-abortion messages would be "hindered" and "significantly affect[ed]" if they were forced to employ those who support abortion rights. Like in *Dale*, the court granted complete deference to the organizations both in defining themselves as expressive and in self-assessing the law's burden on their message. Unlike in *Dale*, however, their victory resulted in an exemption from laws governing *employment*, and the court offered no explanation for why regulations governing the buying and selling of labor pose identical constitutional concerns as regulations governing mere group membership.

More recently, the Second Circuit took the plunge and similarly extended expressive association claims to employment decisions. In 2023, in *Slattery v. Hochul*, the complainant nonprofit crisis pregnancy center challenged a New York state law in the Second Circuit, which, like the ordinance in St. Louis, prohibited employment discrimination on the basis of reproductive decision-making.[277] The crisis pregnancy center provided a number of services and "discourage[d] abortion,"[278] and it argued that the New York law would violate its right to expressive association because it employed only those who opposed abortion and extramarital sexual relationships who can "credibly communicate" its message to patients.[279] In assessing the claim, the Second Circuit first held that the claimant pled necessary facts to demonstrate its expressive nature regarding anti-abortion advocacy.[280] Next, it rejected the lower district court's finding that the burden of complying with the antidiscrimination law would be incidental to its message.[281] In strong echoes of *Dale*, the Second Circuit concluded instead that the claimant, and presumably the claimant alone, is permitted "to determine that its message will be effectively conveyed only by employees who sincerely share its views."[282] If other courts follow suit and grant sweeping deference to entities in defining their own expressive essence and assessing the burden of legal compliance, there may be no logical endpoint for the number of employers who can secure constitutional exemptions from laws governing hiring practices. This line of jurisprudence thus has major implications for the reach of antidiscrimination law as it relates to any protected characteristic.

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[276] *Id.* at 821.
[277] 61 F.4th 278, 283 (2d Cir. 2023).
[278] *Id.* at 284.
[279] *Id.*
[280] *Id.* at 287.
[281] *Id.*
[282] *Id.* at 288.

A second category in the new frontier of expressive association claims involves entities who seek a right to refuse goods and services. This category has not yet captured widespread judicial support, but there are signs of interest. Once again, the Second Circuit is at the forefront—albeit with respect to a nonprofit rather than commercial entity. If nonprofits may constitutionally withhold goods and services from unwanted patrons, however, what limiting principle would support withholding the right to for-profit commercial entities who may have a larger market presence? In 2020, in *New Hope Family Services, Inc. v. Poole* filed in the Second Circuit, a nonprofit Christian adoption and foster care agency asserted that, based on its religious beliefs regarding the sanctity of different-sex marriage and its important role in children's healthy development, it "cannot recommend adoption by unmarried or same-sex couples."[283] New York regulations prohibiting discrimination on the basis of sexual orientation and marital status would have required it to do so.[284]

Procedurally, the Second Circuit granted review of the lower district court's order granting a motion to dismiss, and at this stage in the litigation courts are required to accept the alleged *facts* as true.[285] It makes sense in this context, then, for courts at this stage to rely on and defer to claimants' factual assertions. Still, the deference the Second Circuit afforded here bears little difference to the deference *Dale* instructs courts to apply to legal questions on the merits. First, the Second Circuit accepted that the claimant is an expressive association because, as it asserted, its conduct and speech convey "a system of values about life, marriage, family and sexuality."[286] Second, the Second Circuit rejected the district court's finding that the law's burden on the claimant's message is only "slight."[287] Like compelled membership and compelled "*hiring*," the court explained, the compelled provision of adoption and foster care services to same-sex and unmarried couples would "directly limit[] its own ability to promote its beliefs and values."[288] In other words, the claimant is expressive because it disagrees with the very object of New York's antidiscrimination law, and application of that law to the claimant was thus inherently burdensome.

There are virtually no guardrails limiting how far this logic may extend, even within the commercial realm. For instance, if a for-profit business donates money to anti-LGBTQ or anti-abortion causes or political campaigns, could it then claim an expressive association right to refuse service to LGBTQ people or those who have had, perform, or support abortions? Assuming the

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[283] 966 F.3d 145, 148–49 (2d Cir. 2020).

[284] *Id.*

[285] *Id.* at 159–60.

[286] *Id.* at 178 (quoting Verified Complaint for Injunctive and Declaratory Relief ¶ 270, New Hope Fam. Servs., Inc. v. Poole, 387 F. Supp. 3d 194 (N.D.N.Y 2019) (No. 5:18-cv-1419)).

[287] *Id.* at 179.

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

business asserts that selling goods or services to these groups would substantially burden its message—why not?

Even in the immediate wake of *Dale*, a principle that seemed well-settled—or at least implicit from subsequent legal decisions—was that expressive associational rights to exclude did not extend to commercial entities and employer-employee relationships. This principle has its origins in Justice O'Connor's *Roberts* concurrence, sealing the 5–4 victory for women's inclusion in private clubs like the Jaycees. Concerned that the Court's opinion "unadvisedly casts doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society,"[289] O'Connor drew a distinction between commercial and non-commercial associations.[290] Acknowledging that a "purely commercial" line is difficult to demarcate, she offered a test focused on whether the association's activities are "predominately of the type protected by the First Amendment" as opposed to predominantly economic in nature.[291] For O'Connor, once an association "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[292] Although O'Connor's concurrence is not binding, it undoubtedly influenced legal thought regarding how to balance First Amendment freedoms with principles of economic opportunity and equality.

Whatever line previously existed between commercial and non-commercial associations has been distorted beyond recognition—to the extent such a line still exists. Although the Supreme Court has never expressly held that for-profit businesses and corporations can bring expressive association claims, its decisions in other doctrinal areas now suggest they can. Beginning in the 1970s, the Burger Court held in a variety of contexts that corporations have free speech rights—albeit subject to greater government oversight than other speakers.[293] Those free speech rights significantly expanded in 2010, in *Citizens United v. Federal Election Commission* in which the Court struck down federal regulations limiting direct campaign expenditures to political campaigns.[294] After it clarified that commercial entities have robust free speech

[289] Roberts v. U.S. Jaycees, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

[290] *Id.* at 633–34.

[291] *Id.* at 635.

[292] *Id.* at 636.

[293] *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767–68, 784 (1978) (holding for the first time that corporations have a free speech right to make certain campaign financial expenditures); Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761, 770 (1976) (reversing decades of precedent holding that corporations do not have free speech rights that could limit regulation over advertising).

[294] 558 U.S. 310, 365 (2010).

rights, the Court's concern for the rights of those commercial entities soon bled into religious liberty claims. First, in 2014, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court ruled in favor of a corporation seeking a statutory religious liberty exemption from a federal law requiring employers to provide employees health insurance covering contraception.[295] Then, in both *Masterpiece Cakeshop* and *303 Creative*, the Court laid the groundwork for extending the reach of commercial religious liberty protections beyond the statutory realm and into the Free Exercise Clause.

With the First Amendment door left hanging open, it is difficult to see why associational expression claims affecting employment decisions and even the commercial sale of goods and services should be treated differently. As long as absolute deference to the association's assertions governs these claims, more courts are likely to move the law in this direction. This doctrinal area is quickly advancing towards a zone of deregulation with little objective judicial oversight.

III. EXPRESSIVE CONDUCT AND RELIGIOUS EXERCISE

Contemporary disputes over First Amendment constraints on antidiscrimination law in many ways began with religious liberty. Yet, after the Court's landmark 1990 decision in *Employment Division v. Smith*[296] limiting the reach of religious liberty claims, the Free Exercise Clause—at least initially—rarely served as a viable vehicle for securing constitutional protection for conduct otherwise prohibited by law. Nor was the Free Exercise Clause particularly necessary for those seeking to exclude on constitutional grounds given the simultaneously expanding reach of the compelled speech and expressive association doctrines as discussed above.[297] In the past decade, however, two major legal developments have brought religious liberty as a freestanding legal claim back into the limelight, offering fresh and potentially capacious opportunities for religious adherents to secure protection for otherwise legally forbidden conduct.

This Part first discusses the Court's revitalized interest in the Free Exercise Clause through novel theories of religious discrimination and the possibly forthcoming overruling of *Smith*.[298] Section A describes expressive religious exercise under the Free Exercise Clause.[299] Section B then discusses the proliferation of Religious Freedom Restoration Acts (RFRAs) and the

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[295] 573 U.S. 682, 736 (2014).

[296] *See* 494 U.S. 872, 890 (1990) (upholding an Oregon law that criminalized drug use, even for religious purposes), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709 (2005).

[297] *See supra* Parts I and II (discussing expressive conduct and free speech claims, and examining expressive association claims).

[298] *See infra* notes 301–359 and accompanying text.

[299] *See infra* notes 301–329 and accompanying text.

Court's permissive application of such laws to a wide array of "substantial burdens" that otherwise religiously neutral and generally applicable laws allegedly impose on religious practices.[300] In assessing these alleged burdens, near total deference to claimants seeking safe harbor under RFRAs is currently operating as an independent mechanism for undermining civil rights laws specifically and the regulatory state more broadly. This laissez-faire turn departs from earlier Supreme Court precedent applying principles of objective judicial oversight to questions of the law's burdening effect on religious exercise. If the Court indeed overrules *Smith*, there is every reason to believe that such deference will likewise infiltrate free exercise analysis. Objective guardrails are sorely needed.

A. Expressive Religious Exercise Under the Free Exercise Clause

This Section explores the use of expressive religious exercise under the Free Exercise Clause.[301] In the early years of free exercise jurisprudence, the Supreme Court on two occasions rejected a reading of the Clause that would provide an avenue for claimants to seek exemptions from religiously neutral and generally applicable laws that incidentally burden religious conduct. First, in 1878, in *Reynolds v. United States*, the Court rejected a claim alleging that the application of a federal statute criminalizing bigamy violated the Free Exercise Clause.[302] Rhetorically questioning whether a person can "excuse his practices" contrary to law "because of his religious belief," the Court conclusively answered no.[303] The Court came to the same conclusion in *Minersville School District v. Gobitis* in 1940, rejecting a free exercise challenge to a school's compulsory flag salute policy: "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[304]

Breaking from precedent, the Court in 1963 in *Sherbert v. Verner*[305] applied strict scrutiny to a Seventh-Day Adventist's free exercise claim in which she challenged a state's decision to deny unemployment benefits because of her refusal to accept gainful employment if required to work on Saturdays—her Day of Sabbath. For the first time, the Court held that strict scrutiny ap-

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[300] *See infra* notes 331–359 and accompanying text.

[301] *See infra* notes 302–329 and accompanying text.

[302] 98 U.S. 145, 166 (1878).

[303] *Id.* at 166–67 ("To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.").

[304] 310 U.S. 586, 594 (1940) (citation omitted), *overruled on other grounds by* W.Va. State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

[305] 374 U.S. 398, 399–401 (1963).

plies whenever the purpose or effect of *any* law even *incidentally* burdens religious practices.[306] *Sherbert* was decided during the notoriously liberal Warren Court era, and at the time it was a progressive intervention designed to protect individual minority religious adherents who historically lacked representation and input in lawmaking processes.[307] Taken to its logical extremes, however, *Sherbert* could be interpreted as "creating a new presumptive right to religious exemptions."[308] Contributing to the threat of potentially limitless religious exemptions, the Court in 1981 in *Thomas v. Review Board of Indiana Employment Security Division* instructed lower courts to grant significant deference to claimants when reviewing allegations of how a law burdens individual religious practices: "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection."[309]

Undoubtedly aware of the chaos an unchecked *Sherbert* standard could unleash on the rule of law, the Court in 1990 once again changes course. *Smith* involved the intersection of Oregon's criminal prohibition on controlled substances and its civil unemployment benefits system. After they ingested the hallucinogen peyote for ceremonial purposes at a Native American Church, claimants were fired from their jobs at a drug rehabilitation center and deemed ineligible for unemployment payments due to drug-related misconduct.[310] Relying on *Sherbert* and *Thomas*, claimants argued that state's decision deeming them ineligible for unemployment violated the Free Exercise Clause.[311]

The Court began its analysis on a skeptical note, pointing out that the exercise of religion entails the performance and abstention of much conduct otherwise validly subject to the reach of law.[312] It then cited to the pre-*Sherbet* decisions of *Reynolds* and *Gobitis* to support a questionable retelling of its own free exercise jurisprudence, emphasizing that it has never held that an individual's religion is an exemption from abiding with the law.[313] This is false,[314] but

[306] *See id.* at 404, 406 (noting that governments must justify laws that affect religious practice with a "compelling state interest").

[307] *See* Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 658–59 (2016) (describing mounting criticism of *Sherbert* by conservatives in the 1970s and through the1980s, who argued that *Sherbert* is too individualistic and urged minority religious adherents to secure legal protections through traditional democratic processes).

[308] James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 708.

[309] 450 U.S. 707, 714 (1981).

[310] Emp. Div. v. Smith, 494 U.S. 872, 874 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709 (2005).

[311] *Id.* at 876.

[312] *Id.* at 877.

[313] *Id.* at 878–79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

[314] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (holding that a state law mandating formal education through the age of sixteen could not be applied to Amish claimants under the Free Exercise Clause because a religious accommodation would not undermine state interests). To the

the Court proceeded to explain its conflicting decisions by focusing on convoluted distinctions[315] rather than simply engaging in an exercise of honesty by directly overruling *Sherbert* and its progeny. Effectively, the Court announced a new rule: religiously neutral and generally applicable laws that incidentally burden religious beliefs or practices do not give rise to a free exercise claim.[316]

Smith was wildly unpopular from the moment it was announced, and criticisms came from both the political left and right.[317] As this Article discusses below, the enactment of federal and state RFRAs (Religious Freedom Restoration Act) was one quick and lasting response.[318] In the last decade, however, political sentiment has shifted. Today, it is largely those on the left who view individual religious liberty claims with skepticism while conservative movement lawyers have expressly asked the Supreme Court to overrule *Smith* and take religious liberty back to its *Sherbert* roots. Why the change? As with expressive conduct and expressive association, the impetus behind many of today's religious liberty claims are laws that prevent LGBTQ discrimination and safeguard reproductive health access. Sensing lost ground in the culture wars, conservatives have seized on religious liberty as a powerful tool for fighting back against their perceived victimization at the hands of liberal elites.[319]

In 2021, in *Fulton v. City of Philadelphia*, the Court granted certiorari to consider whether *Smith* was ripe for overruling.[320] The case arose after a newspaper published a story about a religious foster care agency, Catholic Social Services (CSS), and its stance against placing children in homes with unmarried partners or two people in a same-sex marriage.[321] CSS contracted with Philadelphia's Department of Human Services in a shared partnership to place

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Smith Court's credit, however, apart from in *Wisconsin v. Yoder* and in unemployment compensation cases with facts similar to *Sherbert*, "the Supreme Court ruled for the government and against the free exercise exemption claimant in every decision rendered between 1972 and 1990." Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 177 (1995) (emphasis omitted).

[315] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120–27 (1990) (characterizing the *Smith* Court's use and description of precedent as "troubling, bordering on the shocking"); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1, 12–26 (1991) (characterizing the *Smith* Court's discussion of precedent as " not trustworthy" and thoroughly walking through each precedent to explain why).

[316] *See Smith*, 494 U.S. at 885 (noting that an individual's religious beliefs cannot exempt them from obeying a law).

[317] *See* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1084 (2022) (noting that *Smith* was "met with outrage from Republicans and Democrats alike").

[318] *See* discussion *infra* Part III.B (discussing expressive association in *Boy Scouts of America v. Dale)*.

[319] *See generally* Luke A. Boso, *Rural Resentment and LGBTQ Equality*, 71 FLA. L. REV. 919 (2019) (discussing the cultural and political sources sewing anxiety in conservative circles and invigorating conservative legal strategies centered on the First Amendment).

[320] 593 U.S. 522, 532 (2021).

[321] *Id.* at 530–31.

children in temporary homes.[322] CSS asserted that it has a sincerely held religious belief that "marriage is a sacred bond between a man and a woman,"[323] and it does not wish to place children in homes that would suggest an endorsement of views contrary to its religious belief. The problem for CSS was that excluding same-sex partners as suitable foster parents would violate both a local antidiscrimination ordinance and a provision in its contract with the city, and thus the city declined to renew the contract.[324]

If the Court had overruled *Smith*, the question under *Sherbert* ostensibly remained whether the city's decision to end its partnership with CSS burdened CSS's religious exercise, and, if so, whether that action survives strict scrutiny. The Court punted, however, explaining that it "need not revisit that decision *here*."[325] Instead, it ruled in favor of CSS under a broad conception of what a "generally applicable" law means under *Smith*. Because the city's contract with CSS included a "mechanism for individual exemptions,"[326] that policy was not "generally applicable" and was therefore subject to the rigorous demands of strict scrutiny—even though the city had never actually granted an exception under the policy.[327]

Given the innumerable number of laws and policies that include mechanisms for individualized considerations and exceptions, *Fulton* has the potential to fundamentally alter the free exercise landscape and indirectly achieve in many cases the same outcome that directly overruling *Smith* would achieve.[328] Six Justices concurring in the ultimate judgment, however, advocated going further, with three of those Justices explicitly endorsing the revival of *Sherbert*'s strict scrutiny standard for incidental burdens on religious conduct.[329] In the context of

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[322] *Id.* at 529.

[323] *Id.* at 530 (quoting Joint Appendix Vol. I at 171, *Fulton*, 593 U.S. at 522 (No. 19-123)).

[324] *Id.* at 531.

[325] *Id.* at 533 (emphasis added).

[326] *Id.* (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709 (2005)).

[327] *Id.* at 537.

[328] *See* Stephen M. Feldman, *White Christian Nationalism Enters the Political Mainstream: Implications for the Roberts Court and Religious Freedom*, 53 SETON HALL L. REV. 667, 730 (2023) (analyzing *Fulton* as continuing the Court's current trend of "hollowing out *Smith's* precedential importance" given how expansively it interprets *Smith*'s requirement of religious neutrality and general applicability as a prerequisite for avoiding strict scrutiny).

[329] *See Fulton*, 593 U.S. at 543–45 (Barrett, Kavanaugh & Breyer, JJ., concurring and Alito, Thomas & Gorsuch, JJ., concurring in the judgment) (pushing to overrule or replace *Smith*). Justices Barrett, Kavanaugh, and Breyer concurred separately to express the unanswered questions that would arise if the Court indeed overruled *Smith*, including questions regarding which types of burdens would trigger what version of scrutiny. *Id.* at 543–44 (Barrett, Kavanaugh & Breyer, JJ., concurring). Justices Alito, Thomas, and Gorsuch also concurred separately, but they argued that *Smith* must be overruled with a return to *Sherbert*'s strict scrutiny standard for incidental burdens on religious practices. *Id.* at 614 (Alito, Thomas & Gorsuch, JJ., concurring in the judgment).

today's culture wars—encompassing LGBTQ rights, abortion, contraception, race, diversity and inclusion initiatives, or any other hot-button issue animating political divides—the application and scope of *Sherbert* today would look wholly different than it did in 1963 as a modest and relatively infrequently used tool to accommodate religious minorities. A *Sherbert* of the 2020s risks constitutionalizing an endless array of exclusionary conduct on religious grounds through claims most often brought by conservative dissidents who oppose progressive legal initiatives. This could transform *Sherbert* into yet another weapon in the growing legal arsenal for dismantling civil rights laws. In the next Section's discussion of RFRAs, this Article shows why such an outcome is possible, but it also offers a modest objective doctrinal tweak for judges to resist the most destructive impact of *Smith*'s seemingly inevitable demise.[330]

B. Expressive Religious Exercise Under RFRAs

Tapping into widespread outrage over the Court's implicit overruling of *Sherbert* in *Smith*, Congress acted quickly to pass the federal Religious Freedom Restoration Act of 1993.[331] While the Court soon thereafter held that Congress exceeded its legislative authority by extending the federal RFRA's reach to state and local acts,[332] the statute remains applicable to federal acts and thus offers a statutory basis for claimants to bring religious liberty claims against the federal government. Additionally, approximately twenty states have enacted their own versions of a RFRA that either closely mirror the federal statute or extend even further.[333] Congress transparently designed the federal RFRA to reinstate the most religion-protective interpretation of *Sherbert*, expressly criticizing *Smith* in its legislative findings.[334] In brief, federal RFRA claims require claimants to clear two preliminary hurdles: (1) they must have a sincerely held religious belief (2) that is "substantially burdened" by governmental action.[335] Once claimants clear these threshold hurdles, the burden shifts to the government to demonstrate why its action survives strict scrutiny: i.e., the government must show that an individual accommodation would not

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[330] *See infra* Part III.B.

[331] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

[332] City of Boerne v. Flores, 521 U.S. 507, 536 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Ramirez v. Collier, 595 U.S. 411 (2002).

[333] *See* Ann C. McGinley, *Religious Accommodations in the* Dobbs *Era*, 27 EMP. RTS. & EMP. POL'Y J. 276, 280 n.12 (2024) (offering a current description of the legal landscape for RFRAs).

[334] *See* Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1911–12 (2001) (describing the political environment and legislative process leading to the federal RFRA).

[335] WHITNEY K. NOVAK, CONG. RSCH. SERV., IF11490, THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER 1 (2020).

undermine its compelling interests.[336] This Section discusses expressive religious exercise under RFRAs.[337]

Because a majority of the Justices in *Fulton* expressed an interest in overruling *Smith*, RFRAs and the ways in which courts have interpreted and applied them are instructive of where free exercise law may be heading. A maximalist interpretation could mean that innumerable forms of religiously expressive conduct, including exclusionary conduct allegedly required by someone's religious beliefs, could secure constitutional protection if an individual accommodation would not undermine the government's broader interests. There is, however, an available compromise that courts can and should take to blunt the most destructive effects of religious individualism on the regulatory state: giving objective bite to the requisite preliminary showing of a *substantial* burden on religious exercise.[338] The recent judicial trend in assessing this threshold requirement reflects an impulse towards absolute deference to a claimant's self-assessment of the law's burden, yet this was not always how the Supreme Court interpreted this requirement.

In a pre-*Smith* decision from 1988, *Lyng v. Northwest Indian Cemetery Protective Association*,[339] the Court primarily relied on the substantial burden inquiry to reject Native American claimants' request for injunctive relief to prevent the government from constructing a road for timber harvesting on federal land claimants deem sacred. The Court acknowledged that the government's plan for the land "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs."[340] The Court nevertheless limited the universe of constitutionally significant burdens on religious exercise by noting that the government neither (1) coerces individuals to violate their religious beliefs, nor does it (2) "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[341] Moreover, although it is true that incidental burdens can be sufficient to trigger strict scrutiny under *Sherbert*, absent coercion or penalty, merely making it "more difficult" to exercise reli-

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[336] *Id.*

[337] *See infra* notes 338–359 and accompanying text.

[338] *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 98 (2017) (urging courts to meaningfully adjudicate questions of substantial burden, or a risk that an important threshold legal question becomes a nonjusticiable question "effectively established by the claimant's mere say-so"). Gedicks suggests that judges can gauge the substantiality of a burden on religious exercise by relying on causation and injury principles common in secular tort law. *Id.* at 130–32; *see also* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1775 (arguing that the substantiality of the burden should be judged according to the "substantiality of the civil penalties triggered by religious exercise" (emphasis omitted)).

[339] 485 U.S. 439, 439 (1988).

[340] *Id.* at 449.

[341] *Id.*

gion falls short of the evidentiary showing required to trigger such a demanding form of judicial review.[342] Admittedly, the Court's distinction between *coercing* someone to act contrary to their religious beliefs and simply making their exercise of religion *more difficult* is wanting for clarity. The important takeaway from *Lyng*, however, is that it opens the door for judges to objectively inquire into the nature and degree of religious burdens rather than simply taking the claimant's assertions at face value.

In the post-*Smith* world of federal RFRA claims brought by conservative Christians rather than religious minorities, the Court's approach to the burden question has been dramatically more deferential. Two key Supreme Court cases highlight this shift: *Burwell v. Hobby Lobby Stores, Inc.* from 2014[343] and *Zubik v. Burwell* from 2016.[344] Both cases dealt with the 2010 Patient Protection and Affordable Care Act's (ACA) employer mandate to provide health insurance coverage to employees inclusive of certain forms of contraception.[345]

In *Hobby Lobby*, Christian Mennonite owners of a for-profit closely held company sought an exemption under the federal RFRA from the contraception mandate because of its alleged burden on their sincerely held religious belief that life begins at conception.[346] The owners claimed to believe some methods of contraception covered by the mandate "are abortifacients" as they can inhibit the further development of a fertilized egg.[347] Their theory of the burden was essentially that, by complying with the mandate, they would be "facilitating abortions."[348] If they did not comply, however, the federal government can assess significant financial penalties.[349]

Addressing head-on the government's argument that complying with the contraception mandate is too attenuated from the destruction of any embryo,[350] the Court in an opinion by Justice Alito built a wall of absolute deference in favor of the claimants. The claimants *believed* engaging in this mandated con-

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[342] *Id.* at 450.

[343] *See generally* 573 U.S. 682 (2014) (highlighting the shift towards a deferential approach).

[344] *See generally* 578 U.S. 403 (2016) (per curiam) (noting the difference between the deferential approach).

[345] *See Hobby Lobby*, 573 U.S. at 697 (discussing the implicated statutes); *Zubik*, 578 U.S. at 405–06 (same); 42 U.S.C. § 300gg-13(a)(4) (granting the Health Resources and Services Administration (HRSA) the authority to interpret a provision of the ACA mandating insurance coverage without cost-sharing for preventative care). The HRSA in turn promulgated guidelines inclusive of all FDA approved contraception methods and sterilization procedures. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725–26 (Feb. 15, 2012) (codified at 29 C.F.R. pt. 2590) (discussing the HRSA guidelines).

[346] 573 U.S. at 700–01.

[347] *Id.* at 691, 697–98.

[348] *Id.* at 691.

[349] *Id.* at 720.

[350] *Id.* at 723.

duct would be "connected" to the destruction of an embryo, the claimants also *believed* doing so would be "immoral," and it is ultimately not for courts to "say that their religious *beliefs* are mistaken or *insubstantial*."[351] The majority also ignored seemingly relevant evidence that Hobby Lobby holds 401(k) investments in companies that manufacture the very drugs and devices to which it objects.[352] Effectively, the Court obliterated any line between the technically separate factual and legal questions of religious belief and burden: a factual belief that the law burdens religious exercise *is* the legal burden. This deference is even more alarming given how far a theory of indirect facilitation or complicity might extend. Could an employer object to laws mandating a minimum wage under a similar rationale if they sincerely believe employees will take the pay to purchase and use embryo-destroying contraception? Does the line of attenuated reasoning ever end?

The Court retained its posture of absolute deference to assertions of substantial religious burdens in *Zubik*,[353] albeit without issuing a decision on the ultimate federal RFRA merits. At the time, under regulations promulgating the same contraception mandate as in *Hobby Lobby*, a religious employer could submit a form to either their health insurance provider or the federal government self-certifying their objections to the contraception mandate so a third party could intervene and provide coverage.[354] The *Zubik* claimants had an undisputed sincere religious belief that "deliberately avoiding reproduction through medical means is immoral."[355] They objected under the federal RFRA to the self-certification process because it would require them to "take[] actions that directly cause others to provide contraception" or might make it "appear" as if they were participating in such a scheme.[356] Justice Scalia died after the Court heard oral arguments, which possibly altered internal deliberations and prompted the Court to request supplemental briefing on whether the parties could agree on a process by which employees could obtain coverage with-

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[351] *Id.* at 724–25 (emphasis added).

[352] Gregory M. Lipper, *The Contraception-Coverage Cases and Politicized Free-Exercise Lawsuits*, 2016 U. ILL. L. REV. 1331, 1336.

[353] *See* 578 U.S. 403, 409 (2016) (per curiam) (highlighting the petitioner's religious exemption claims).

[354] *Id.* at 405–06.

[355] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 668 (2020) (describing the same nucleus of underlying religious objections to the contraception mandate as in *Zubik* but deciding different substantive and procedural issues as to the validity of later promulgated federal rules on how employees of a religious employer may obtain coverage absent an employer's self-certification) (quoting Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, 794 F.3d 1151, 1167 (10th Cir. 2015), *vacated*, *Zubik*, 578 U.S. at 403).

[356] *Id.* (quoting *Little Sisters of the Poor Home for the Aged, Denver, Colo.*, 794 F.3d at 1168).

out the employer's self-certification.[357] Satisfied that such a compromise was possible, the Court vacated the judgements below, remanded to allow the parties to develop and implement a process bypassing objecting employers, and declined to rule on the merits.[358]

Requesting supplemental briefing on a potential compromise suggests that at least some members of the Court viewed the self-certification process as a substantial burden on religious exercise. In Justice Thomas's majority opinion in a subsequent decision upholding the implemented federal compromise, the Court showed its hand: for the past seven years, the claimants, "like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision—have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs."[359] The Court's unusual procedural maneuvers and revealing dicta indicated that it likely agreed; completing a form registering a qualifying religious objection to the contraception mandate, thereby setting into motion a process by which a different party can ensure coverage, is itself a substantial burden on religious exercise. If even this ministerial requirement is a substantial burden, it is difficult to discern any limits on how attenuated the connection can be between alleged facilitation and an assertedly immoral consequence.

This Article does not contest the longstanding principle that questions as to the factual *truth* of a religious belief are inappropriate for judicial review given the competing constitutional prohibition on governmental establishment. But questions as to the *burden* should be viewed as mixed questions of law and fact ripe for meaningful evidentiary analysis through an objective legal lens. If deference is the only applicable standard, religious liberty claims are destined to win in nearly every case given the deciding role that a finding of "substantial burden" plays in triggering strict scrutiny—an almost impossible standard for the government to meet. As the Supreme Court itself demonstrated in *Lyng*, courts need not absolutely defer to claimants on this elemental issue. An objective check would strike at least some balance between the constitutional protection of religious exercise and the preservation of otherwise generally applicable legislative prerogatives implementing sound public policy.

CONCLUSION

The First Amendment has become one of the most effective weapons in the conservative movement's legal assault on progressive public policy and the

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[357] *See* Patrick J. McNulty & Joseph F. Moser, *Absolution for Opting Out of the Contraception Mandate: Substantial Burden Gone Awry*, 67 DRAKE L. REV. 89, 105–07 (2019) (describing the unusual factual circumstances leading to the *Zubik* Court's ultimate punt).

[358] *Zubik*, 578 U.S. at 408–09.

[359] *Little Sisters of the Poor Saints Peter & Paul Home*, 591 U.S. at 687.

regulatory state. A robust First Amendment is essential to protect the marketplace of ideas and individual liberty, but that marketplace and the liberties exercised within it are increasingly guaranteed for only some. Although the First Amendment ostensibly safeguards speech, expressive association, and religious belief, exclusionary *conduct* is rapidly earning constitutional protection across doctrinal areas. This constitutional safe harbor for exclusionary conduct has been made possible by judicial bias in the creation and application of the various tests that apply to each discrete claim.

Sometimes the Supreme Court changes or abandons the applicable underlying test—with little or no explanation—to support a conservative outcome, most often in the context of expressive conduct and expressive association claims. Other times the Court purports to apply a well-worn test but deploys inconsistent procedural or interpretative maneuvers to reach a conservative result, like assuming an issue without deciding it or taking unspoken judicial notice of adjudicative or legislative facts. One consistent theme across doctrinal divides is the Court's selective use of deference—in evaluating claimants' assertions regarding the expressive nature of their exclusionary conduct, the expressive nature of an association's exclusionary policies, or the burden that legal compliance would impose on their expressive associational interests or individual religious exercise. Unlike in early precedents interpreting the scope of the First Amendment's various protections, today's jurisprudence lacks objective guardrails.

The Court's haphazard First Amendment jurisprudence has in turn given lower courts license to pick and choose from a menu of options to reach outcomes they prefer. For example, in June 2024, in a 2–1 opinion in which two Trump-appointed judges comprised the majority, the Eleventh Circuit enjoined a private organization's funding program open only to Black female business owners.[360] In defending against a claim of race discrimination brought under federal law by a conservative nonprofit, Fearless Fund Management (Fund) argued that its bestowal of race- and gender-conscious grants was protected expressive conduct under the First Amendment.[361] The Fund argued that its funding program expresses a "commitment" to Black women-owned businesses.[362] The Eleventh Circuit, however, was unwilling to defer to the Fund's self-assessment of its message, distinguishing *303 Creative* as about a wedding website designer's First Amendment right to exclude LGBTQ "message[s]" rather than classes of people based on their "status."[363] This decision represents a rare example of a First Amendment loss when pitted against antidiscrimination law, but its colorblind outcome strongly aligns with conservative interests. As persuasive-

[360] Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 103 F.4th 765, 769 (11th Cir. 2024).
[361] *Id.* at 771.
[362] *Id.* at 779.
[363] *Id.* at 778 (quoting 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2317 n.3 (2023)).

ly argued in a recent op-ed, it is difficult to explain recent First Amendment jurisprudence as reflective of anything other than the judiciary's biased preference for "red" speech over "blue" speech.[364]

The First Amendment should not be so easily manipulable as a tool for selecting winners and losers based on the ideological messages reflected in purportedly expressive conduct, expressive associational practices, or religious conduct at issue. In June 2024, news broke that Justice Alito was covertly recorded at a private event at which he said, "I agree with you," in response to a comment about the need for religious people "to return our country to a place of godliness."[365] It was an unprecedented moment of candor from a public figure with such immense power over the shape of constitutional law, and it offers a window into the ideological commitments behind the Court's recent First Amendment push.

In decades past, the Court relied on a contextual evidence-based approach to assess the expressive nature of conduct, the burden of inclusion on an association's internal organizational interests, and the burden legal compliance would impose on religious exercise. Lower court judges should resurrect and follow this tradition. Their role as neutral arbiters includes parsing and weighing meaningful factual and legal distinctions. The judiciary's continued failure to perform an objective check in cases primarily involving conservative First Amendment objections to civil rights statutes points to an ideological agenda that erodes public trust, threatens democratic norms, and dismantles antidiscrimination law. It does not have to be this way. We deserve better.

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[364] *See* Hila Keren, *The Hollow Promise of One of the Supreme Court's Worst 2023 Decisions Has Just Been Exposed*, SLATE (June 11, 2024), https://slate.com/news-and-politics/2024/06/supreme-court-worst-2023-decisions-303-creative.html?pay=1718210711677&support_journalism=please [https://perma.cc/4WR3-STNX] (identifying that the outcomes of First Amendment cases correlate with how the speech seeking to be protected leans politically).

[365] Justin Jouvenal & Ann E. Marimow, *Justice Alito Talked About Political Divide on Purported Secret Recordings*, WASH. POST (June 10, 2024), https://www.washingtonpost.com/politics/2024/06/10/alito-secret-recordings-politcal-divide/ [https://perma.cc/SYK3-8BG3].