Florida Law Review

Volume 77 | Issue 1 Article 2

January 2025

# Expressive Discrimination: Universities' First Amendment Right to Affirmative Action

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# EXPRESSIVE DISCRIMINATION: UNIVERSITIES' FIRST AMENDMENT RIGHT TO AFFIRMATIVE ACTION

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Abstract

In the wake of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, affirmative action proponents should pursue a First Amendment approach. Private universities, which are speaking associations that express themselves through the collective speech of faculty and students, may be able to assert an expressive association right, based on *Boy Scouts of America v. Dale*, to choose their faculty and students. This theory has been recently strengthened by *303 Creative LLC v. Elenis*.

I discuss various complexities and counterarguments: (1) Race is not different from sex or sexual orientation for purposes of the doctrine. (2) The market context may not matter, especially after *303 Creative*. (3) The conditional-federal-funding context does give the government more power than a simple regulatory context; the government will still be able to induce race-neutrality by the threat of withdrawing federal funds, but the unconstitutional conditions doctrine precludes draconian penalties such as withdrawing all funds from the entire institution based only on affirmative action in some units. (4) This theory doesn't apply to public institutions.

I also explore the potential flexibilities of this theory, based on recent litigation. The scope of the *Boy Scouts* exception might vary based on (1) what counts as substantial interference with expressive organizations, (2) what counts as a compelling governmental interest, and, most importantly, (3) what it takes for activity to be expressive.

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## INTRODUCTION

June is always a big month for Supreme Court watchers, but the last two days of June 2023 were more interesting than usual for constitutional and civil rights law. In one case, the Court made race-conscious affirmative action—which had long been only grudgingly accepted—even more difficult. But the decision in another case paves the way for an argument that private universities have a First Amendment right to engage in affirmative action.

On June 29, 2023, the Supreme Court decided *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[1] cutting back on the legality of race-conscious affirmative action in universities and all but overruling *Grutter v. Bollinger*.[2] This was both a statutory and a constitutional opinion: all universities that accept federal funds are governed by Title VI of the Civil Rights Act of 1964; public universities are also governed by the Equal Protection Clause.[3] But the two have been interpreted to impose identical standards,[4] so the distinction didn't make much practical difference.

The very next day, the Court decided *303 Creative LLC v. Elenis*.[5] Lorie Smith, a website designer, decided to enter the wedding-website business; she didn't want to create websites promoting gay weddings or otherwise contradicting her beliefs,

1. 600 U.S. 181 (2023).

2. 539 U.S. 306 (2003); *Students for Fair Admissions*, 600 U.S. at 287 (Thomas, J., concurring); *id.* at 342 (Sotomayor, J., dissenting); Kent Greenfield, *Using the First Amendment to Save Race-Conscious College Admissions*, 4 AM. J. L. & EQUAL. 201, 206 (2024). *But see generally* Peter N. Salib & Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123 (2023) (arguing that affirmative action will survive because universities will change their admissions processes to be less transparent and any disparate racial effects will be immunized from scrutiny under *Washington v. Davis*).

3. APRIL J. ANDERSON, CONG. RSCH. SERV., R48043, RACE-CONSCIOUS ADMISSIONS AND EQUAL PROTECTION IN HIGHER EDUCATION 1 (2024).

4. *Students for Fair Admissions*, 600 U.S. at 198 n.2.

5. 600 U.S. 570 (2023).

but that could have opened her up to prosecution under the Colorado Anti-Discrimination Act.[6] The Supreme Court held that the statute couldn't be applied to force her to create websites she disagreed with. A website is just words and images—"pure speech."[7] If the state made Smith create a website for a gay marriage—just because she was willing to create one for a straight marriage—that would be compelled speech, which would violate her First Amendment rights.[8]

These two lines of doctrine don't usually talk to each other, but they should—especially now.

Suppose you're a private-university president who wants to have affirmative action for faculty hiring or student admissions (or both). You've tried to fit your program within the confines of *Grutter*. You've steered clear of impermissible interests such as racial balancing or remedying societal discrimination,[9] avoided illegal methods such as quotas or inappropriately numerical targets,[10] and stuck to approved interests such as the value of diversity.[11] Then, on June 29, your general counsel said such efforts should be curtailed or abandoned. After sleeping on it—you sleep late the next morning, so you don't wake up until after the Supreme Court has released its opinions—is there anything you can do on June 30?

Yes, there is.

Lorie Smith's websites were pure speech. But so is virtually all your university's activity. Everything significant that universities do—lectures, homework, exam-taking, paper-writing—boils down to talking and writing. That includes the all-important transcript and diploma, which are just the university speaking to certify what the student has accomplished. If this isn't pure speech, what is?

You think back to an older case: *Boy Scouts of America v. Dale*,[12] where the Supreme Court upheld the Boy Scouts' exclusion of a gay assistant scoutmaster even though this violated an antidiscrimination statute.[13] The Boy Scouts engaged in expression, part of which included a position against

6. *Id.* at 579–81.

7. *Id.* at 587.

8. *See* Greenfield, *supra* note 2, at 227–28.

9. Grutter v. Bollinger, 539 U.S. 306, 323–24 (2003) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306–07, 310 (1978)).

10. Gratz v. Bollinger, 539 U.S. 244, 270 (2003); *Grutter*, 539 U.S. at 334.

11. *Grutter*, 539 U.S. at 328.

12. 530 U.S. 640 (2000).

13. *Id.* at 659.

homosexuality.[14] Given this position, forcing the organization to accept a gay person in a leadership position "would, at the very least, force [it] to send a message, both to the youth members and the world, that [it] accepts homosexual conduct as a legitimate form of behavior."[15]

*Boy Scouts* built on a previous case—the unanimously decided *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[16] which upheld the right of parade organizers to exclude an LGBT Irish-American organization from the parade even though this violated an antidiscrimination statute.[17] The state courts interpreted this as an exclusion of LGBT people, but the Court recognized that this was an attempt to alter the parade organizers' message.[18] Organizations have the right to choose their message, and sometimes the speaker's identity is the message.[19] This is why you can limit yourself to actors of color for *Hamilton* or cisgender female contestants for a beauty pageant.[20]

Freedom of speech implies a right against compelled speech: the right to speak includes the right to *choose* what to say, i.e., the right *not* to say certain things. The First Amendment also includes a right of expressive association: people have the right to group together to express their views.[21] In the expressive-association context: the right to speak in groups includes the right to *choose* whom to speak with, i.e., the right to choose whom *not* to associate with in speaking. We can call this principle—the marriage of the expressive-association right with the right against compelled speech—the principle of "expressive discrimination."[22]

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14. *Id.* at 650–51.

15. *Id.* at 653.

16. 515 U.S. 557 (1995).

17. *Id.* at 574–75.

18. *Id.* at 563–64, 572–73.

19. *See* Greenfield, *supra* note 2, at 219.

20. *See, e.g.*, Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012) (finding the First Amendment to protect producers' ability to control their intended creative messages); Green v. Miss U.S. of Am., LLC, 52 F.4th 773, 783 (9th Cir. 2022) (recognizing that the First Amendment allows a beauty pageant to exclude transgender contestants).

21. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). Thus, the claimant in an expressive-association case would be the university rather than (as in Equal Protection cases challenging affirmative action) an individual student. *See* Greenfield, *supra* note 2, at 212–13.

22. *Cf.* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1160 (2002) ("*Boy Scouts* is the first case in the modern period, and perhaps

What does this mean for your university's affirmative action programs? Your university is a speaking organization whose "message" may include teachings about diversity. The university speaks not only through its administration but also through its entire scholarly community, which includes faculty and students (perhaps also some staff). Using an antidiscrimination law such as Title VI or 42 U.S.C. § 1981[23] to force the university to speak through people not of its choosing—which could mean a faculty and student body that does not match the university's notions of diversity—could impede the university's ability to speak. The university's expressive-association right can include the ability to take race into account to create a university community with the desired amount or type of diversity.[24]

Previously, one could have argued that the *Boy Scouts* expressive-discrimination principle was limited to noncommercial, volunteer organizations such as parades and the Boy Scouts and that it wouldn't protect the discrimination in contracting required for affirmative action for faculty and students. But this is where *303 Creative* helps: the Court reaffirmed the right against compelled speech in an economic, for-profit context. Lorie Smith "offers her speech for pay and does so through . . . a company in which she is 'the sole member-owner.' But none of that makes a difference."[25]

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the first case in American history, to rule in favor of a party asserting a *constitutional right to discriminate*—at least on free speech grounds."); *see also* Lydia E. Lavelle, *Freedom of Speech: Freedom to Creatively Discriminate?*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 69, 107 (2022) (using the phrase "creatively discriminate" in a play on the name of *303 Creative* in an article published during the time between the lower court and Supreme Court decisions in that case); Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 244 (2023) (referring to "rights grounded in the First Amendment[, whether the speech or religion clauses,] to refuse compliance with civil rights laws" as "rights of first refusal"); Saadeh v. N.J. State Bar Ass'n, No. A-2201-22, 2024 WL 5182533, at *11 (N.J. Super. Ct. Dec. 20, 2024) ("[A]lthough the Association refers to its program as one of expressive inclusion, it is, by design, also a form of expressive exclusion recognized in *Dale*.").

23. Private universities are subject to both Title VI and § 1981, but § 1981 has been interpreted as coextensive with the Equal Protection Clause and Title VI. Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003); Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 387–88, 391 (1982); *see also* Greenfield, *supra* note 2, at 208–09 (noting that the Court found Title VI's requirements for private universities to be the same as the Equal Protection Clause's for public universities).

24. *See* Greenfield, *supra* note 2, at 203 (noting that some universities may "see themselves as having an obligation to take race into account to create a campus community that embodies their social, moral, ideological, religious, and educational commitments").

25. 303 Creative LLC v. Elenis, 600 U.S. 570, 594 (2023).

The legal landscape on June 30 is thus more promising than it was on June 29. You can assert an expressive-association right to choose your faculty and students because those are the speakers in your pure-speech organization. And this right can trump mere statutory antidiscrimination policies.

And just in time! The day before yesterday, you could simply rely on your affirmative action program's legality. You've never before needed a constitutional theory that would let you ignore the statutes, but now you do. The expressive-association theory can give you what you need and more: if this works, not only can you go back to running your previous programs, but now you can run any affirmative action program you like, even one that would have been illegal under *Grutter*. If you like, you can use quotas and pursue outright racial balancing or try to remedy societal discrimination, rather than be limited to the single rationale of the educational benefits of diversity.[26] If the government can't force the Boy Scouts to have a gay assistant scoutmaster or force Lorie Smith to design a pro-gay-marriage website, what right does it have to tell your university what speakers to choose?

If only Harvard's lawyers had argued this First Amendment theory.[27] This should be the next frontier in private-university affirmative-action litigation—or the basis of a private university's defense next time it gets sued.[28]

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26. *See* Greenfield, *supra* note 2, at 212 ("Institutions would no longer be limited to the notion that attention to race is necessary to further diversity."); *see also id.* at 238–39 (arguing that private universities could use their belief in diversity as a basis to consider race in admissions through expressive association).

27. This is unrelated to the First Amendment theory argued in the American Council on Education's (ACE) amicus brief in *Students for Fair Admissions*. *See generally* Brief of American Council on Education, et al. as Amici Curiae in Support of Respondents, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1199), 2022 WL 3130689 [hereinafter ACE Brief]. ACE's argument was that a ruling against consideration of race would selectively chill applicants' essays, discouraging students from writing about their racial or ethnic identities. *Id.* at 4–5, 29–31, 2022 WL 3130689, at *4–5, *29–31.

28. *See* Greenfield, *supra* note 2, at 203–04 (noting that this would be a move for "creative and courageous plaintiffs," amounting to "jurisprudential jujitsu"); *see also id.* at 249–50 (arguing that a First Amendment claim could support using race in college admissions).

Greenfield suggests that universities might also want to consider religious freedom claims under the Religious Freedom Restoration Act (RFRA). *Id.* at 205 n.15. I am skeptical of such claims as a general matter. The free speech claims I discuss here involve a conflict between a statute and the First Amendment, where the First Amendment wins. But because there is no general constitutional right to a

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Part II of this Article presents this theory and explores some of its complexities.

The Supreme Court has never endorsed a strong form of expressive-association rights, whereby restrictions on an expressive organization's ability to choose its members is a per se burden. Antidiscrimination cases such as *Bob Jones University v. United States*[29] and *Roberts v. United States Jaycees*[30] are still good law. Your expressive-association claim will thus look better if your facts look a lot like those in *Boy Scouts*. But then you have a problem. The assistant scoutmaster was an authority figure who spoke on behalf of the organization and was expected to inculcate the organization's values.[31] Many universities aren't like that—at least not with

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religious exemption from generally applicable law, *see* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990), *superseded by statute*, Religious Freedom Restoration Act, Pub. L. No. 103–141, 107 Stat. 1488 (1993), a religious rights case will just be a conflict between one statute (RFRA) and another (Title VI or § 1981), and the resolution of the conflict will be a statutory matter. Under RFRA, someone who challenges a university's racial affirmative action program under Title VI or § 1981 can overcome the university's RFRA defense by showing that the antidiscrimination law in question is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The case that the statutory interest in eradicating racial discrimination is compelling will be fairly straightforward, and the case that forbidding such discrimination (or making such discrimination the trigger for pulling government funding) is the least restrictive means of pursuing that interest will likewise be fairly straightforward.

Likewise, Rachel Moran suggests that religious universities might be able to justify the use of race-based affirmative action under the Free Exercise Clause. Rachel F. Moran, *Affirmative Action, Religious Liberty, and the Freedom to Discriminate*, CANOPY F. (Mar. 13, 2024), https://canopyforum.org/2024/03/13/affirmative-action-religious-liberty-and-the-freedom-to-discriminate/ [https://perma.cc/8HTL-XPGJ]. I am likewise skeptical of this claim. Cases, such as *Carson v. Makin*, 596 U.S. 767 (2022), have struck down laws because they treat religious organizations differently from secular ones, *see, e.g.*, *id.* at 789; but Title VI and § 1981 treat all institutions identically, so any claim for a religious exemption would seem to founder on *Smith*.

However, there may indeed be a viable religious liberty claim to the extent the university can argue that a statute (because it has exceptions) is not truly generally applicable, *see, e.g.*, Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam), or to the extent the people covered by the university's affirmative action program can be characterized as "ministers" within the meaning of the ministerial exception, *see* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).

29. 461 U.S. 574 (1983).

30. 468 U.S. 609 (1984).

31. Boy Scouts of Am. v. Dale, 530 U.S. 640, 649–50 (2000).

respect to faculty and students—because they have strong faculty- and student-based academic-freedom and free-speech norms.

The universities that are the best fit for an expressive-association theory are those that expect or require faculty and students to promote university values, which might require weakening academic-freedom and free-speech norms. Other universities might be able to use the theory, but it won't be as good a fit, so the result will be harder to predict.[32]

Part III addresses various follow-on questions:

- Does the racial angle matter, given that the other cases arose in the context of sexual-orientation discrimination? (The cases don't support treating these different types of discrimination differently.)
- Does the market angle matter, since the other cases arose in the context of volunteer or nonprofit activity? (*303 Creative* suggests it doesn't.)
- What about laws such as Title VI, which don't regulate universities outright but merely impose conditions on recipients of federal money—bringing into play the looser constraints of the unconstitutional conditions doctrine? (This is the greatest hurdle. But the unconstitutional conditions doctrine bars pulling funding from the entire university based on discrimination by any single unit.)
- Could public institutions use this theory too? (No.)

Part IV asks how far this theory can go. Based on recent litigation, I identify three flexibilities in the doctrine, which help us understand what doctrinal movement is plausible.

- One is what it takes to make a substantial burden on an association's expression.
- Another is what governmental interests can be characterized as "compelling," so as to overcome the expressive-association right under strict scrutiny.
- But the biggest question is what activities are characterized as "expressive." That's a threshold issue—if the action isn't expressive, then First Amendment analysis isn't even relevant. You can't unilaterally make nonexpressive conduct, such as tax avoidance, expressive by talking about it or claiming civil disobedience.[33] This threshold question preserves the core of antidiscrimination law in the vast majority of cases, even for expressive associations. But some

32. Thus, this Article isn't as positive about the possibilities of the *Boy Scouts* affirmative-action theory as some of the other literature. *See infra* note 86.

33. *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006).

activities, such as flag burning or parades, are inherently expressive.[34] The test has to do with social expectations and how the particular conduct is likely to be perceived.[35] This test is flexible, and different attitudes on the part of courts can lead to different results.

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The key takeaway, though, is that—at least in private education, and possibly more broadly—the First Amendment expressive-association theory is potentially liberating for affirmative action.[36] The expressive-association cases have been criticized as giving a free pass to racists, sexists, and homophobes.[37] (Perhaps; but they have rights too.) But affirmative action can dwarf all of that. For decades, affirmative action has tried to fit into the constraining framework of Equal Protection/Title VI—satisfying neither affirmative-action opponents who advocate colorblindness nor proponents who would prefer programs forthrightly grounded in reparations for past injustices or remedying current inequalities.[38] Now that Equal Protection/Title VI doctrine has come down strongly for colorblindness, the First Amendment theory has the potential (at least in some private universities) to convert affirmative action from a grudgingly allowed concession to a strongly protected right.

## I. HOW TO BE LIKE THE BOY SCOUTS

### A. *The Prima Facie Case*

The Boy Scouts revoked assistant scoutmaster James Dale's adult membership in the Boy Scouts when it found that he was gay.[39] It explained that the Boy Scouts "specifically forbid[s] membership to homosexuals."[40] Dale sued, and the state courts found that such discrimination violated New Jersey's public

34. Texas v. Johnson, 491 U.S. 397, 406 (1989); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 568 (1995).

35. *Johnson*, 491 U.S. at 405.

36. *See* Greenfield, *supra* note 2, at 212 (calling this theory "liberating" for private universities).

37. *See, e.g.*, *id.* at 202 (calling *303 Creative*, as well as *Students for Fair Admissions*, "inequality-producing").

38. *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2167–68 (2013) (giving examples from both sides).

39. Boy Scouts of Am. v. Dale, 530 U.S. 640, 644–45 (2000).

40. *Id.* at 645.

accommodations statute.[41] Nonetheless, the Boy Scouts won: the Supreme Court held that applying the statute that way violated the Boy Scouts' expressive-association right.[42]

First, the Court held that, as a threshold matter, the expressive-association right applied.[43] This right "is not reserved for advocacy groups"; it applies more generally to any groups that "engage in some form of expression, whether it be public or private."[44] The Court determined that the Boy Scouts was expressive by examining its mission statement—part of the mission is "helping to instill values in young people," which the organization does through its scoutmasters and assistant scoutmasters.[45] "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."[46]

Second, the Court held that "the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."[47] The Boy Scouts' teachings were contrary to homosexuality—the Court deferred to the organization's assertion that this was so, but there was also some evidence of this in the organization's past statements.[48] And "Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'"[49] Here, too, the Court deferred to the "association's view of what would impair its expression," but it was also clear that, in light of Dale's identity and visible gay activism, his "presence in the Boy Scouts would, at the very least, force the organization 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."[50]

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41. *Id.* at 646–47.
42. *Id.* at 661.
43. *Id.* at 648.
44. *Id.*
45. *Id.* at 649.
46. *Id.* at 650.
47. *Id.*
48. *Id.* at 650–53. *But see* Greenfield, *supra* note 2, at 216 (discussing the lack of deference, in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), to "the group's own view of whether the inclusion of women as full members would burden its interests"); *id.* at 223.
49. *Boy Scouts*, 530 U.S. at 653 (quoting Reply Brief for Petitioner at 5, *Boy Scouts*, 530 U.S. 640 (No. 99-699)).
50. *Id.*; *see also* Greenfield, *supra* note 2, at 221–26 (discussing *Boy Scouts* and its various court opinions).

Let's see how universities would do under this framework.[51]

Do universities engage in expression?[52] They're at least as expressive as the Boy Scouts—probably more so.[53] Expression is by far the most important thing that universities do.[54]

Professors spend their classroom time talking to and with students. Professors and students read books and write papers.

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51. A recent treatment of this issue, written simultaneously with and independently from this Article, is Greenfield, *supra* note 2; *see also id.* at 205 n.16. For a brief anticipation of Greenfield's argument, see Kent Greenfield & Eduardo Peñalver, *How the First Amendment Can Save Affirmative Action*, THE HILL (July 19, 2023, 12:30 PM), https://thehill.com/opinion/congress-blog/4104184-how-the-first-amendment-can-save-affirmative-action/ [https://perma.cc/2HFW-6MEB]. In the more than two decades between *Boy Scouts* (at one end) and *Students for Fair Admissions* and *303 Creative* (at the other), only two commentators seriously analyzed the affirmative action issue. *See generally* David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619 (2001); David P. Gearey, Comment, *New Protections After* Boy Scouts of America v. Dale*: A Private University's First Amendment Right to Pursue Diversity*, 71 U. CHI. L. REV. 1583 (2004). One article from 2000 argued that universities (including public ones) have a First Amendment right to consider race in admissions, but that article focused on the *Bakke* academic freedom rationale discussed in notes 60–75 *infra*, not on the then-upcoming *Boy Scouts* decision. *See generally* Alfred B. Gordon, *When the Classroom Speaks: A Public University's First Amendment Right to a Race-Conscious Admissions Policy*, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 57 (2000). A few other articles discussed the idea very briefly. Theodore Cross, *Has the Supreme Court's "Boy Scouts Ruling" Provided a Safe Harbor for Affirmative Action in Higher Education?*, J. BLACKS IN HIGHER EDUC., Winter 2000–2001, at 6, 6; David J. Trevino, Comment, *The Currency of Reparations: Affirmative Action in College Admissions*, 4 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 439, 466–68 (2002); Richard A. Epstein, *Foreword: "Just Do It!": Title IX as a Threat to University Autonomy*, 101 MICH. L. REV. 1365, 1385 (2003). For an extremely early preview of this argument, see Russell L. Weaver, *Constitutional Law—Civil Rights: Towards Resolving 42 U.S.C. § 1981 with the Right to Privacy and the Right to Associate*, 42 MO. L. REV. 312, 313 n.8 (1977).

52. *See Boy Scouts*, 530 U.S. at 648, 655 (evaluating the requirements for an association to be an "expressive association"); *see also* Gearey, *supra* note 51, at 1587, 1595 (discussing whether private universities are expressive associations).

53. What of the distinction between a university's own views and the (possibly dissenting) views of the faculty and students? On the potential problems that academic freedom poses for this expressive association theory, *see infra* text accompanying notes 82–85; *infra* Section II.C.

54. Thus, while Title VI applies to all institutions receiving federal funds, not just universities—and the *Students for Fair Admissions* holding thus has potential consequences for all such institutions—the potential First Amendment theory is most relevant for expressive institutions, of which universities are a prime example. *See* Greenfield, *supra* note 2, at 210 (noting that the holding sweeps far beyond universities); *see also id.* at 251 ("Universities and colleges are distinctly expressive in ways that most businesses are not."); *id.* ("[A] holding in favor of a college or university claimant [may be] rooted partially in the unique attributes of a university.").

The professors explain to the students why their papers are bad; the students revise. The students write exams; the professors read them and write comments. The professors opine on how good the students' work is, which might be boiled down to a convenient expression such as "B+." The administrators produce two all-important pieces of paper: the transcript, which lists a student's classes and grades, and the diploma, which names the university and certifies that a student has completed the requirements. Those two pieces of paper (especially the diploma) are the main reasons why students go into debt and pay universities the big bucks.[55] This is all speech—"pure speech."[56]

What does the university do other than speech? Dorms, cafeterias, gyms, and parking are comparatively insignificant. If necessary, the university could just rely on third-party vendors for those.

Perhaps more problematic for the "universities as expressive" theory is that many universities have substantial nonexpressive activities that relate very tangentially to teaching and learning. Some argue that these activities are distant from universities' educational mission—or that they wag the dog and make universities like corporations.[57] These include scientific labs that generate marketable patents, medical centers that treat patients, sports teams that generate revenue, and enormous endowments.[58] Perhaps some of these

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55. *E.g.*, David A. Jaeger & Marianne E. Page, *Degrees Matter: New Evidence on Sheepskin Effects in the Returns to Education*, 78 REV. ECON. & STAT. 733, 733 (1996); Brandon Joel Tan, *The Consequences of Letter Grades for Labor Market Outcomes and Student Behavior*, 41 J. LAB. ECON. 565, 567 (2023) (finding that students with higher grades tend to earn higher salaries). *Listen to* INDIGO GIRLS, *Closer to Fine*, *on* INDIGO GIRLS (EXPANDED EDITION) (Epic Records 1989) ("I spent four years prostrate to the higher mind / Got my paper and I was free.").

56. 303 Creative LLC v. Elenis, 600 U.S. 570, 587 (2023).

57. Fredrik deBoer, *Why We Should Fear University, Inc.*, N.Y. TIMES MAG. (Sept. 9, 2015), https://www.nytimes.com/2015/09/13/magazine/why-we-should-fear-university-inc.html [https://perma.cc/99UV-93GB].

58. *See, e.g.*, Mark A. Lemley, *Are Universities Patent Trolls?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611 (2008); Barak Richman, *Universities Are Prioritizing Their Health Systems over Teaching. That's Killing Academic Freedom.*, POLITICO (Dec. 31, 2023, 9:00 AM), https://www.politico.com/news/magazine/2023/12/31/universities-no-longer-fight-for-academic-freedom-blame-the-hospitals-00133272 [https://perma.cc/MM8X-63ZF]; CHARLES T. CLOTFELTER, BIG-TIME SPORTS IN AMERICAN UNIVERSITIES xiii (2d ed. 2019); Thomas Gilbert & Christopher Hrdlicka, *A Hedge Fund That Has a University*, WALL ST. J. (Nov. 13, 2017, 6:20 PM), https://www.wsj.com/articles/a-hedge-fund-that-has-a-university-1510615228 [https://perma.cc/P49E-7YJV].

could be characterized as hands-on activities that are ancillary to teaching—but surely not all of them. (Likewise, the Girl Scouts run a lucrative cookie operation.[59]) But to the extent that the university has at least *some* segregable units that focus primarily on teaching, learning, reading, and writing—call it the "College of Arts and Sciences" model—at least *those* units are expressive organizations that largely engage in pure speech.

Focusing on that core model, the Supreme Court has often written that universities play a unique First Amendment role. Long ago, Justice Felix Frankfurter wrote in *Sweezy v. New Hampshire*[60] about "the dependence of a free society on free universities."[61] He quoted the following language from a report on South African universities:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[62]

Note that selection of faculty and students are two of the essential freedoms of the university.

Later, in *Keyishian v. Board of Regents*,[63] the Court wrote that academic freedom is "a special concern of the First Amendment"[64]—recognizing the distinctive place of universities in First Amendment doctrine because of teaching, research, and related expressive activities.[65] And some other

59. Grace Donnelly, *Meet the Cookie Executives: These Girl Scouts Are Deciding the Future of Your Favorite Treats*, FORTUNE (Apr. 27, 2018, 1:40 PM), https://fortune.com/2018/04/27/girl-scouts-cookie-executives/ [https://perma.cc/6RNF-FCB3].

60. 354 U.S. 234 (1957).

61. *Id.* at 262 (Frankfurter, J., concurring).

62. *Id.* at 263; *see also* Greenfield, *supra* note 2, at 236 (calling universities "intentionally compositional," i.e., they "express their core values . . . by way of choices as to who to invite into their community").

63. 385 U.S. 589 (1967).

64. *Id.* at 603.

65. *See* Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 190 (2021) (recognizing the important role of universities in First Amendment discussions).

cases—*Garcetti v. Ceballos*[66] and *Rust v. Sullivan*[67]—have at least hinted that free-speech norms might apply more stringently in universities.[68]

These weren't affirmative action cases, but Justice Lewis Powell, citing *Sweezy* and *Keyishian*, tied it all together in *University of California Regents v. Bakke*[69]: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."[70] Justice Powell wrote that the university's diversity goal was "of paramount importance in the fulfillment of its mission" and pointed out that, while diversity is most important "at the undergraduate level," it is also important in medical and law schools.[71]

Twenty-five years later, *Grutter* explicitly adopted Justice Powell's opinion, quoting his First Amendment–related discussion and noting universities' "special niche in our constitutional tradition," grounded in "the expansive freedoms of speech and thought associated with the university environment."[72]

The Supreme Court's last word was in *Students for Fair Admissions*. The Court didn't exactly endorse Justice Powell's views: it quoted Justice Powell's language about a university's academic freedom but noted that Justice Powell wasn't

66. 547 U.S. 410, 425 (2006) ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

67. 500 U.S. 173, 200 (1991) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.").

68. *See also* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1499–1501, 1513, 1516–17 (2007) (outlining the role of universities within First Amendment discussions).

69. 438 U.S. 265 (1978).

70. *Id.* at 312.

71. *Id.* at 313–14; *see also id.* at 404–05 (Blackmun, J., concurring) ("I, of course, accept . . . that . . . academic freedom is a special concern of the First Amendment . . . .").

72. Grutter v. Bollinger, 539 U.S. 306, 329 (2003); *see also* ACE Brief, *supra* note 27, at 7–11 (explaining that the First Amendment gives colleges and universities broad discretion to define their missions and shape their student bodies).

speaking for anyone else on the Court.[73] But the Court didn't specifically disapprove of Justice Powell's First Amendment/academic freedom angle either (it just made strict scrutiny harder to satisfy).[74] So, while *Grutter* (and thus Justice Powell's *Bakke* opinion) can no longer be taken at face value, the idea that (at least private) universities are entitled to some amount of special First Amendment–inspired respect hasn't been rejected.

Of course, the Justice Powell view isn't a stand-alone First Amendment theory grounded in expressive-association rights—it's just an argument for greater Equal Protection deference. But it shows that treating universities as expressive associations is plausible and perhaps even obvious.[75]

But back to the Boy Scouts analogy. Like the Boy Scouts, universities also have mission statements—many of which explicitly incorporate diversity, antiracism, racial justice, reparations, and the like.[76] (I'll say "diversity" for simplicity,

73. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208–10 (2023).

74. Justice Sonia Sotomayor discussed Justice Powell's First Amendment analysis further in her dissent. *Id.* at 331–33 (Sotomayor, J., dissenting).

75. Horwitz, *supra* note 68, at 1508, 1517, 1549–50. The idea that universities should get special consideration as a matter of First Amendment expressive association theory might also get support from Justice Sandra Day O'Connor's concurrence in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 631–40 (1984) (O'Connor, J., concurring in part and concurring in the judgment); *see also* Gearey, *supra* note 51, at 1598 n.81 (discussing Justice O'Connor's concurrence in *Roberts*). On this point, see *infra* Section III.B.

76. *E.g.*, COLUMBIA UNIV., OFF. OF THE PROVOST, DIVERSITY MISSION STATEMENT, https://provost.columbia.edu/content/diversity-mission-statement [https://perma.cc/TXW8-CXEC] ("Columbia is dedicated to increasing diversity in its workforce, its student body, and its educational programs."); STANFORD UNIV., STANFORD | IDEAL, STATEMENT ON DIVERSITY AND INCLUSION, https://idealdeisurvey.stanford.edu/about-survey/message-president-and-provost/survey-announcement [https://perma.cc/FB4U-7ZKV] ("Higher education has the mission to advance human welfare in a rapidly changing world. Institutions that are truly inclusive and embrace and advance diversity everywhere—in every program, every school and every area of operation—will be the most successful. Stanford must become one of those institutions!"); UNIV. OF MINN., OFF. FOR EQUITY & DIVERSITY, MISSION, VISION, & VALUES, https://diversity.umn.edu/mission-vision-values [https://perma.cc/Q8JA-NYAB] ("We increase access to higher education by advocating for members of our community and emphasizing the importance of diversity in promoting learning and development at the University of Minnesota."); *see also* Greenfield, *supra* note 2, at 235 (noting that most persuasive claims will come "from colleges or universities with long-standing and mission-driven associational interests that support the use of race in defining their student communities"); *id.* at 235–36 (discussing how private universities may be able to assert a First Amendment right to expressive association to be exempted from new admissions requirements).

but this can include a wide range of views regarding the importance of having people of different races, or a particular racial balance, within the university community. Indeed, if this expressive-association theory is viable, universities won't need to be constrained by *Grutter*'s specific "educational benefits of diversity" rationale.[77])

In most cases, universities' commitment to diversity is probably clearer than was the Boy Scouts' opposition to homosexuality.[78] Just in case, universities should be explicit about their views; if they haven't been up-front about their views on diversity and racial justice (perhaps to keep their affirmative-action programs looking legal under *Grutter*), they should become more up-front now. But regardless, as in *Boy Scouts*, we should defer to a university's representations of its own values; any past statements are "instructive";[79] and for most universities, one should be able to find abundant evidence that their diversity commitment is sincere (even if some may find this commitment to be somewhat skin-deep[80]). As with the

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77. *Grutter*, 539 U.S. at 319, 327–33.

78. *See* Greenfield, *supra* note 2, at 204 ("[T]he First Amendment interests that many universities can claim are stronger, more persuasive, and more longstanding than those that formed the gravamen of the claims in *303 Creative* and its forebears.").

79. Boy Scouts of Am. v. Dale, 530 U.S. 640, 651 (2000).

80. For instance, Nancy Leong writes:

> Striving for numerical diversity, without more, results in awareness of nonwhiteness only in its thinnest form—as a bare marker of difference and a signal of presence. This superficial view of diversity consequently leads white individuals and predominantly white institutions to treat nonwhiteness as a prized commodity rather than as a cherished and personal manifestation of identity. Affiliation with nonwhite individuals thus becomes merely a useful means for white individuals and predominantly white institutions to acquire social and economic benefits while deflecting potential charges of racism and avoiding more difficult questions of racial equality.

Leong, *supra* note 38, at 2155; *see also id.* at 2191–94 (discussing how this process plays out in universities); *id.* at 2218–19 (noting how this process fails to effectively foster inclusiveness); Richard Thompson Ford, *Capitalize on Race and Invest in Justice*, 126 HARV. L. REV. F. 252, 253 (2013) ("The complaint of commodification has some bite when applied to university admissions policies, where perhaps we are entitled to expect loftier motives to predominate."); *id.* at 255; Mark J. Perry, *Glenn Loury: "Affirmative Action is Dishonest. It's Not About Equality, It's About Covering Ass"*, AEI (June 21, 2019), https://www.aei.org/carpe-diem/glenn-loury-affirmative-action-is-dishonest-its-not-about-equality-its-about-covering-ass/ [https://perma.cc/K72G-QUBZ] (quoting Glenn Loury as saying, "I'm impugning the motives of universities. We're content with representation as distinct from achievement").

Boy Scouts, universities might be trying to convey a particular message—here, racial diversity—but if their faculty or student body were insufficiently diverse, that would "send[] a distinctively different message."[81]

One might object to the attempt to fit universities into a Boy Scouts mold. But many of these objections are already dealt with in *Boy Scouts* itself.

Not everyone at a university has to believe in diversity; many private universities voluntarily adopt free-speech norms that preclude forcing faculty or students to believe anything particular;[82] some faculty or students might oppose diversity goals or affirmative action. But the Boy Scouts didn't insist on ideological homogeneity: "the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"[83]

A university can have many other values, and perhaps diversity isn't most universities' *primary* value. But the same is true of the Boy Scouts: "[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."[84] Similarly, even if a university decided to teach the importance of diversity "by example" rather than through explicit instruction, that wouldn't matter, because "the First Amendment protects [an organization's] method of expression."[85]

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81. *Boy Scouts*, 530 U.S. at 656; Bernstein, *supra* note 51, at 624, 629–31, 634–38; Gearey, *supra* note 51, at 1588–89, 1601–02.

82. *See* FOUND. FOR INDIVIDUAL RTS. EXPRESSION, PRIVATE UNIVERSITIES, https://www.thefire.org/research-learn/private-universities [https://perma.cc/X2X3-E7MZ]; *see also, e.g.*, EMORY UNIV., POLICY 8.14, RESPECT FOR OPEN EXPRESSION POLICY, § 8.14.1, https://emory.ellucid.com/documents/view/19648?security=c6f36f9de43a2cd25fc99614d09384f649a313cf [https://perma.cc/JDH3-S2F9] (affirming students and faculty members' right to open expression).

83. *Boy Scouts*, 530 U.S. at 655; *see also* Bernstein, *supra* note 51, at 625 (noting that the *Boy Scouts* Court provided a broad interpretation of expressive association); Gearey, *supra* note 51, at 1590, 1598, 1600. Nonetheless, on the problems that free speech and academic freedom might pose for the theory, see *infra* Sections I.C.1 and I.C.2.b.

84. *Boy Scouts*, 530 U.S. at 655.

85. *Id.* at 655–56; Bernstein, *supra* note 51, at 625, 635; *see also* Gearey, *supra* note 51, at 1589–90, 1595–96, 1598–99, 1601–03 (analyzing the *Boy Scouts* holding in a private university context).

### B. *Strong and Weak Expressive Association Rights*

But this is only the beginning of the analysis. Applying *Boy Scouts* to affirmative action requires some extra steps, because the Court has never articulated a strong expressive-association vision. The *Boy Scouts* view is limited and may not support an affirmative-action right at all universities. Only some will be able to take advantage of the expressive-association right and bring faculty and students within the doctrine.[86]

In Subsections 1 through 3 below, I explore the consequences of taking a strong expressive-association vision seriously—it would likely mean the invalidity of antidiscrimination law whenever an expressive association engages in expression. Subsection 4 explains the weaker expressive-association right that's actually present in the caselaw—one where the claimant has to show an actual burden on its ability to speak, for instance where the law outright forces a change in the organization's message or where the law prevents the organization from choosing its desired leaders or spokespeople.

#### 1. Compelled Association as Compelled Speech

The *Boy Scouts* holding depended on finding that the New Jersey antidiscrimination law imposed a "significant[] burden" on the Boy Scouts' ability to express itself.[87] Do antidiscrimination laws significantly burden the university's ability to spread its ideas? Perhaps the compelled association is itself a significant burden. As with the Boy Scouts, perhaps we should defer to the university's view on what would burden its ability to spread its ideas.[88] And even if we ignore deference, perhaps we could still get the same result: if a gay assistant scoutmaster's mere *presence* would "force the [Boy Scouts] to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate

86. The other contributions to this literature don't stress this aspect of *Boy Scouts*; this Article thus makes a more limited point about the possible *Boy Scouts* affirmative action theory than other articles. Greenfield, for instance, writes that "[i]f the Court applies its precedents honestly, these beliefs should easily win recognition as the kind of interests protected by the First Amendment," Greenfield, *supra* note 2, at 240—but Greenfield doesn't focus on the limitations that I discuss in Section I.B.4 *infra*, such as whether the affected students or faculty are authority figures or speak on behalf of the university. *See id.* at 235–41 ("Fitting a College's Claim into Existing Precedent"). Likewise with Bernstein, *supra* note 51, at 634–35, and Gearey, *supra* note 51, at 1595–1603.

87. *Boy Scouts*, 530 U.S. at 653.

88. *Id.*; Gearey, *supra* note 51, at 1588.

form of behavior,"[89] couldn't the same be true of the university when it speaks, contrary to its professed diversity values, through a non-diverse set of people?

This strong view would be based on a couple of analogies: (1) speech compulsion is just as disfavored, under the First Amendment, as speech restriction; (2) freedom of speech is just as protected as freedom of expressive association; and, consequently, (3) compelled speech is just as bad as forced association in an expressive organization.

First, observe the connection between *freedom of speech* and *freedom from compelled speech*. The right to speak implies the right to choose *whether* one will speak—i.e., the right to choose *not* to speak. Forcing you to speak denies you the right to choose whether to speak. In compelled speech cases, we don't look deeply into *why* the speaker doesn't want to say what they're being compelled to say, and we don't ask precisely *how* the compelled speech would harm the speaker or alter their message. It's enough that there's a compulsion. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."[90] (The government might still win, but this is a matter of evaluating the compulsion under the appropriate degree of scrutiny, not of determining whether a compulsion exists to begin with.)

Compelled speech is at least as much of an imposition as bans on speech. "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[91]

Further, it does not cure the compulsion that you can distance yourself from the speech. One who is forced to speak "may be forced either to appear to agree with [the compelled speech] or to respond."[92] Then "protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."[93]

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89. *Boy Scouts*, 530 U.S. at 653.

90. Riley v. Nat'l Fed'n for the Blind of N.C., Inc., 487 U.S. 781, 795 (1988).

91. *Id.* at 796–97.

92. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 15 (1986) (plurality opinion) (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 98–100 (1980) (Powell, J., concurring in part and in the judgment)).

93. *Id.* at 16.

This "constitutional equivalence of compelled speech and compelled silence"[94] goes back to cases such as *Miami Herald Publishing Co. v. Tornillo*,[95] which held that newspapers can't be required to give equal space to the candidates they criticize,[96] and *Wooley v. Maynard*,[97] which held that freedom-loving New Hampshire can't force drivers to display "Live Free or Die" on their license plates.[98] "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[99] Similarly, as in *Hurley*, "[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid, . . . one who chooses to speak may also decide what not to say."[100] "[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[101]

In fact, speech compulsion may be even *more* problematic than speech prohibition—"a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence"[102]—because of the dignitary harm of being forced to affirm something contrary to conscience.[103]

Second, let's connect freedom of speech with expressive-association rights.[104] Why do we care about expressive association? Because in addition to our right to individual free speech, we also have a right to join others in speaking. The Supreme Court has protected expressive-associational rights

94. *Riley*, 487 U.S. at 797.

95. 418 U.S. 241 (1974).

96. *Id.* at 257–58.

97. 430 U.S. 705 (1977).

98. *Id.* at 713.

99. *Id.* at 714 (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

100. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. Inc., 515 U.S. 557, 573 (1995) (quoting Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 11 (1986)).

101. *Id.* at 575.

102. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 893 (2018) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943)).

103. *Cf.* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (grounding the Fifth Amendment privilege against self-incrimination in the need "to respect the inviolability of the human personality," so that the government must "produce the evidence against [the accused] by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth").

104. *See* Greenfield, *supra* note 2, at 214 (discussing the similarity between speech and association claims in the case law).

for decades, such as in the context of people's right to organize political parties.[105]

And this right covers more than just parties. In *Roberts v. United States Jaycees*, the Court generally recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment."[106] The First Amendment protects "collective effort on behalf of shared goals"[107]—the expressive-association right is a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[108]

Moreover, both the individual and associational rights have both their positive and negative versions. The right to speak implies the right against compelled speech, i.e., the right *not* to speak when one doesn't want to. And the right to join with others in speaking should, similarly, imply the right to choose *whether* to join with particular people in speaking, i.e., the right to *refuse* to join those whom one doesn't want to join.

One should have First Amendment protection not only when one is "prohibited . . . from actively associating" but also when one is prohibited "from refusing to associate."[109] "[A] regulation that forces the group to accept members it does not desire . . . may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate."[110]

### 2. This Doesn't Cover Nonexpressive Association

But this freedom of *expressive* association isn't part of any *general* freedom of association, which the First Amendment does *not* protect.[111] If it did, *all* antidiscrimination law would be vulnerable, and the Court has never suggested that.[112] Even if

105. *E.g.*, Cousins v. Wigoda, 419 U.S. 477, 487–88 (1975).

106. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

107. *Id.* at 622.

108. *Id.*

109. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977), *overruled in part by* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018).

110. *Roberts*, 468 U.S. at 623.

111. U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973).

112. However, some antidiscrimination laws have been interpreted partly based on background principles of freedom of association. For instance, the Supreme Court held that private, voluntary race-based affirmative action plans do not violate Title VII (despite its literal text) in part based on the broad remedial purposes of Title VII and in part based on principles of avoiding undue regulation of private business. *E.g.*,

one does believe in a strong general freedom of association, the First Amendment would be an odd place to find it: the freedom of intimate association recognized in existing case law—which covers family relationships, sexuality, and the like—is a species of substantive due process,[113] not a free-speech right, penumbras notwithstanding.

The First Amendment thus can't generally be used to "erect a shield against antidiscrimination laws."[114] You don't get First Amendment protection just by claiming that your violation of a law is expressive or has ideological motives.[115] Conduct can't "be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[116] Otherwise, to borrow a phrase from Free Exercise doctrine, "every citizen [would] become a law unto himself."[117] The cases have therefore looked, as a threshold matter, to whether one's conduct is "inherently expressive."[118]

Thus, in *Rumsfeld v. FAIR*,[119] the Supreme Court rebuffed the law schools' attempt to bar military recruiters from their campuses to protest the military's discrimination against LGBT people.[120] Federal law conditioned universities' access to federal funds on universities allowing access to military recruiters; the law schools argued that they were entitled to a First Amendment exemption.[121] But the Court said that there was no First Amendment problem, even if one ignored the funding issue and assumed that access was required outright.[122] Pure speech is inherently expressive; flag burning is inherently

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United Steelworkers of Am. v. Weber, 443 U.S. 193, 200–01, 203–04, 208 (1979) (stressing the voluntary and private nature of the affirmative action plan); *id.* at 206 (noting that Title VII was enacted in part with "substantial support from legislators in both Houses who traditionally resisted federal regulation of private business").

113. *E.g.*, *Roberts*, 468 U.S. at 618–20; *see also* Greenfield, *supra* note 2, at 215 (explaining the difference between intimate and expressive associations).

114. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000).

115. *See* Eugene Volokh, *The First Amendment and Refusals to Deal*, 54 U. PAC. L. REV. 732, 733–35 (2023) (noting that the First Amendment generally does not protect refusals to do business); *see also* Gearey, *supra* note 51, at 1589 (recognizing the *Dale* Court's holding that organizations cannot use the First Amendment to be exempt from any incompatible state statute).

116. United States v. O'Brien, 391 U.S. 367, 376 (1968).

117. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

118. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64, 66 (2006).

119. 547 U.S. 47 (2006).

120. *Id.* at 58.

121. *Id.* at 51.

122. *Id.* at 59–60.

expressive; a parade is inherently expressive; "a law school's decision to allow recruiters on campus" isn't.[123] This is so even though law schools as a whole are expressive organizations: we look at the nature of the act, not the nature of the organization. The law schools' admission of recruiters isn't itself an expressive act, which fundamentally distinguishes that compulsion from the compulsions of speech at issue with the website designer in *303 Creative* or, say, the crisis pregnancy centers in *NIFLA v. Becerra*.[124]

How do we know that? After all, law schools "could be viewed as sending the message that they see nothing wrong with the military's policies" if they allow the recruiters.[125] But—said the *FAIR* Court—the test isn't merely whether someone *could* interpret an action to send a particular message. As in the case of shopping centers that are forced by state law to allow other people's expressive activity, there is "little likelihood that the views of those engaging in the expressive activities would be identified with the owner."[126] (This is so even though law schools are expressive associations and shopping centers aren't.) If you see military recruiters recruiting outside law schools, there are many possible explanations:

> An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.[127]

123. *Id.* at 64, 66; Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 657 (2018) (Thomas, J., concurring in part and concurring in the judgment) (listing other types of conduct that have been held to be expressive, including nude dancing, wearing armbands, conducting silent sit-ins, and refusing to salute the flag); Volokh, *supra* note 115, at 734. Carlos Ball suggests that *303 Creative* can't be distinguished from previous racist business-owner cases on the grounds that the services in *303 Creative* were more expressive: "[T]he *303 Creative* Court did not attempt to distinguish the cases on the basis of the degree of expressiveness in the commercial services at issue." Carlos A. Ball, *First Amendment Exemptions for Some*, 137 HARV. L. REV. F. 46, 63 (2023). But the *303 Creative* Court's characterization of the services as being "pure speech" does precisely that.

124. 585 U.S. 755 (2018).

125. *F. For Acad. & Institutional Rts., Inc.*, 547 U.S. at 64–65.

126. *Id.* at 65 (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980)).

127. *Id.* at 66.

And this is also why there's no expressive-association right to boycott.[128] One can always explain why one doesn't like certain people, companies, or organizations, and even explain why they should be boycotted.[129] But the boycott itself isn't inherently expressive (even though it may always have "an expressive component"[130]). If we focus on the fact that someone isn't buying from someone else, there are many nonexpressive reasons for that. And even if we focus on the fact that many coordinated buyers aren't buying from some sellers, there are nonexpressive reasons for that too,[131] such as pressuring someone to change their behavior in ways that antitrust law condemns.[132]

Similarly, cases such as *Bob Jones University v. United States*—about whether a university that barred interracial dating and marriage could qualify for a § 501(c)(3) tax exemption—wouldn't be altered by the *Boy Scouts* rationale.[133] Banning interracial dating and marriage has a perfectly clear nonexpressive reason—racists just don't like race-mixing—and thus it isn't inherently expressive.[134] This is even ignoring the possibility that tax exemption cases are often judged more leniently because tax exemptions can be characterized as a type of subsidy.[135]

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128. *See generally* Volokh, *supra* note 115 (discussing the First Amendment's applicability to boycotts).

129. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982).

130. FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 431 (1990).

131. *See, e.g.,* Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982). There was some ambiguous language in *Claiborne Hardware* suggesting that politically motivated boycotts would be protected, and, in 1990, *Superior Court Trial Lawyers Ass'n* distinguished *Claiborne Hardware* from *International Longshoremen's Ass'n* based on whether the boycott was economically motivated. *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 426–28. But any confusion in the cases has been resolved by *Rumsfeld v. FAIR*, which establishes that even boycotts that are not economically motivated aren't inherently expressive. Volokh, *supra* note 115, at 735–38; *see also* text accompanying *infra* notes 289–296.

132. *E.g.*, Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 461–62 (1941).

133. Bob Jones Univ. v. United States, 461 U.S. 574, 579–82 (1983); *see also* Alex Zhang, *Antidiscrimination and Tax Exemption*, 107 CORNELL L. REV. 1381, 1429–38 (2022) (discussing religious freedom and RFRA).

134. That these activities are non-expressive is crucial: if they were expressive, they would be covered by the rule that tax exemptions cannot be viewpoint discriminatory. Thus, one couldn't deny a tax exemption to schools that *advocated* segregation while allowing it for schools that didn't. *See* Speiser v. Randall, 357 U.S. 513, 516, 518–19 (1958).

135. *See* Alexander Volokh, *Taxing Nudity: Discriminatory Taxes, Secondary Effects, and Tiers of Scrutiny*, 2 J. FREE SPEECH L. 627, 639–40 (2023).

Couldn't one affect the likelihood that people interpret one's actions as expressive by loudly announcing one's motivation in boycotting or in excluding military recruiters? No: then one's actions would be expressive "only because [one] accompanied [one's] conduct with speech explaining it"; it would be that speech that created "[t]he expressive component of [one's] actions," and that's "strong evidence that the conduct . . . is not so inherently expressive" that it merits First Amendment protection as expressive conduct.[136] In other words, in assessing the likelihood that one's conduct is perceived as sending a message, one should ignore any accompanying speech.

### 3. Compelled Association and the Degree of Scrutiny

In short, even the strong view of compelled expressive association wouldn't grant a *general* right to avoid antidiscrimination law when one has ideological reasons for violating it. So, let's continue to explore the implications of the strong view, but limiting ourselves to when one is engaging in expressive activity.

Suppose an antidiscrimination law prohibits your expressive organization from excluding people according to some criterion (race, sex, or anything). It doesn't directly require or prohibit any speech—it just requires equal treatment of groups A and B. It amounts to a conditional command: "If you're going to join with people from group A for purposes of speech, you must also be willing to join with these other people from group B for purposes of speech."

You can comply and avoid penalties in two ways: either (1) by continuing to speak together with group A and acceding to the demand to speak together with group B or (2) by avoiding your original speech together with group A. Option (1) is a speech compulsion, because the prospect of penalties makes you speak under circumstances where you don't want to. Option (2) is a speech prohibition, because the prospect of penalties makes you not speak when you want to. *Either speak when you don't want to or don't speak when you do want to—or pay the penalty.* On this view, antidiscrimination mandates, as applied to expressive association, are no different than a combination of speech compulsions and speech restrictions.

136. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 64, 66 (2006); *see also* Volokh, *supra* note 115, at 734 (explaining the *Rumsfeld* holding in the context of refusals to deal).

Does this imply an exemption from antidiscrimination law—not just for "expressive organizations," but for any organization when it engages in expression? This reasoning wouldn't be limited to civil rights law (i.e., no Title VII for media organizations); it would also extend to other antidiscrimination regimes, for instance labor law's prohibition on discrimination or retaliation based on union status or union activity.

Maybe. But again, this wouldn't be the end of the analysis: we would still need to evaluate the government's rationale for compelling the association under the appropriate level of scrutiny. This might be harder than it sounds, because even the appropriate level of scrutiny is somewhat unclear.[137]

*Wooley v. Maynard* applied strict scrutiny to the "Live Free or Die" compelled speech claim: the state's interest had to be "sufficiently compelling," and the means were invalid "when the end [could] be more narrowly achieved."[138] *Riley v. National Federation for the Blind*[139] likewise required "compelling necessity" and "means precisely tailored."[140] In the associational context, *Roberts v. United States Jaycees* also applied strict scrutiny: the government was required to show a "compelling state interest[], unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[141] (The government won in that case because it successfully asserted an "interest in eradicating discrimination against [a state's] female citizens."[142])

On the other hand, *West Virginia State Board of Education v. Barnette*[143] didn't apply any standard that looked like strict scrutiny—asking instead whether there was a "clear and present danger."[144] (Our familiar tiers of scrutiny barely even

137. *See* Greenfield, *supra* note 2, at 213–14 (noting the failure to do compelling-interest analysis in *303 Creative* and the general inconsistency as to the level of scrutiny in the case law); *id.* at 246–47; Yoshino, *supra* note 22, at 276, 283. First Amendment law is often unclear: Robert Post writes that the doctrine "is neither clear nor logical. It is a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections." Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991); *see also* Yoshino, *supra* note 22, at 281 (quoting Post's language about the uncertainty surrounding First Amendment law and applicable standards).

138. Wooley v. Maynard, 430 U.S. 705, 705, 716 (1977).

139. 487 U.S. 781 (1988).

140. *Id.* at 800.

141. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

142. *Id.*

143. 319 U.S. 624 (1943).

144. *Id.* at 633.

existed at that time,[145] but *Barnette* didn't even apply any test that was substantively similar.) *Miami Herald Publishing Co. v. Tornillo* didn't give any standard either.[146] The Court left the level of scrutiny open in *Hurley*, since the government's interests were invalid in any event.[147]

*Boy Scouts* also didn't adopt any particular level of scrutiny: it rejected the argument that intermediate scrutiny applied and then simply stated that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[148] *303 Creative* didn't even mention strict scrutiny except when summarizing the Tenth Circuit's strict scrutiny analysis[149]—and that was a case where discussing strict scrutiny would have been highly relevant, if only to rebut the Tenth Circuit's reasoning.

So, the appropriate level of scrutiny in compelled speech and associational freedom cases is a bit ambiguous.[150] Perhaps the current Court dislikes the judge-made and somewhat artificial structure of tiers of scrutiny for fundamental rights[151]—but this phenomenon goes back further than the current Court. Perhaps the Court doesn't feel the need to always be clear on the test when it's obvious, in its view, that the government would lose. Perhaps compelled speech would even violate intermediate

145. The term "strict scrutiny" wasn't used by a federal court in a constitutional context until *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), which wasn't a First Amendment case.

146. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247–58 (1974).

147. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 578–79 (1995); *see also* Greenfield, *supra* note 2, at 220–21 (discussing how the *Hurley* Court avoided the question of the appropriate level of judicial scrutiny).

148. Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000). The *Boy Scouts* Court said its analysis was similar to that in *Hurley*. *Id.* And the discussion in *Hurley*, rather than adopt a particular labeled level of scrutiny, stated a per se rule against compelled speech, *Hurley*, 515 U.S. at 573–74, and rejected the state's antidiscrimination goal as impermissible when applied to altering the content of someone's speech, *id.* at 578–79. *See also* Greenfield, *supra* note 2, at 226 (discussing the level of scrutiny in *Boy Scouts*).

149. 303 Creative LLC v. Elenis, 600 U.S. 570, 583 (2023); *see also* Greenfield, *supra* note 2, at 230–33 (noting that the *303 Creative* Court never explicitly applied strict scrutiny).

150. *See* Greenfield, *supra* note 2, at 216–18 (noting that the level of scrutiny in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), was ambiguous); *id.* at 228–29.

151. *Cf.* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19–24 (2022) (questioning the value of "means-end scrutiny" where "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon" (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008))).

scrutiny, which requires "ample alternative channels of communication"[152]—what does it even mean, in a compelled-speech or compelled-association context, to say that one has alternative channels of (non-?) communication? (If *303 Creative* can indeed be taken as establishing a per se rule,[153] that might introduce some welcome clarity into this area.)

Because strict scrutiny is a commonly used standard for speech restrictions, because some cases treat compelled speech as equivalent to compelled association, and because some cases treat speech compulsion as even worse than speech restriction, it seems fair to say that the standard is *at least* as strict as strict scrutiny, and perhaps in some contexts it might even approach a per se rule.

So, to sum up: If we take seriously the equivalence between free-speech and expressive-association rights, does that imply an exemption from antidiscrimination laws for any expressive organization? Or for any organization when it engages in expression? The answer is: Quite possibly, if the standard is strict scrutiny, and almost certainly, if the standard is even stricter.

### 4. The Need to Find Significant Interference

But *Boy Scouts* doesn't take such a strong view of the equivalence between free speech and expressive association. The Court's decision wasn't based on the mere fact that the Boy Scouts, an expressive organization, was being forced to accept a member (even a speaking member such as an assistant scoutmaster) that it didn't want. As the Court wrote, "an expressive association [cannot] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[154] (This is *precisely* what religious organizations can do—only as to their clergy—under the Title VII ministerial exemption.[155] But the Court hasn't said the same outside of that narrow context.[156])

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152. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

153. *See* Yoshino, *supra* note 22, at 280–81.

154. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000).

155. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

156. *See, e.g.*, *id.* at 189 (denying expressly that "a religious organization's freedom to select its own ministers" is governed by the more restrictive approach of *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

Rather, the Court stressed a few factors: (1) the Boy Scouts' mission involved opposition to homosexuality;[157] (2) Dale was a "leader" or authority figure whose duties involved speaking for the organization, i.e., inculcating the Boy Scouts' mission (even if only by example);[158] and (3) the forced association impaired the message, i.e., the disconnect between that mission and Dale's status as a visible gay activist was too great.[159] These factors are connected: the forced association is more likely to impair the message if you're forced to accept people you don't want as leaders or spokespeople; and it's easier to show an impairment of the message if the message is well-defined (e.g., stated in a mission statement).

We could call this a *weak-form* expressive-association right: instead of merely importing the compelled-speech prohibitions to compelled association, we protect expressive association when these factors are shown.[160] Alternatively, we could call this the *derivative* theory of expressive association: the expressive-association right is merely the right to come together to do things that are already independently protected by the First Amendment; thus, forced association isn't unconstitutional unless you can show some effect on your speech. Compelled speech is thus easier to get struck down than compelled association.

Factor (1), the mission prong, isn't too hard to satisfy for universities: many universities have pro-diversity statements. Factor (2), the leadership prong, is trickier, because not everyone at a university is part of the university's leadership or speaks for the institution, and not everyone's duties include inculcating values. Factor (3), showing actual burden, can be trickier still—though, as I've said for example in cases such as *Boy Scouts*, when factor (2) is present, factor (3) is easier to satisfy.

The case law is full of instances where the Supreme Court didn't really believe—or where it wasn't really argued—that the antidiscrimination law interfered with the association's ability to express its message.

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157. *Boy Scouts of Am.*, 530 U.S. at 650–53.

158. *Id.* at 649–50, 655–56.

159. *Id.* at 654–56.

160. *Cf.* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1928–41 (2006) (noting that First Amendment doctrine's restrictions on government's refusal to subsidize expressive association aren't identical to the doctrine's restrictions on government's refusal to subsidize speech).

An early case is *Associated Press v. NLRB*,[161] where the Associated Press (AP) asserted a right to hire and fire whomever it wanted based on its unreviewable determination as to who was likely to be biased or partial in their reporting.[162] That violated the National Labor Relations Act, because the supposed source of bias stemmed from union activity.[163] But, said the Court, there was no claim that the fired employee had ever shown bias or was likely to do so, and the statute didn't prohibit firing someone who in fact showed bias or prejudice.[164]

Some decades later, the Court decided various race and sex discrimination cases under the civil rights laws. In *Runyon v. McCrary*,[165] the Court rejected a private non-religious school's claim that the First Amendment allowed it to reject black students.[166] The school was segregated, but "there [was] no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."[167] As David Bernstein writes, the *Runyon* defendants made "what amounts to a short, throw-away argument" on "'freedom of association,'" and they "did not make an expressive association claim grounded in the First Amendment. They did not argue in their briefs that the school's ability to promote segregation would be compromised, nor did they provide evidence at trial on that issue."[168]

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161. 301 U.S. 103 (1937).

162. *Id.* at 131.

163. *Id.* at 129–30.

164. *Id.* at 131–32. *But see* Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1128–33 (Wash. 1997) (holding that a state statute prohibiting discrimination based on political activity could not constitutionally be applied against a newspaper's policy prohibiting employees from engaging in high-profile political activity).

165. 427 U.S. 160 (1976).

166. *Id.* at 167–68, 176.

167. *Id.* at 176 (quoting McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)); *see also id.* at 177 ("Thus, the [discriminating schools] remain presumptively free to inculcate whatever values and standards they deem desirable."); Ball, *supra* note 123, at 64 ("[I]t is not plausible to contend that the racist owners of the private schools in *Runyon*, through their teaching and counseling of students, were not sufficiently engaged in otherwise protected expression under the First Amendment"). But the issue is not whether the school owners were engaged in expressive activity—they surely were—but whether forcing them to take students they didn't want to take infringed on that expressive activity. By contrast, forcing someone to produce a message, which was at issue in *303 Creative*, directly affects that person's expression.

168. Bernstein, *supra* note 51, at 627; *see also id.* ("The *Runyon* Court ruled that the defendants failed to allege that their First Amendment expressive association rights were violated, not that a racist organization could never establish such a claim."); *id.* at 625 (noting that *Runyon* left open the issue of what might happen if

Similarly, in *Hishon v. King & Spalding*,[169] the Court rejected a law firm's claim that being forced to accept woman partners would violate its "constitutional rights of expression or association."[170] Like a school, a law firm's work product is predominantly speech—but here, too, the firm didn't show specifically how its rights or expression "would be inhibited" by such a requirement.[171]

The leading case is *Roberts v. United States Jaycees*, where the Court held that the Jaycees—a nonprofit membership corporation devoted to promoting "young men's civic organizations" and "inculcat[ing] . . . a spirit of genuine Americanism and civic interest"[172]—couldn't refuse to admit women as full members.[173] The refrain is familiar: "[T]he Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association."[174] The Jaycees had undermined its own case: since women could already be members (though second-class ones) and could participate in some activities, its claim hinged on the dubious additional symbolic effect of promoting women to full voting-member status.[175]

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the institution's speech were in some way inhibited); *id.* at 627–29 (noting that courts between *Roberts* and *Boy Scouts* ignored *Runyon* in evaluating expressive association claims and applied *Roberts* instead); *id.* at 626 (noting that the conventional wisdom about *Runyon* ignores these points); Gearey, *supra* note 51, at 1593 (discussing that the *Runyon* Court left the issue of a possible First Amendment claim regarding private discrimination unsettled); Greenfield, *supra* note 2, at 243 (discussing that *Runyon*'s association analysis may be considered dicta).

169. 467 U.S. 69 (1984).

170. *Id.* at 78.

171. *Id.* (simplifying the *Runyon* holding: "There is no constitutional right . . . to discriminate in the selection of who may attend a private school"); *see also* Volokh, *supra* note 115, at 739–40 (explaining that the *Hishon* Court reached its conclusion "because such discrimination is simply not treated as symbolic expression for First Amendment purposes").

172. Roberts v. U.S. Jaycees, 468 U.S. 609, 612–13 (1984).

173. *Id.* at 621.

174. *Id.* at 626; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657–58 (2000) (distinguishing *Roberts* on this ground); Gearey, *supra* note 51, at 1591 (discussing *Roberts*'s holding that a law reflecting a compelling state interest may only minimally burden an organization in order to trump expressive association); Greenfield, *supra* note 2, at 215–18 (discussing the likely intentional lack of clarity of the proper level of scrutiny in *Roberts*).

175. *Roberts*, 468 U.S. at 627; *see also* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) ("[T]he 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."); N.Y. State Club Ass'n v. City

And more recently, in *Rumsfeld v. FAIR*: "The [military recruiter access statute] neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy . . . ."[176]

Could a group ever show an interference with its ability to get its message out? Yes, said *N.Y. State Club Ass'n*:

> It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.[177]

When can you show such an interference?[178] Most obviously, when the law actually changes the message. In the expressive association context, this can happen when the law forces you to accommodate someone else's message, as in the St. Patrick's Day Parade in *Hurley*.[179] The parade organizers refused an application from the Irish-American Gay, Lesbian and Bisexual Group of Boston to participate in the Saint Patrick's Day

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of New York, 487 U.S. 1, 13–14 (1988) ("On its face, [the law] does not affect in any significant way the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs to abandon or alter any activities that are protected by the First Amendment. . . . [A]ppellant has not identified those clubs for whom the antidiscrimination provisions will impair their ability to associate together or to advocate public or private viewpoints.").

176. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 60 (2006). It shouldn't be enough for an organization to show that it won't be able to verbally disparage a protected group while serving it, à la "We're required to serve your kind, but we don't like it"; that sort of speech is unprotected under the "speech integral to illegal conduct" exception associated with *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). *See Rumsfeld*, 547 U.S. at 62; Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1004 (2016). Thus, the Second Circuit's preliminary holding in *New Hope Family Services v. Poole*, 966 F.3d 145 (2d Cir. 2020)—that a religious adoption agency's expressive association rights were potentially violated by a state antidiscrimination law prohibiting discrimination against same-sex couples, because the agency would be required to enforce expressive limitations on its employees when interacting with people using its services, *id.* at 178–80—seems questionable. (I discuss *New Hope*'s separate compelled speech holding at note 188 *infra*.)

177. *N.Y. State Club Ass'n*, 487 U.S. at 13.

178. *See infra* Section III.B.1.

179. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 581 (1995).

Parade.[180] The Massachusetts courts held that this violated a state antidiscrimination statute.[181] But the Supreme Court *unanimously* held that the organizers had a First Amendment right to exclude speakers whose message they disagreed with.[182] "[T]he state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."[183] And this was unconstitutional, because "a speaker has the autonomy to choose the content of his own message."[184]

Another example of forced accommodation of someone else's message was in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[185] where a state public utilities commission forced a private utility to provide space to a different organization in the newsletter that it regularly sent to its customers along with their bill.[186] And yet another was *Miami Herald Publishing Co. v. Tornillo*, where a state statute granted political candidates "equal space" in newspapers that had criticized them.[187] These are closely analogous to mandates that one "personally speak [someone else's] message"—of course they affect one's own message.[188]

When it comes to organizational membership, the cases have thus stressed that an organization should be able to discriminate ideologically against people who don't share the

180. *Id.* at 560–61.
181. *Id.* at 561–66.
182. *Id.* at 559.
183. *Id.* at 572–73.
184. *Id.* at 573.
185. 475 U.S. 1 (1986).
186. *Id.* at 4–7.
187. Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 (1974); *see also* Volokh, *supra* note 115, at 742 ("[N]ewspapers may well have the right to refuse to, for instance, publish op-eds by Israeli citizens or political advertisements submitted by Israeli companies." (citing *Miami Herald*, 418 U.S. at 256)).
188. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 63 (2006). Another example is *New Hope Family Services v. Poole*, 966 F.3d 145 (2d Cir. 2020), where a Christian ministry that ran an adoption agency challenged a New York state law preventing it from declining to work with same-sex couples—raising, among other claims, a compelled speech claim. *Id.* at 148–49. The way the law affected its message was not by forcing it to work with people it didn't want to work with, but by forcing it to assert, as part of the adoption process, that a placement with a same-sex couple would be in the best interests of the child. *Id.* at 176–78. (I discussed *New Hope*'s separate holding on expressive association at note 176 *supra*.)

organization's goals.[189] (Thus, universities could use an expressive-association theory to assert their right to have speech codes,[190] though that's beyond the scope of this Article.)

A particular instance of an antidiscrimination law altering the message is where the discrimination *is* part of the message.[191] If I want to cast *Othello* the usual way, where Othello is black and everyone else is white, preventing race-based casting is an obvious interference with my artistic vision. The same is true if Patrick Stewart does *Othello* with race-reversed casting,[192] if Lin-Manuel Miranda does *Hamilton* with people of color playing the Founding Fathers (only George III gets to be white),[193] if the producers of *The Bachelor* and *The Bachelorette* discriminate against non-whites (presumably because they think that will increase their revenues),[194] or if Woody Allen casts predominantly white people in his movies simply because that's who "fits the part most believably in [his] mind's eye" and "feels dramatically correct" to him.[195] Even though there's no "bona fide occupational qualification"

189. *See* Associated Press v. NLRB, 301 U.S. 103, 131–32 (1937) (noting that AP could fire reporters who actually showed bias or prejudice); Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 580 (1995); *see also* Greenfield, *supra* note 2, at 237 (giving hypothetical examples where universities are forced to accept students who espouse beliefs contrary to their missions or values). Sharing the organization's goals could include acting in conformity to the organization's mission, so a religious pro-life pregnancy counseling organization that opposes extramarital sex and abortion should probably be able to engage in employment discrimination not only against people who *advocate* extramarital sex and abortion but also against people who *engage in* extramarital sex and *obtain* an abortion. *See* Slattery v. Hochul, 61 F.4th 278, 287–91 (2d Cir. 2023); *id.* at 288 ("To decide whether someone holds certain views—and therefore would be a reliable advocate—Evergreen asks whether that person has engaged or will engage in conduct antithetical to those views.").

190. Bernstein, *supra* note 51, at 638–41; *cf.* Horwitz, *supra* note 68, at 1551–53 (arguing that universities should enjoy institutional autonomy without judicial interference with regard to determining their institutional mission).

191. *Cf.* Greenfield, *supra* note 2, at 225 ("[*Boy Scouts*] expands [the] holding [of *Hurley*] by saying status *can be* message.").

192. J. Wynn Rousuck, *"Othello" Goes Where None Has Gone Before; Review: Patrick Stewart Stars in a Production That Reverses the Play's Racial Lines*, BALT. SUN, Nov. 19, 1997, at 1E.

193. Michael Paulson, *"Hamilton" Producers Will Change Job Posting, but Not Commitment to Diverse Casting*, N.Y. TIMES (Mar. 30, 2016), https://www.nytimes.com/2016/03/31/arts/union-criticizes-hamilton-casting-call-seeking-nonwhite-actors.html [https://perma.cc/HH68-WZ43].

194. Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986, 989 (M.D. Tenn. 2012).

195. WOODY ALLEN, APROPOS OF NOTHING 225 (2020).

exemption to Title VII for race as there is for sex,[196] such racial casting is clearly within the expressive-association right.

*Boy Scouts* presented a special case, where factors (2) and (3) were present simultaneously. When antidiscrimination law alters the organization's choice of leaders or authority figures who speak for the organization, it should be easier to show a burden on the organization's expression; *Roberts* had suggested that the government "try[ing] to interfere with the internal organization or affairs of [a] group" might do the trick.[197] Perhaps the law can force an organization to include an unwanted regular member, even a regular member whose job is speaking—but when it forces the organization to have a leader or authority figure it doesn't want, particularly one who speaks on behalf of the organization and inculcates its values, that really does, as *Boy Scouts* says, "send[] a distinctly different message."[198] (One can also imagine cases where an organization wants to hire people who will create its message, even though they're not authority figures. An example of this would be the writing team that writes a TV show; NBC has argued that it has the right to hire a diverse writing team—and thus pass over a white man—for the show *SEAL Team*.[199])

### C. *Expressive Association for Students and Faculty*

In short, it's not trivial for an organization to show that antidiscrimination law interferes with its ability to express its message.

*Boy Scouts* is about an expressive organization's right to choose the authority figures who speak on its behalf. An organization is an abstract body, which lacks a mouth to speak with or fingers to type with. For an organization to speak, it must do so through people that it chooses (using whatever decisionmaking method it has).[200]

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196. 42 U.S.C. § 2000e-2(e).

197. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

198. Boy Scouts of Am. v. Dale, 530 U.S. 640, 655–56 (2000). For another case where the fact that the *leadership* of an organization was affected by an affirmative action program may have been significant to the holding, see *Saadeh v. N.J. State Bar Ass'n*, No. A-2201-22, 2024 WL 5182533, at *10 (N.J. Super. Ct. Dec. 20, 2004).

199. Gene Maddaus, *CBS Defends Diversity Hiring on 'SEAL Team' From 'Anti-White Discrimination' Suit*, VARIETY (May 23, 2024, 4:52 PM), https://variety.com/2024/tv/news/cbs-seal-team-diversity-hiring-brian-beneker-lawsuit-1236015143 [https://perma.cc/9UZQ-2YWB].

200. Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 138–46 (2012); Alexander Volokh, *The Moral*

If a university wants to discriminate, it would be well advised to establish—provided the necessary mission statement is present—that it's dealing with people who have some authority and are expected to inculcate its values. It should have no problem doing so with its high-ranking, policymaking staff members, including at least the president or chancellor, provost, and various deans.[201]

Showing this with respect to faculty and students is possible, but not automatic. In what follows, I suggest what a university could do to make its case look as much as possible like *Boy Scouts*. A university doesn't necessarily have to go all the way in the direction I suggest, but because we're not 100% sure how far the *Boy Scouts* doctrine extends, universities who do this will have the most straightforward case.

### 1. Faculty as Leader-Speakers

A university's speakers obviously include its teachers. They're the ones responsible for most of the university's speech product: lectures, discussion, feedback, scholarship, and grades. This group includes tenure-track faculty, visiting faculty, lecturers, adjuncts—and also perhaps some employees formally designated as "staff" (maybe some librarians teach classes on research methods, or maybe career services staff teach classes on professionalism, or perhaps some fellows or postdocs are formally labeled "staff" at some institutions?) and some students who work as teaching assistants and give occasional lectures or lead discussions. These teachers are all authority figures to some extent, and they all speak at the behest of their administration overlords—I can't teach at all unless my dean assigns me to a class, and I can't teach calculus if my dean tells me to teach constitutional law. And if a director can insist on casting a black man to play *Othello*, what's the distinction between hiring professors to teach a class and hiring actors to play a role?[202]

But are professors really similar to actors, or to the scoutmasters and assistant scoutmasters in *Boy Scouts* who, "[d]uring the time spent with the youth members, . . . inculcate

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*Neutrality of Privatization as Such*, *in* THE CAMBRIDGE HANDBOOK OF PRIVATIZATION 117, 118–19 (Avihay Dorfman & Alon Harel eds., 2021).

201. But for such university-wide officials, the university is likely to run into a different problem—that of conditional funding under Title VI. *See* Part II.C *infra*.

202. *E.g.*, Richard Lee Smith & J. Merrell Hansen, *The Teacher/Actor*, 47 CLEARING HOUSE 96 (1972) (discussing similarities between the two roles).

them with the Boy Scouts' values"?[203] If professors have academic freedom rights and aren't required to express any particular view on diversity or anything else—and especially if they have tenure or other protections that help secure these rights—there's no guarantee that they'll teach the school's values. As a professor, I tell my students to be nice, ethical, and scholarly, and not to plagiarize, but I don't consider it my role to care about or support my university's views on any contested social or political issues. If I do take the university's position, it would be by coincidence, because I happen to agree with those views in a particular instance, not because I care about the university's values as such. (Indeed, because my university subscribes to academic freedom norms, I consider it the university's duty to support me precisely when I *disagree* with its views.)

Academic freedom thus seems to be a problem for a *Boy Scouts* theory. We don't know for sure because *Boy Scouts* is somewhat ambiguous. The Court noted that

> the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant. . . . The fact that the organization . . . tolerates dissent within its ranks[] does not mean that its views receive no First Amendment protection.[204]

Is the Boy Scouts' policy of partial tolerance similar to academic freedom in a university? Similarly, the Boy Scouts "discourage[d] [its] leaders from disseminating views on sexual issues."[205] This might be enough to bring university faculty within the *Boy Scouts* regime, just on the basis of their (like assistant scoutmasters) being limited authority figures within the institution. Or maybe professors' academic freedom is radically different from the expectation that scoutmasters inculcate values. We don't really know. But the closer faculty are to the role of explicitly inculcating the institution's values, the neater the *Boy Scouts* analogy.

If academic freedom is a potential problem, then a solution would be to somehow require, encourage, or pressure faculty to inculcate students with the administration's teaching on diversity.

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203. *Boy Scouts*, 530 U.S. at 649–50.
204. *Id.* at 655–56.
205. *Id.* at 655.

Note, first, that universities have a right to do so explicitly, or even to outright choose their members based on ideology, even if some antidiscrimination law says otherwise. Most jurisdictions don't ban discrimination based on politics or ideology,[206] and if they did, (as I've noted above) an expressive organization could ignore such a law.

Private universities can also adopt mission statements that explicitly elevate social justice above free-speech or academic-freedom values;[207] and even universities that nominally commit to free-speech norms can in practice privilege other values in case of conflict. Some universities adopt free-speech and academic-freedom statements, but nonetheless require or strongly encourage (perhaps pressure?) professors into teaching particular themes. A university might adopt a "[d]iversity statement[] for faculty job applications" where faculty job applicants are expected to answer questions such as "What does diversity mean to you, and why is this important?"; "Do you understand the university's diversity goals?"; and "How has your thinking about diversity actively influenced your teaching, research, and/or scholarship?"[208] Such statements might also be solicited as part of professors' annual reports.

Perhaps a university that solicits such statements doesn't intend to require a commitment to furthering a particular

206. *But see* Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 N.Y.U. J.L. & LIBERTY 490, 490 (2022) (explaining how in several major cities and counties, some territories, and some states, private businesses may not discriminate against patrons based on certain kinds of political activities).

207. The universities that do so the most openly now are mostly conservative or religious, such as Brigham Young, Hillsdale, or Pepperdine. But, until it changed its policies a few years ago, Vassar College "chose to elevate values like civility over freedom of expression, meaning the college could punish students for speaking in an uncivil manner, even when that speech is clearly protected under First Amendment standards." Mary Griffin, *What Does a School with a "Warning" Rating Look Like? BYU-Idaho Demonstrates*, FIRE (Dec. 5, 2019), https://www.thefire.org/news/what-does-school-warning-rating-look-byu-idaho-demonstrates [https://perma.cc/6QWZ-C3RD]; *see also* Laura Beltz, *Why Hillsdale Earns a "Warning" Rating from FIRE*, FIRE (Oct. 24, 2023), https://www.thefire.org/news/why-hillsdale-earns-warning-rating-fire [https://perma.cc/HM9B-5E39] (noting that Vassar "revised its policies to more clearly commit to free speech rights").

208. CAREER SERVS., UNIV. OF PA., DIVERSITY STATEMENTS FOR FACULTY JOB APPLICATIONS, https://careerservices.upenn.edu/application-materials-for-the-faculty-job-search/diversity-statements-for-faculty-job-applications/ [https://perma.cc/V4XZ-QG76]; *see also* CTR. FOR CAREER DEV., PRINCETON UNIV., DIVERSITY STATEMENTS, https://careerdevelopment.princeton.edu/guides/resume-cv-cover-letter-diversity-statement/diversity-statements [https://perma.cc/FB3U-LCCC] (detailing Princeton University's diversity statement process for employment).

ideology through teaching and research; perhaps, innocuously, it just wants applicants to explain how they would be sensitive to the needs of different sorts of students. Still, the existence of such statements might discourage people with the "wrong" views from applying or might signal to those who get hired that promoting the university's diversity, equity, and inclusion mission is expected and will further their careers within the institution.

Faculty don't need to be directly required to toe the party line; academic freedom needn't be *completely* compromised. But as I noted above, the analogy between a university and the Boy Scouts is neater when academic freedom norms are weak, i.e., if there's at least an expectation, and at most a requirement, that the faculty will use their position to inculcate the university's values to some degree.

### 2. Students as Speakers or as Audience

But a lot of the affirmative-action debate is about students. What about the admission of ordinary students, who aren't usually thought of as leaders or authority figures, and most of whom won't do anything more than take classes?

Here, I discuss two possible theories to support a university's First Amendment right to choose its students. First, a university could assert an expressive-association right not only to choose its speakers but also to choose its audience. This is a straightforward case to make—though it's mostly supported by lower-court cases, and perhaps it looks too much like a strong-form compelled-association claim.

Second, one could think of students themselves as part of the speaking community, based on ideas of student governance and inclusion of students in academic freedom. Like for faculty, this theory is strongest at universities where students are selected based on their commitment to diversity ideas or are encouraged or pressured to affirm those ideas. This is more closely related to weak-form expressive-association doctrine and looks more like the *Boy Scouts* case, but many universities probably won't want to take advantage of this theory.

#### a. The Right to Choose One's Audience

"Right to choose one's listeners" cases come up occasionally, though more rarely than "right to choose one's speakers" cases such as *Boy Scouts*; a listener's case has yet to reach the Supreme Court. In one case before the New York Commission on Human Rights (which never went to court), *In re Minoo*

*Southgate v. United African Movement*,[209] involving race-based exclusion from a pan-Africanist meeting, the Commission upheld the application of New York City's antidiscrimination law[210]—using reasoning from *Roberts v. United States Jaycees*.[211]

But two court cases, both involving the Nation of Islam, have upheld the discriminators' position.

In one (pre–*Boy Scouts*) case, *City of Cleveland v. Nation of Islam*,[212] the Nation of Islam was trying to get access to a municipal convention center "for a 'men only' address by the Nation's leader, Minister Louis Farrakhan."[213] This violated an Ohio statute and a Cleveland ordinance,[214] but a federal district court ruled in favor of the Nation of Islam:

> In the present case the City of Cleveland is attempting to use a human rights statute to justify interference with the content of a private speaker's message. . . . If the City is allowed to make the public accommodation law requiring Minister Farrakhan to speak to a mixed audience, the content and character of the speech will necessarily be changed. The City would then be regulating private speech which would be a violation of the First Amendment.[215]

In another (post–*Boy Scouts*) case, *Donaldson v. Farrakhan*,[216] a mosque affiliated with the Nation of Islam leased a theater owned by the city of Boston to hold a "[m]en's meeting on black on black crime, violence, and drugs in communities of color."[217] The Massachusetts Supreme Judicial Court ruled that Massachusetts's antidiscrimination law couldn't be applied against the Nation of Islam here—in part relying on freedom of religion principles, but in part explicitly discussing freedom of association and citing *Boy Scouts*:

> [W]e must decide whether the forced inclusion of women in the mosque's religious men's meeting by

209. Nos. MPA95-0851 & PA95-0031, 1997 WL 1051933 (N.Y.C. Comm'n Hum. Rts. June 30, 1997).

210. *Id.* at *1.

211. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

212. 922 F. Supp. 56 (N.D. Ohio 1995).

213. *Id.* at 57.

214. *Id.*

215. *Id.* at 59.

216. 762 N.E.2d 835 (Mass. 2002).

217. *Id.* at 838.

> application of the public accommodation statute would significantly burden the mosque's expressive association.
>
> "[I]ntrusion into the internal structure or affairs of an association" is one way in which government action may unconstitutionally burden this freedom. [*Boy Scouts*, citing *Roberts*.] Such intrusion might take the form of a regulation forcing a group to accept members it does not desire. Forced inclusion of unwanted members may impair the ability of a group to express only the views it intends to express. If the forced inclusion of an unwanted person affects in a significant way the group's ability to advocate public or private viewpoints, it is in violation of the First Amendment.[218]

In short, the Court wrote, "[f]orcing the mosque and its leaders to include women in the meeting would change the message"[219]—and this would violate the group's expressive-association right.

The *Nation of Islam* and *Donaldson* cases have somewhat conclusory reasoning. If we think of the audience at the Nation of Islam talk as just passive listeners, why, as the *Nation of Islam* court wrote, would "the content and character of the speech . . . necessarily be changed" depending on the audience?[220]

Similarly, why should we think of the listeners as "members" whose inclusion would be, in the words of the *Donaldson* Court, an "intrusion into [the group's] internal structure or affairs"?[221] The expressive-association right is the right of people to join with others for the purpose of speaking. It's easy to see why forcing someone's inclusion violates a general freedom of association—but that's not what the First Amendment protects. It's harder to see why imposing unwilling *listeners* infringes a *speaker's* right to associate with other speakers for the purpose of speaking.

There's a certain attractiveness to the bottom line of these two Nation of Islam cases. As I discussed above, the expressive-association right is similar to the free-speech right, and compelled association is like compelled speech; the right to speak implies a right to refuse to speak *for any reason*, even

218. *Id.* at 840.
219. *Id.* at 841.
220. *Nation of Islam*, 922 F. Supp. at 59.
221. *Donaldson*, 762 N.E.2d at 840.

because one doesn't approve of who else is in the room. A "choose your own listeners" case should thus function just like a "choose your own speakers" case. It shouldn't require showing that the content of the message would be changed, and it shouldn't require characterizing listeners as members of the group. It should simply require asserting the right of the organization to choose the circumstances under which it wants to speak. Such a theory would straightforwardly support a university's right to choose its students using race-conscious affirmative action, even if the students are merely conceptualized as passive listeners.

But though this view is coherent, it looks like a strong-form expressive-association right—which, as I've said above, is more than what the Supreme Court cases hold.[222] *Roberts*[223] and related cases reject the view that there's an expressive-association right to merely choose one's members, even one's speaking members. And if there's no general right to choose one's members—if *Boy Scouts* still insists on showing real interference with one's expression—it seems doubtful that there's a right to choose one's *listeners*, who, after all, aren't even engaged in the speech acts. Admittedly, some of the case law includes listeners as within the protection of the First Amendment,[224] but a listeners' rights theory isn't the most obvious place to find an organization's right to exclude listeners.

The fact that some cases come out this way means that this is a contested area, and perhaps the Court will ultimately move toward stronger expressive-association protection, but for now, this might be an overreading of *Boy Scouts*.

### b. Students as Speakers Themselves

But one doesn't have to rely on asserting a right to choose one's listeners. As I've said above, the university's speakers include at least its high-ranking officials and teachers, including faculty, some staff, and some students who work as instructors or TAs. But we don't have to be that narrow.

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222. Thus, I don't think it's clear that *Runyon*—a case about a school choosing its students—would come out differently today, as Justice Sotomayor suggested in 303 Creative LLC v. Elenis, 600 U.S. 570, 639 n.16 (2023) (Sotomayor, J., dissenting), or as suggested by Yoshino, *supra* note 22, at 268–69.

223. Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984).

224. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (explaining that the First Amendment extends to free speech by radio because the rights of listeners are paramount).

Many universities adopt a broad view of who's part of the scholarly community, and this view informs their free-speech and academic-freedom policies. Emory University describes itself as "a community of scholars"[225] and grants rights under its Open Expression Policy to the entire "Emory University Community," which is broadly defined to include students, staff, faculty, and others.[226] Smith College writes, in its Statement of Academic Freedom and Freedom of Expression, that "[a]cademic freedom pertains to students as well as faculty."[227]

The American Association of University Professors, a leading defender of academic freedom, stresses that principles of academic freedom properly apply to students, not just professors: "Student freedom is a traditional accompaniment to faculty freedom as an element of academic freedom in the larger sense."[228] The Foundation for Individual Rights and Expression similarly writes that "academic freedom should be enjoyed by colleges, faculty members, and students."[229] We've already seen the view that academic freedom is a First Amendment concern, and some Supreme Court cases indicate that the concept applies to university students as well as to professors.[230]

This makes sense: graduate students are expected to do what professors do—even undergraduates are expected to argue original scholarly theses—and the work of developing and expressing ideas isn't limited to peer-reviewed publications; it begins and continues in student interactions, lunch-table discussions, and student protests.

A university doesn't have to take this view. It could describe undergraduates as mere passive listeners—expressive-association rights allow the university to say who its speakers

225. EMORY UNIV., *supra* note 82, § 8.14.1.

226. *Id.* § 8.14.2.

227. SMITH COLL., STATEMENT OF ACADEMIC FREEDOM AND FREEDOM OF EXPRESSION, https://www.smith.edu/your-campus/offices-services/office-student-affairs/student-handbook/statement-academic-freedom-and-freedom-expression [https://perma.cc/C3VN-4ZBT].

228. *Academic Freedom of Students and Professors, and Political Discrimination*, AM. ASS'N OF UNIV. PROFESSORS (citation omitted), https://www.aaup.org/academic-freedom-students-and-professors-and-political-discrimination [https://perma.cc/X2MF-MMK9].

229. David Hudson, *'The Foundation of Intellectual Discovery': The Role of Academic Freedom in Civil Society*, FIRE (Nov. 1, 2022), https://www.thefire.org/news/foundation-intellectual-discovery-role-academic-freedom-civil-society [https://perma.cc/XVJ2-M7FM].

230. *E.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835–36 (1995).

are, and courts must defer to the university's self-characterization. But courts must also defer to the many private universities that *do* include students in their statements of who's a part of their scholarly community.

Moreover, because most universities implement some form of student governance—partly binding themselves to respect decisions taken by the student body as a whole through elections—they're recognizing that *all* students are decisionmakers in the institutions, just as faculty are thanks to faculty governance. It helps the *Boy Scouts* analogy if the student government has adopted diversity-based resolutions.[231] It also helps if students oversee certain aspects of university operations, such as student disciplinary proceedings.[232]

Is it strange to talk about students as being authority figures rather than customers or passive listeners? Not at all; in fact, when universities as we know them first arose in the Middle Ages, they were mostly either associations of professors that recruited students (such as the University of Paris) or associations of students that hired professors (such as the University of Bologna).[233] Today, imagining universities as being (potentially) radically egalitarian for *Boy Scouts* purposes is no more outlandish than applying the Title VII ministerial exception broadly for religions that lack a hierarchical structure.[234]

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231. *E.g.*, Jadon Urogdy, *UGS Passes Affirmative Action Resolution*, STAN. DAILY (Oct. 23, 2023, 12:30 AM), https://stanforddaily.com/2023/10/23/ugs-passes-affirmative-action-resolution/ [https://perma.cc/7PWJ-WP52]; Kendal Mitchell, *USAC Passes Resolution to Support Diversity Requirement*, DAILY BRUIN (Nov. 26, 2014, 1:58 AM), https://new.dailybruin.com/post/usac-passes-resolution-to-support-diversity-requirement [https://perma.cc/DKR3-R75K].

232. *E.g.*, EMORY UNIV. COLL. COUNCIL CONST. art. I, § 1 (2023), https://collegecouncil.emory.edu/documents/governing-documents/college-council-constitution.pdf [https://perma.cc/D79Q-JF56].

233. 1 HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 18, 148–49 (F.M. Powicke & A.B. Emden eds., 2d ed. 1936).

234. *See* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 797–98 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc); John H. Mansfield, *A Tale of Two Organists: Suits Against Churches for Employment Discrimination and Sexual Abuse by Ministers*, 7 GEO. J.L. & PUB. POL'Y 237, 242–43 (2009); Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1797 (2008). In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012), the Supreme Court declined to "adopt a rigid formula for deciding when an employee qualifies as a minister." *See also id.* at 196–97 (Thomas, J., concurring) (stating that courts applying the ministerial exception should "defer to a religious organization's

But wait, didn't I say earlier that academic freedom is a problem for the *Boy Scouts* analogy, because members who are totally free can't easily be likened to authority figures who are mouthpieces for university values? Quite right, and that point is just as important for students as for faculty. The point here isn't that universities need to protect their students' academic freedom—just that universities often recognize students as speakers on par with faculty.

Just as with faculty, the more that universities require or pressure their students to adopt particular diversity-based values—or perhaps merely self-consciously select students based on whether they abide by those values—the more students can be characterized as speakers and decisionmakers of the organization who are involved in inculcating the university's message. Some universities indeed impose this sort of pressure. For instance, Columbia Teachers College has required students in its education programs to demonstrate their "commitment to social justice."[235] (Indeed, the National Council for the Accreditation of Teacher Education previously recommended "that education students demonstrate a belief in 'social justice' in order to graduate."[236]) For ordinary undergraduate students, Haverford College maintains an honor code that seems to enforce some degree of ideological conformity:

> [A]cts of discrimination, microaggression, and harassment, including, but not limited to, acts of racism, sexism, homophobia, transphobia, classism, ableism, tokenism, cultural insensitivity,

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good-faith understanding of who qualifies as its minister," with specific reference to the need to not disadvantage non-mainstream religions); *id.* at 198 (Alito, J., concurring) (stating that a formal ordination process should not be considered necessary for the ministerial exception to apply); *id.* at 202 & n.4 (pointing expressly to "some faiths," such as Jehovah's Witnesses, that "consider the ministry to consist of all or a very large percentage of their members").

235. Greg Lukianoff, *Social Justice and Political Orthodoxy*, CHRON. HIGHER EDUC. (Mar. 30, 2007), https://www-chronicle-com.lp.hscl.ufl.edu/article/social-justice-and-political-orthodoxy/ [https://perma.cc/KD55-UCHD].

236. Samantha Harris, *The Battle Against Ideological Litmus Tests for Education Students: A Work in Progress*, FIRE (Dec. 29, 2006), https://www.thefire.org/news/battle-against-ideological-litmus-tests-education-students-work-progress [https://perma.cc/42RX-N6XV]; *see also* KC Johnson, *Disposition for Bias*, INSIDE HIGHER ED (May 22, 2005), https://www.insidehighered.com/views/2005/05/23/disposition-bias# [https://perma.cc/X2NW-HA6D] ("[The National Council for the Accreditation of Teacher Education] issued new guidelines requiring education departments . . . to 'include some measure of a candidate's commitment to social justice' when evaluating the 'dispositions' of their students.").

> discrimination based on citizenship status, discrimination based on religion, and discrimination based on national origin, accent, dialect, or usage of the English language are devoid of respect and therefore, by definition, violate this Code.[237]

Defending against violations of the Code by bringing up certain political or social views is itself a violation of the Code:

> Upon encountering actions, values, or words that we find to be lacking trust, concern, and/or respect and that are thus degrading to ourselves and to others, we may initiate dialogue with the goal of repairing the damage that these actions, values, or words may have caused while also encouraging the restoration of our community values.
>
> In these dialogues, confronted students weaponizing the Code's expectation of respect in order to silence and/or invalidate the experiences of harmed parties—including invalidating experiences of harm by claiming discrimination against a privileged identity (e.g., claims of reverse-racism) or refusing to reflect on their actions—is a violation of the Code.[238]

The Code also requires students to "act as active bystanders when [they] witness a breach of the Social Code"[239] and to "report [them]selves" if they believe they have violated community standards.[240] (The idea that students are also enforcers of speech-restrictive policies isn't uncommon: through "bias intervention and response team polic[ies]," hundreds of universities encourage students to report on their colleagues for discriminatory expression.[241])

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237. HAVERFORD COLL. HONOR COUNCIL, THE CODE, § 3.04(2) (2023), https://honorcouncil.haverford.edu/the-code/ [https://perma.cc/FZ36-JCNP].

238. *Id.*

239. *Id.* § 3.06.

240. *Id.* § 3.05.

241. *See, e.g.*, Speech First, Inc. v. Sands, 144 S. Ct. 675, 676–77 (2024) (Thomas, J., dissenting from denial of certiorari); GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE 195–212 (2018); EMORY UNIV. CAMPUS LIFE, FILE A BIAS INCIDENT REPORT, https://campuslife.emory.edu/about/initiatives/bias/file-report.html [https://perma.cc/VWT6-KE2S].

Admittedly, Haverford has also adopted a free-speech policy,[242] so a lot might depend on what would happen if these two commitments were thought to collide. Indeed, some commentators state that free speech is not a high value at Haverford in practice.[243] Haverford thus seems like an excellent example of a university that has made pro-diversity statements (including the student-driven ones quoted above),[244] that includes students in its scholarly community,[245] that practices "student self-governance,"[246] and that expects students to actively endorse and enforce its values.

The analogy with the Boy Scouts is probably strongest for schools that are like Haverford—or that decide to change their policies to make themselves more like Haverford. Haverford is well-positioned to test out this expressive-association theory. Researching this Article has made me extremely unwilling to send my kids there, but I would be glad to write its brief.

## II. SOME COMPLICATIONS

### A. *Is Race Different?*

One might resist this whole argument by arguing that race discrimination is different from the sexual-orientation discrimination in *Boy Scouts* and *303 Creative*.[247]

But the racial angle shouldn't make any difference.[248] The doctrine doesn't distinguish between race and other bases of

242. HAVERFORD COLL., EXPRESSIVE FREEDOM AND RESPONSIBILITY (2017), https://www.haverford.edu/sites/default/files/Office/Deans/Expressive-Freedom-and-Responsibility-Policy.pdf [https://perma.cc/97N3-URYL].

243. *E.g.*, *Sounding the FIRE Alarm at Haverford College*, FIRE (Jan. 20, 2023), https://www.thefire.org/news/sounding-fire-alarm-haverford-college [https://perma.cc/G677-MUV6].

244. *E.g.*, HAVERFORD COLL., ANTIRACISM, DIVERSITY, EQUITY, AND INCLUSION COMMITMENTS, https://antiracismcommitments.haverford.edu [https://perma.cc/7CTP-RUZY].

245. HAVERFORD COLL. HONOR COUNCIL, *supra* note 237, § 3.04(1)(d).

246. HAVERFORD COLL., STUDENTS' COUNCIL, https://www.haverford.edu/students-council [https://perma.cc/5NHW-CE9G].

247. *See, e.g.*, Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 103 F.4th 765, 779 n.11 (11th Cir. 2024) (distinguishing a previous Eleventh Circuit expressive-association case as inapposite to the expressive-association challenge before it on the grounds that the latter case related to race discrimination while the former one didn't, "and Supreme Court precedent indicates that prohibitions on race discrimination are uniquely resistant to First Amendment challenges").

248. *See* Bernstein, *supra* note 51, at 626 & n.39; Gearey, *supra* note 51, at 1593; Greenfield, *supra* note 2, at 204 (arguing that the move to race would be "an

discrimination. When one challenges *governmental* discrimination, Equal Protection doctrine draws strong distinctions—embodied in the applicable tiers of scrutiny—depending on whether the discrimination was based on race, sex, or something else.[249] But that's not implicated here, because there's no state action in private universities' affirmative action programs. Here, the issue is compelled association, which (as discussed above) is like compelled speech.

Doctrinally, a person's liberty interest in saying something racist is the same as their interest in saying something anti-gay: the question is merely whether they're being made to say something they don't want to say.[250] There's no doctrinal reason why *303 Creative* would (or should) have come out differently if Lorie Smith had refused to make websites for interracial marriages.[251]

And for associational freedom, an antidiscrimination law can burden a group's expression just as much when the group is being racially discriminatory as when it's being discriminatory against LGBT people. There's no doctrinal reason why *Boy Scouts* would (or should) have come out differently if it were a "Hitler Youth" organization that wanted to have white scoutmasters to teach white supremacy. (Or, in a more mainstream context, compare the racial theater and TV casting decisions discussed above with the gender-related decisions of someone making straight rom-coms or cisgender female beauty pageants.[252])

The cases cite each other without regard to the type of discrimination involved. *Claybrooks v. ABC*,[253] recognizing a right to be racially discriminatory in TV show casting, relied heavily on *Hurley*—a case about an LGBT Irish-American

extension" of the existing cases, though one that "flows naturally" from them); *id.* at 228–30, 233–35, 241–47; Yoshino, *supra* note 22, at 245, 262–69. *But see* Ball, *supra* note 123, at 63–64 (giving various reasons to think that *303 Creative* might remain cabined to the sexual orientation context, chiefly that the Court believes opposition to gay marriage is more sincere and reasonable than racism).

249. James E. Fleming, *"There is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2309 (2006).

250. *But see* Ball, *supra* note 123, at 65–68 (arguing that the *303 Creative* doctrine is an exception to the otherwise applicable principle of viewpoint neutrality).

251. *See* Yoshino, *supra* note 22, at 266 ("[I]n the pure speech context, the Court has taken great pride in protecting hate speech. . . . The *303 Creative* Court did not quote [*Matal v. Tam*, 582 U.S. 218 (2017)], but it swore fealty to this principle.").

252. *See supra* text accompanying notes 192–195; Green v. Miss U.S. of Am., LLC, 52 F.4th 773, 777 (9th Cir. 2022).

253. 898 F. Supp. 2d 986 (M.D. Tenn. 2012).

group's participation in a parade[254]—without considering whether race issues are different from LGBT issues.[255] Similarly, *Donaldson v. Farrakhan*, finding a right to address a men-only audience, relied on *Boy Scouts*[256] without discussing whether anti-LGBT discrimination is similar to sex discrimination (or even a type of sex discrimination, as later suggested by *Bostock v. Clayton County*[257]).

Perhaps the difference isn't in the level of the burden on the speaker or association, but on whether the government would prevail under the relevant level of scrutiny.[258] Can the government prevail more easily in a race case?

Recall that the appropriate level of scrutiny is somewhat unclear. If strict scrutiny is required, that raises two possibilities: (1) Would the government's interest in ending race discrimination be compelling, while the interest in ending sex or sexual-orientation discrimination isn't? (2) Does the race, sex, or sexual-orientation context affect whether narrow tailoring is present?

As to the first option, the Court has held that eradicating racial discrimination is compelling in cases such as *Bob Jones University v. United States*.[259] But other interests have been held to be compelling too: *Roberts* talked about "Minnesota's compelling interest in eradicating discrimination against its female citizens."[260] And the *Roberts* Court referred to discrimination more generally: A state's "commitment to

254. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 560–61 (1995).

255. The *Claybrooks* court did consider one possible distinction between that case and *Hurley*: whether the organization involved was an advocacy group. *Claybrooks*, 898 F. Supp. 2d at 995–96. It seemed clear to the court that the race-versus-LGBT distinction was irrelevant.

256. Donaldson v. Farrakhan, 762 N.E.2d 835, 841 (Mass. 2002).

257. 590 U.S. 644, 651–53 (2020).

258. *See* Greenfield, *supra* note 2, at 229–30, 244–47.

259. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

260. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). Bernstein questions whether Minnesota's interest can be considered compelling, because "federal law did not (and still does not) forbid public accommodations to discriminate on the basis of sex. . . . The Court failed to explain how a federal constitutional right could be overridden by a single state's claimed compelling interest, an interest not even protected by federal statute." Bernstein, *supra* note 51, at 623. But whether an interest is compelling doesn't depend on positive law. It depends on the Court's judgment, not on whether the interest happens to be protected by any law, federal or state. A state's interest in eradicating race discrimination would continue to be "compelling" for strict scrutiny purposes even if Congress repealed all federal antidiscrimination laws.

eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order."[261] In fact, "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent."[262]

For sexual-orientation discrimination, one could either rely on the broad *Roberts* formulation or think of sexual-orientation discrimination as a species of sex discrimination. The Tenth Circuit, in *303 Creative*, stated (citing *Roberts*) that "Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace."[263]

The case law thus resists any distinction between eradicating different forms of discrimination in terms of the strength of the governmental interest. Any antidiscriminatory governmental purpose is likely to be held compelling.

And as to narrow tailoring, it seems that the degree of tailoring of any antidiscrimination law depends on how broadly or narrowly it sweeps, not on the basis of the discrimination that it prohibits. One could conclude that, given that eradicating the dignitary harms of discrimination is a compelling interest, the most narrowly tailored means of achieving that goal is a complete prohibition.[264] Or one could conclude (as did the Tenth Circuit) that the governmental goal is ensuring access to services.[265] If that's the case, it depends on how unique someone's services are; as long as one can get the same product elsewhere, one can afford to make exceptions, but as to unique products, a complete prohibition is the most narrowly tailored way of achieving the goal.[266] These theories

261. *Roberts*, 468 U.S. at 624; *see also* Greenfield, *supra* note 2, at 216, 226 (discussing when a state's interest in preventing discrimination can overcome an expressive organization's purported interest).

262. *Roberts*, 468 U.S. at 628.

263. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023).

264. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 608–09 (2023) (Sotomayor, J., dissenting); Yoshino, *supra* note 22, at 280–82.

265. *303 Creative LLC*, 6 F.4th at 1179.

266. *Id.* at 1180–82. Kenji Yoshino argues that the relevance of the availability of a service elsewhere depends on how one frames the governmental interest; an "equal access" goal functions differently from an "equal dignity" goal. Yoshino, *supra* note 22, at 282. Some Justices are skeptical of whether "equal dignity" goals are compelling, pointing to the strong protection accorded to offensive speech. *Id.* at 267–68 (discussing Justice Thomas's concurrence in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018)).

may be plausible, but they don't distinguish race from sexual orientation.

Or perhaps—sticking with the "equal access" goal—the degree of tailoring has something to do with the scope of the statute's exceptions. A complete prohibition might be minimally tailored, a prohibition with some targeted exceptions more tailored, and so on. Here, one might ask to what extent the availability of exceptions prevents the government from achieving its goal. The background societal level of discrimination against a particular group might thus be relevant in assessing whether an antidiscrimination law is really the government's least restrictive alternative;[267] so would the degree of competitiveness or "monopoly power" in a particular industry.[268]

Perhaps—one might argue, under this view—a racial-discrimination prohibition must be super-strict, because only an absolute law can succeed in combating racial discrimination.[269] Perhaps a prohibition against sexual-orientation discrimination can afford to not be so absolute, because anti-LGBT discrimination isn't as widespread and thus LGBT people are more likely to find someone willing to deal with them. (Even if one custom website designer won't deal with them, another custom website designer will;[270] the uniqueness of that particular website designer's product wouldn't be relevant.)

But one problem with that theory is that the cases don't ask that question. Another problem is that even if the relative degrees of animosity toward different groups were relevant, it's not clear which way that cuts in today's society. What's more widespread today, anti-LGBT animus or racial animus? Surely interracial couples can more easily find a wedding-website designer than can same-sex couples. And if that's the case, a principle that allows for anti-LGBT expressive exceptions should apply at least as strongly in the racial case.

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267. *See* Yoshino, *supra* note 22, at 282.

268. *303 Creative LLC*, 600 U.S. at 590.

269. *See* Greenfield, *supra* note 2, at 246 (seeking to distinguish modern-day affirmative action from *Bob Jones*–style racial discrimination by contrasting invidious and remedial discrimination).

270. *303 Creative LLC*, 600 U.S. at 583.

## B. *The Market Context and the Level of Scrutiny*

### 1. Maybe This Doesn't Apply in the Market Context?

Last year, one could have objected that *Boy Scouts* has never been extended to the commercial context.[271] The Boy Scouts is a nonprofit, volunteer organization.[272] *Hurley* is about a parade—likewise a nonprofit, volunteer organization. Avoiding compelled speech is all well and good, and so is expressive association, but should antidiscrimination law give way even when commercial relations are involved?

Perhaps one could have argued that universities are still covered by *Boy Scouts* because they're generally nonprofits. But perhaps not: there's nothing magical about nonprofits (the Jaycees was also a nonprofit[273]), there's no sharp distinction between how nonprofit and for-profit firms act,[274] and there's no strong difference between how nonprofits and for-profits are treated in fields such as antitrust.[275] Thus, despite universities' expressive nature, one might think the commercial, rather than volunteer, aspect is primary. Student admissions and faculty hiring are about commercial relations—for faculty, this is about one's very livelihood, and for students, it's about a multi-year contract, perhaps hundreds of thousands of dollars of debt, and preparation for a career.

In arguing that commercial relations are different, one could have looked to various sources, though they wouldn't all have had the same implications for universities.

First, one could have looked at *Runyon v. McCrary*, which denied a private school's right to discriminate against black students.[276] Some might find this the closest case on point to university affirmative action, since it involved a school (though,

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271. *See* Ball, *supra* note 123, at 64 ("[N]one of the Court's hate speech cases arose in the context of speech by business owners denying jobs, housing, or goods and services to classes protected by antidiscrimination laws. Instead, when the Court has interpreted the Free Speech Clause to protect hate speech . . . it has done so outside of the commercial marketplace context.").

272. BOY SCOUTS OF AM., https://www.scouting.org [https://perma.cc/LPH6-JQU9].

273. Roberts v. U.S. Jaycees, 468 U.S. 609, 612 (1984).

274. *E.g.*, Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 J. ECON. LIT. 701, 701 (1996) (arguing that for-profit and non-profit organizations perform many of the same functions).

275. *E.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 n.22 (1984); Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975).

276. Runyon v. McCrary, 427 U.S. 160, 163–79 (1976).

admittedly, a for-profit school[277]) trying to choose its students based on racial criteria. But, as noted above, *Runyon* didn't squarely present the issue.

Second, one could have looked at Justice Powell's concurrence in *Runyon*.[278] Justice Powell thought that (as a statutory matter) § 1981 applied because the school there was "operated strictly on a commercial basis" and was "part of a commercial relationship offered generally or widely."[279] He distinguished that school from "[a] small kindergarten or music class, operated on the basis of personal invitations extended to a limited number of preidentified students."[280] Universities would certainly fall on the commercial side of Justice Powell's line, though Justice Powell wasn't making any constitutional point.

Third, one could have looked at Justice O'Connor's concurrence in *Roberts*.[281] Justice O'Connor argued that expressive-association rights should belong to expressive associations, not commercial ones.[282] Expressive associations, she wrote, should get to define their membership.[283] "[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice"[284]—and "state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard."[285] But freedom of commercial association, she wrote, is only minimally protected.[286]

Justice O'Connor's view would probably cut in favor of the university's First Amendment claims: universities are predominantly engaged in expression, and—especially if they have a strong race-related mission statement and choose their members to inculcate their values—state regulation of their membership could dilute their message. Though, it's hard to say

277. Bernstein, *supra* note 51, at 626.

278. *Runyon*, 427 U.S. at 186–89 (Powell, J., concurring).

279. *Id.* at 188–89.

280. *Id.* at 188.

281. Bernstein, *supra* note 51, at 626; *see also id.* at 640 ("[I]f speech would be protected by the First Amendment if the government tried to punish the speaker, a private school also may not punish a member of the school community who engages in such speech.").

282. Roberts v. U.S. Jaycees, 468 U.S. 609, 632–35 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

283. *Id.* at 633.

284. *Id.*

285. *Id.* at 635–36.

286. *Id.* at 634.

for sure, because a lot of money is changing hands and the relations are contractual. *Green v. Miss USA*[287] illustrates the range of possible disagreement here: is a for-profit beauty pageant an expressive association that promotes certain ideals of beauty and "female role models," or is it a glorified "multi-level marketing business"?[288]

Fourth, one could have looked at the expressive-boycott case law. The basic rule is that boycotting activity isn't protected by the First Amendment, whereas the expression surrounding boycotts is.[289] But for a while, some language in *FTC v. Superior Court Trial Lawyers Ass'n*[290] provided some support for an economic/noneconomic distinction. There, the Court ruled against striking court-appointed defense attorneys for indigent defendants,[291] and it distinguished its holding from its pro-boycotters holding in *NAACP v. Claiborne Hardware Co.*[292] In the Court's view, what made the NAACP boycott different was that it was for "[e]quality and freedom"; the lawyers' strike/boycott, by contrast, was an economic boycott whose "immediate objective was to increase the price that [the strikers] would be paid for their services," no matter their "altruistic . . . motives."[293] Regulation of such "economic boycotts" was well within "the government's 'power to regulate . . . economic activity.'"[294]

Perhaps "the better reading" of these cases "is that many but not all elements of political boycotts are expressive"[295] and that the economic/noneconomic distinction doesn't really play a role. Still, even if it's a misguided dictum, the *Superior Court Trial Lawyers* language is there; what do we do with it? Universities fit uneasily into this dichotomy because their pursuit of affirmative action is grounded in ideas of equality and freedom, even though that plays out through economic activity. (In any event, *Rumsfeld v. FAIR* ultimately made clear that boycotting activity is unprotected—not because of any

287. 52 F.4th 773 (9th Cir. 2022).

288. *Compare id.* at 803–05 (Vandyke, J., concurring) (arguing that a for-profit beauty pageant is an expressive association), *with id.* at 818–20 (Graber, J., dissenting) (arguing that the pageant is a commercial association).

289. FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 426–27 (1990).

290. 493 U.S. 411 (1990).

291. *Id.* at 436.

292. 458 U.S. 886 (1982).

293. *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 427.

294. *Id.* at 428 (quoting *Claiborne Hardware Co.*, 458 U.S. at 912–13).

295. Volokh, *supra* note 115, at 738.

economic/noneconomic distinction but because boycotting simply isn't expressive activity.[296])

### 2. The Possible Irrelevance of Markets

So, if we look at the older materials, we're left with some uncertainty about whether the *Boy Scouts* theory applies in a market context at all and, if it doesn't, what that means for universities' hiring and admissions decisions. But today, after *303 Creative*, any economic/noneconomic distinction is harder to maintain.

First, as a matter of first principles, compelled-speech and expressive-association claims are no less relevant in economic contexts than in noneconomic ones. If the NAACP wanted to be run by a black person, the American Nazi Party by a white person, or the National Association of Women by a woman, it's an equal burden on those groups' expression, whether those directors were paid or volunteer. If—as a writer or director—I want to have race-conscious casting in *Othello* or *Hamilton*, it seems like an equal imposition on my artistic vision whether or not the actors are employees. This is so, even though we're talking about someone's livelihood.

Second, various cases applying this framework over the years have come out in favor of the First Amendment claimant even though economic transactions were involved. In *Claybrooks*, the district court upheld the right of *The Bachelor* and *The Bachelorette* to discriminate based on race in casting, even though participants were paid a stipend.[297] In *Miss USA*, the Ninth Circuit upheld the right of a beauty pageant to limit itself to cisgender women, even though winners received valuable prizes.[298] *Hurley*, too, noted that protections against compelled speech apply generally—they're not just for the press but are also "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers."[299]

Third, there's now a decades-old tradition of cases upholding First Amendment rights even in the economic/commercial/corporate context—for instance, in

296. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 65–66 (2006).

297. Claybrooks v. Am. Broad. Cos., Inc., 898 F. Supp. 2d 986, 989, 1000 (M.D. Tenn. 2012).

298. Green v. Miss U.S. of Am., LLC, 52 F.4th 773, 777–78 (9th Cir. 2022).

299. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995).

campaign finance,[300] in commercial speech,[301] in other deregulatory contexts,[302] and in the general tendency to treat corporations as rightsholders.[303] This civil rights expansion, recognizing that people don't check their free-speech rights at the door when they do business or use the corporate form, has progressed unabated—even in the face of persistent complaints about First Amendment Lochnerism[304] and "weaponizing" the First Amendment.[305] The Court has written that "[i]t is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment'"[306]—and that "too late" was over forty-five years ago.

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300. *E.g.*, Citizens United v. FEC, 558 U.S. 310, 342–45 (2010); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784–86 (1978).

301. *E.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501–04 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 486–91 (1995).

302. Expressions Hair Design v. Schneiderman, 581 U.S. 37, 46–48 (2017); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 890–901 (2018).

303. *Citizens United*, 558 U.S. at 342–62; *see also* Greenfield, *supra* note 2, at 228 ("[T]he [*303 Creative*] Court implicitly expanded the doctrine in allowing the company, 303 Creative, to claim the expressive interests of its investor-owner, Smith. That, too, had never been seen before in the precedents, but the Court did not seem troubled by the projection of Smith's values onto a limited liability company she formed to insulate her from potential company debts and obligations.").

304. *See generally* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (analyzing the implications of modern constitutional deregulation as commercial interests continue to lay claim to First Amendment protections); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016) (demonstrating that complaints about "First Amendment Lochnerism" date back to protections of free exercise and free expression in the 1930s and 1940s); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179 (2018) (discussing the broad reach of a weaponized First Amendment over the Food and Drug Administration).

305. *E.g.*, *Janus*, 585 U.S. 878 at 955 (Kagan, J., dissenting); Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223 (2020) (characterizing recent First Amendment trends as weaponization); *see also* Yoshino, *supra* note 22, at 246, 272 (warning of a "war of all against all"). *But see* Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2065, 2076–93 (2018) (arguing that the deregulatory vision of the First Amendment can be used to serve a progressive agenda).

306. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 786 n.23 (1978) (quoting Buckley v. Valeo, 424 U.S. 1, 16 (1976)).

Finally, we now have *303 Creative*, where Lorie Smith operated through a for-profit corporation. What difference did this make? None at all:

> Of course, as the State emphasizes, Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is "the sole member-owner." But none of that makes a difference. Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers.[307]

Justice Sotomayor, in her dissent, argued that public accommodations laws reflect a "simple, but powerful, social contract" where one agrees to serve the public at large by choosing to sell to the public at large.[308] She characterized the *Hurley* and *Boy Scouts* regime as applying "to private, nonprofit expressive associations" and not to "clearly commercial entities" such as 303 Creative LLC, and she argued that "any burden on the company's expression is incidental to the State's content-neutral regulation of commercial conduct."[309] The significance of *303 Creative* lies in how clearly and forthrightly the majority rejected the relevance of the public accommodations context and the commercial/noncommercial distinction championed by Justice Sotomayor.[310]

*303 Creative* strongly undermines any contrary hints that one might glean from *Runyon* or *Roberts*.[311] It's true that "the First Amendment does not generally protect liberty of contract."[312] But when we have a regulation that would violate

307. 303 Creative LLC v. Elenis, 600 U.S. 570, 594 (2023).

308. *Id.* at 609 (Sotomayor, J., dissenting).

309. *Id.* at 634–65.

310. *See* Greenfield, *supra* note 2, at 214 (noting how *303 Creative* "allow[ed] for the first time a for-profit company to claim a First Amendment waiver from otherwise applicable anti-discrimination law"); *id.* at 228; Yoshino, *supra* note 22, at 259–60.

311. *See* Bernstein, *supra* note 51, at 626.

312. Volokh, *supra* note 115, at 735.

the First Amendment when applied to speech done for free, *303 Creative* strongly supports the argument that the regulation also violates the First Amendment when applied to speech done for money.

#### 3. Strict Scrutiny Analysis

There still remains the possibility that a ban on discrimination in an economic context would satisfy the relevant level of scrutiny, while a ban on discrimination in a volunteer context wouldn't.[313] As above, note that there's some uncertainty about what the level of scrutiny truly is. Perhaps it's strict scrutiny, perhaps it's more; but the best evidence as to how that scrutiny would come out is *303 Creative* itself, which treated the commercial context as irrelevant. This makes it unlikely that eradicating discrimination in the economic context would be any more likely to survive than eradicating discrimination in the volunteer context.

### C. *Title VI and Conditional Federal Spending*

Educational contracting—for faculty or students—is governed by regulatory statutes such as § 1981 or Title VII. Suppose the *Boy Scouts* theory overcomes these statutes because *forcing* universities to accept members they don't want would interfere with their message. Universities would still have to contend with *non-regulatory* statutes like Title VI, under which they could lose their federal funding.[314] (Harvard was, in fact, sued under Title VI,[315] which has, like § 1981, been interpreted to be coextensive with Equal Protection.[316])

Under current law, universities will not be entitled to an exemption from Title VI, even if the courts accept the *Boy Scouts* theory—because the government isn't *forcing* you to do anything when it induces behavior by offering conditional funding. This will be a significant issue for most universities,

313. Just as the possibility that eradicating discrimination based on race satisfies the relevant level of scrutiny whereas eradicating discrimination based on sex or sexual orientation doesn't. *See supra* Section III.A.

314. 42 U.S.C. § 2000d (prohibiting racial discrimination by any "program or activity receiving Federal financial assistance").

315. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 197–98 (2023).

316. *Id.* at 198 n.2; Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003).

since most universities receive federal funding,[317] even if just in the form of federal financial assistance for their students.[318]

Originally, the threat of losing funding was relatively mild. As a statutory matter, the Supreme Court held in *Grove City College v. Bell*[319] that sex discrimination would only put a limited amount of university funding at risk under Title IX of the Education Amendments of 1972—the "program or activity" implicated by student financial aid would be only the student

317. David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 152–53. One study located a mere "19 functioning colleges offering undergraduate baccalaureate degrees that intentionally forego all federal government funding, including financial aid programs for students." JAY SCHALIN, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL, BREAKING AWAY FROM LEVIATHAN: COLLEGES CAN THRIVE WITHOUT FEDERAL FUNDING 6–7 (2022). This study might not have located all such colleges, but, in any event, the number of such universities must be quite small. *See generally Two Decades of Change in Federal and State Higher Education Funding: Recent Trends Across Levels of Government* (Oct. 15, 2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding [https://perma.cc/ZNH6-ECWB] (charting trends in the allocation of state and federal funding to education).

318. That federal financial aid to students is enough to trigger Title IX was established in *Grove City Coll. v. Bell*, 465 U.S. 555, 563–70 (1984).

Perhaps surprisingly, whether mere tax-exempt status counts as federal financial assistance—a question that's relevant for Title VI, Title IX, § 504 of the Rehabilitation Act, and other statutes—is still an unresolved question. If it does, that would make it even harder for a university to give up federal funds. There seems to be no caselaw on the Title VI question beyond a couple of district court opinions. Two cases hold that tax-exempt status is sufficient to trigger Title VI. *See* McGlotten v. Connally, 338 F. Supp. 448, 461 (D.D.C. 1972); Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988). This view also has some support in the Supreme Court's statements that tax exemptions are comparable to subsidies, though one can find statements in the caselaw going the other way. *Compare, e.g.*, Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions."), *with id.* at 544 n.5 ("In stating that exemptions and deductions, on one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical."); Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970) ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."). But another district court case holds the opposite as to Title IX. *See* Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n, 134 F. Supp. 2d 965, 972 (N.D. Ill. 2001).

319. 465 U.S. 555 (1984).

financial aid office.[320] But Congress overruled this interpretation in the Civil Rights Restoration Act of 1987[321] (CRRA)—not only with respect to Title IX but also with respect to a number of other antidiscrimination laws, including Title VI—by specifying that "program or activity" means "all the operations" of a university.[322] So now *all* of a university's funding is jeopardized by any discrimination in *any* unit.[323] And few universities would agree to adopt affirmative action at the cost of losing all their funding.[324]

The good news for universities, though, is that while the government does have some leeway to induce behavior through funding, the unconstitutional conditions doctrine prevents the government from withdrawing a university's *entire* funding based on discrimination by just one unit. Thus, universities should have the ability to make an informed choice to adopt affirmative action—and thus lose federal funding—in certain units; perhaps, for instance, a university might choose to adopt affirmative action in a particular unit that doesn't receive a lot of federal funding and can therefore afford to lose it.

### 1. The Unconstitutional Conditions Doctrine

People constantly waive their rights as a condition of receiving government benefits. For instance, we all have a First Amendment right *not to talk* about constitutional law, but constitutional law professors waive that right if they want to make money as constitutional law professors at public

320. *Id.* at 570, 573. *But see* Brief for Respondent at 39–40, Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006) (No. 04-1152), 2005 WL 2347175, at *39–40 (arguing that *Grove City College* does not stand for a general principle that conditional spending is consistent with the First Amendment, because the college "did not discriminate on the basis of gender . . . and claimed no First Amendment right to do so").

321. Pub L. No. 100-259, 102 Stat. 28 (1988).

322. CRRA amends Title IX by adding 20 U.S.C. § 1687, which defines "program or activity" or "program" to mean "all the operations of" various entities, including a "university." *Id.* § 3(a), 102 Stat. at 28–29. It does the same for various other civil rights statutes, including Title VI. *Id.* § 6, 102 Stat. at 31 (adding 42 U.S.C. § 2000d-4a). The language of the Solomon Amendment, implicated in *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 51 (2006), has a similar effect as codified at 10 U.S.C. § 983(b).

323. Bernstein, *supra* note 51, at 635–36.

324. *See Grove City Coll.*, 465 U.S. at 582–83.

universities—and the same is broadly true for one's on-the-job speech whenever one accepts a government job.[325]

The case law is clear that there's nothing inherently invalid about such inducements, even when what's being induced is something the government couldn't mandate directly.[326] "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."[327] After all, one is always "free to decline the federal funds."[328] In the case of expressive association, "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."[329] "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."[330] Thus, in various post–*Boy Scouts* cases, courts have allowed governments to refuse to subsidize the Boy Scouts unless it stopped discriminating.[331]

The same is true throughout constitutional law.[332] Indeed, there's a certain logic behind one's ability to bargain away one's rights. If constitutional rights represent areas of personal autonomy, the right *whether* to exercise a right and the right *not* to exercise a right are as fundamental as the right itself—and if one can choose not to exercise one's right, it makes sense that one should be able to agree not to exercise that right for whatever reason one likes, including in exchange for something of value.[333]

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325. *E.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006). *But see supra* note 66 (suggesting that *Garcetti* might not apply to "speech related to scholarship or teaching").

326. Volokh, *supra* note 160, at 1924–27.

327. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

328. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 59 (2006).

329. Christian Legal Soc. v. Martinez, 561 U.S. 661, 683 (2010) (quoting Norwood v. Harrison, 413 U. S. 455, 463 (1973)).

330. Grove City Coll. v. Bell, 465 U.S. 555, 575 (1984).

331. *E.g.*, Evans v. City of Berkeley, 40 Cal. Rptr. 3d 205, 400 (2006); Boy Scouts of Am. v. Wyman, 335 F.3d 80, 93 (2d Cir. 2003).

332. *See* South Dakota v. Dole, 483 U.S. 203, 205–12 (1987) (upholding Congress's ability to condition federal funds on state action, if the conditions are related to a federal interest and not coercive, with states free to decline the funds); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 856 (1987) (holding that the government may impose conditions on property use, but the condition must have an "essential nexus" to the governmental interest, illustrating limits on conditions across constitutional law).

333. This view has a similar flavor to the strong-form view of expressive association rights discussed in *supra* Section II.B.

And yet, constitutional law imposes limits on the government's ability to make such deals. Despite Justice Oliver Wendell Holmes Jr.'s quip that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"[334] modern constitutional law doesn't adopt the extreme laissez-faire attitude that the government can offer whatever deals it pleases. And perhaps for good reason: the government has such overwhelming control over access to important discretionary benefits that it could induce whatever behavior it likes if given the chance—achieving indirectly what it couldn't achieve directly through regulation.

Thus, various cases have asserted that "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment,"[335] and that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."[336] Of course, the idea that "the government has no duty to subsidize" and the idea that "the government can't require you to give up any rights as conditions of benefits," in their strong forms, are irreconcilable, so these statements shouldn't necessarily be taken at face value; the point here is just to show that there are *some* constitutional restrictions on the government's ability to condition funds.

This "unconstitutional conditions doctrine" is context-dependent, and in fact there's no single coherent doctrine that applies throughout all areas of constitutional law.[337] But one persistent theme is that the conditions imposed need to be related, or germane, to the purpose of the government program.[338] For government employees, the content of one's on-

334. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

335. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977), *overruled in part by* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018).

336. United States v. Am. Libr. Ass'n, 539 U.S. 194, 210 (2003).

337. For discussions on the unconstitutional conditions doctrine, see generally Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479 (2012); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1029–30 (2011).

338. *E.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (holding that the government may impose conditions on a land-use permit only if there is an "essential nexus" between the condition and the government's purpose); Dolan v.

the-job speech is usually maximally relevant to the government's purpose,[339] while off-duty speech is usually much less so.[340] When public-school students are involved, we weigh the student's interest in speaking against the school's interest in suppressing the speech—but if the speech would have no effect on school operations, presumably that balancing would always cut in favor of the student because restricting the student's speech would be unlikely to be germane to any valid school interest.[341]

### 2. The Significant Independent Grants Principle

Germaneness isn't a problem here, since there's a connection between federal educational funding and Title VI compliance: if you're going to take federal money to educate people, the federal government can demand that the money be spent evenhandedly, without racial discrimination. (The same goes for Title IX and other conditional-funding statutes.)

But the unconstitutional conditions doctrine is subject to an important constraint: the "significant independent grants" principle. This principle has been important in federalism cases involving the Spending Power, where the Court has stated that while Congress can withdraw program funds if the states don't agree to administer its program, it can't put "significant independent grants" at risk.[342] A similar principle applies in First Amendment cases.

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City of Tigard, 512 U.S. 374, 391 (1994) (holding that conditions must be roughly proportional to the impact of the proposed development, further underscoring the germaneness requirement in the context of property exactions).

339. Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

340. Pickering v. Bd. of Educ., 390 U.S. 986 (1968) (holding that a public-school teacher's right to speak on matters of public concern outweighed the school's interest in maintaining workplace discipline); United States v. Nat'l Treas. Emps. Union, 513 U.S. 454, 454 (1995) (holding that a ban on federal employees receiving honoraria for speaking or writing unrelated to their job was found to violate First Amendment rights). *But see* City of San Diego v. Roe, 543 U.S. 77, 80–85 (2004) (holding that off-duty speech by a government employee, when harmful to the government's interest in maintaining public trust, was not protected by the First Amendment).

341. *See, e.g.*, Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 186–87 (2021).

342. Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012) (discussing how the threat to withdraw all Medicaid funding from states that refused to expand Medicaid was unconstitutionally coercive because it put significant independent grants at risk); *see also* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (finding that the conditional grant of a small percentage of federal highway funds in exchange for raising the drinking age was within Congress's power and did not amount to coercion).

*Grove City College* and *Rumsfeld v. FAIR* noted that conditions need to be "reasonable,"[343] but they didn't go into further detail. Other cases have been more specific, though. Professor Eugene Volokh summarizes the doctrine: "While the government may generally place conditions on the use of benefits that it provides, it generally may not control the use of the recipient's other assets as a condition of providing the benefit. We might call this the No Governmental Restrictions on Use of Private Funds Principle."[344] For instance:

- In *Regan v. Taxation with Representation*,[345] the Court held that the government could deny § 501(c)(3) tax deductions to organizations that engaged in lobbying.[346] Nothing prevented those groups from creating a separate lobbying affiliate under § 501(c)(4).[347]
- In *FCC v. League of Women Voters of California*,[348] the Court struck down a prohibition on editorializing by stations that received federal funds.[349] The problem here was that stations weren't even allowed to editorialize with their own funds; that problem would be fixed if the stations could establish separate affiliate organizations.[350]
- In *Rust v. Sullivan*, the Court upheld the prohibition on granting federal funds under Title X of the Public Health Service Act to "programs where abortion is a method of family planning."[351] The organizations that received funding were allowed to advocate abortion in separate activities that maintained "objective integrity and independence" from Title X projects.[352]
- In *Agency for International Development v. Alliance for Open Society International*,[353] the Court struck down a funding condition providing that anti-HIV funding couldn't go to organizations unless they had "a policy explicitly opposing prostitution and sex trafficking."[354] It wasn't just that

343. Grove City Coll. v. Bell, 465 U.S. 555, 575 (1984); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 59–60 (2006).
344. Volokh, *supra* note 160, at 1942.
345. 461 U.S. 540 (1983).
346. *Id.* at 545.
347. *Id.* at 544 & n.6; *see also id.* at 552–54 (Blackmun, J., concurring).
348. 468 U.S. 364 (1984).
349. *Id.* at 381–401.
350. *Id.* at 399–401.
351. 500 U.S. 173, 178 (1991).
352. *Id.* at 180–81.
353. 570 U.S. 205 (2013).
354. *Id.* at 208, 221.

organizations couldn't use *those funds* "to promote or advocate the legalization or practice of prostitution or sex trafficking"[355]—the statute even controlled what recipient organizations did with their own money, separate from that funding program.[356] The Court noted that a condition can't "seek to leverage funding to regulate speech outside the contours of the program itself,"[357] endorsing the "dual structure" theory of *Taxation with Representation* and the segregated project theory of *Rust v. Sullivan*.[358]

This distinction doesn't help an organization if it wants to choose its top-level administrators in a discriminatory way, because that choice of leaders necessarily affects the entire institution.[359] So if a university wants to keep federal funding, it should choose its high-level decisionmakers nondiscriminatorily—here, that means the president, provost, and all other university-wide officials.

But under this distinction, a university would be able to set up separate departments or units—for instance, a law school—keeping the units where it intends to keep federal funding tightly segregated from the ones where it has no federal funding (or where it's ready to give up funding). The university should set up appropriate firewalls. If the funding is received in the form of aid to particular students, that might mean those students shouldn't be allowed to enroll in the discriminating departments. Within individual units, the university should be able to discriminate under the *Boy Scouts* theory. If the federal government insists on regulating the discriminating law school just because the nondiscriminating medical school gets federal funding, then it will be violating the No Governmental Restrictions on Use of Private Funds Principle from *League of Women Voters* and *Alliance for Open Society*.[360]

### D. *Can Public Universities Use This Theory?*

*Students for Fair Admissions* treated public and private universities the same, as far as their ability to discriminate based on race is concerned.[361] However, the First Amendment

355. *Id.* at 208.
356. *Id.*
357. *Id.* at 214–15.
358. *Id.* at 215–17.
359. Volokh, *supra* note 160, at 1942–43.
360. Bernstein, *supra* note 51, at 635–36.
361. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 198 n.2 (2023).

expressive-discrimination workaround described here is available only to private universities. The reason is simple: because of the state-action doctrine, private universities have virtually no constitutional constraints.[362] Therefore, the only constraints that prevent private universities from having affirmative action programs are statutory—in the federal context, Title VI and § 1981. And the *Boy Scouts* theory relies on the idea that a *constitutional* right such as the expressive-association right trumps any mere *statutory* right.[363]

Making a similar argument for public universities would be trickier. First, as governmental organizations, public universities are often thought of as lacking First Amendment rights, which are generally thought to apply only to private parties (whether individuals or collective entities such as corporations[364]). Second, even if public universities have First Amendment rights, they're still state actors, so they're also bound to respect the Equal Protection rights of the people it deals with. We would then have to resolve the conflict between two competing *constitutional* rights—which would be trickier.

This Section explores potential ways for public universities to get around the problem. First, perhaps public universities (and other government bodies) have First Amendment rights of their own. Second, perhaps universities—public or private—are "First Amendment organizations" that deserve particular deference in their academic decisionmaking. Third, perhaps public universities, because of their noncoercive nature, either shouldn't be considered state actors at all or should be subject to a reduced version of constitutional constraints.

But all these theories have little to no support in current doctrine. So, this Section is more of a thought experiment.

### 1. Governments as First Amendment Rightsholders

Whether governments have free-speech rights is an unresolved question of First Amendment law. Most courts—usually in dicta—have "reflexively rejected the notion, relying on the assumption that the First Amendment can only restrict,

362. Private actors are presumptively immune from virtually all constitutional constraints. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 841–44 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 165–66 (1978). *But see* U.S. CONST. amend. XIII; *id.* amend. XXI, § 2.

363. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

364. Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203, 252–53 (2023); *see also* Greenfield, *supra* note 2, at 208–09 ("Private parties are rights *holders* under the constitution, not rights *obligors*.").

not protect, state actors."[365] As Justice Potter Stewart wrote in his concurrence in *CBS v. Democratic National Committee*,[366] "The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."[367] For the contrary view, one could point to some California cases;[368] the *Bakke*/*Grutter* suggestion of deference to university judgment;[369] and Justice Stevens's dissent in *United States v. American Library Ass'n*,[370] where he argued that federal conditions on municipal library funding violate the unconstitutional conditions doctrine.[371] The Supreme Court has noted but not decided the question.[372] So far, we don't have anything authoritative at the level of federal law.

Paul Secunda suggests that assuming that the law school members of the Forum for Academic & Institutional Rights—including the public law schools—are expressive associations may have inadvertently opened the door to public-university employment-discrimination rights.[373] But the *Rumsfeld v. FAIR* analysis is hardly a holding that public universities are expressive associations, and Secunda himself believes that the Supreme Court would reject this suggestion if push came to shove.[374]

Most recently, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[375] the specialty-license-plates case, the Court tantalizingly suggested the existence of state-government First Amendment rights: "[J]ust as Texas cannot require [Sons of Confederate Veterans (SCV)] to convey the State's ideological message, SCV cannot force Texas to include a Confederate battle flag on its specialty license plates."[376] But, again, this was just dictum.

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365. David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1639 (2006); *see also* Greenfield, *supra* note 2, at 210–11 ("[S]tate actors such as [the University of North Carolina] do not have cognizable free speech rights vis-à-vis other government entities.").

366. 412 U.S. 94 (1973).

367. *Id.* at 139 (Stewart, J., concurring).

368. Fagundes, *supra* note 365, at 1644–45.

369. *Id.* at 1646–47.

370. 539 U.S. 194 (2003).

371. *Id.* at 225–31 (Stevens, J., dissenting); *see also* Fagundes, *supra* note 365, at 1645–46.

372. *Am. Libr. Ass'n*, 539 U.S. 194, 210–11.

373. Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1770, 1778–81, 1792–98 (2007).

374. *Id.* at 1771, 1808.

375. 576 U.S. 200 (2015).

376. *Id.* at 219.

That public universities may have First Amendment rights is an intriguing theory, and beyond the scope of this Article.[377] But even if we granted public universities First Amendment rights, we would still have to resolve more issues.

First, a state university with First Amendment rights would be able to assert the expressive-association theory against federal antidiscrimination laws such as Title VI or § 1981. But the *state* university might not be able to assert its rights against *state* law—presumably the state can control its own organizations.[378] (It might be different if the state constitution grants the university system some independence from the rest of state government.[379]) Nor could a *federal* university (such as West Point or the University of the District of Columbia) assert its rights against *federal* law.

Second, public universities, as state actors, are bound by Equal Protection, including the holding in *Students for Fair Admissions*. So, any expressive-association right would have to be balanced against the Equal Protection rights of whoever is harmed by an affirmative action policy. That would be tougher than in the private case, where a constitutional right is up against a mere statute.

And in a matchup between the public university's expressive-association right and the people's Equal Protection rights, the former might not do very well. Recall that *Grutter*, though it didn't explicitly examine the university's First Amendment right, did (following Justice Powell's *Bakke* concurrence) connect universities' interests with "the expansive freedoms of speech and thought associated with the university environment."[380] Despite that, *Grutter* still insisted on strict

377. *See generally* Fagundes, *supra* note 365; Gordon, *supra* note 51, at 63–66.

378. *But see* Horwitz, *supra* note 68, at 1526–30 (because public universities don't look like "governing" state bodies, are granted substantial autonomy from the state, and play a "unique role in advancing First Amendment values," it is plausible to think that they may hold First Amendment rights against the state); *id.* at 1550 (citing J. Peter Byrne, *Constitutional Academic Freedom After* Grutter*: Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929, 937–38 (2006) (arguing that state laws forbidding university affirmative action violate the U.S. Constitution)).

379. *E.g.*, CAL. CONST. art. IX, § 9; Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 257–58 (1934).

380. Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

scrutiny.[381] (And the same was true in some post-*Grutter* cases, even though they deferred to universities' judgment.[382])

Who knows, maybe it would have been different if the Court had entertained the idea of universities' First Amendment *rights* rather than mere First Amendment–inspired *interests*.[383] But based on hints from *Grutter*, if public universities had any First Amendment-inspired scope of action with respect to affirmative action, it was limited.[384]

Justice Anthony Kennedy, in his dissent, similarly broadly endorsed Justice Powell's First Amendment rationale, but insisted on "rigorous judicial review" and "strict review"—which, in his view, prohibited the affirmative action program.[385] Justice Clarence Thomas's separate opinion denied that "the Law School's assessment of the benefits of racial discrimination and devotion to the admissions status quo [were] entitled to any sort of deference, grounded in the First Amendment or anywhere else."[386] In his view, there was "no basis for a right of public universities to do what would otherwise violate the Equal Protection Clause."[387]

The combined views of Justices Kennedy and Thomas now seem to have carried the day: the only place the First Amendment shows up in *Students for Fair Admissions* is in Justice Sotomayor's dissent.[388]

### 2. Universities as "First Amendment Institutions"

Perhaps it's not enough to vaguely gesture, Justice Powell–style, to the importance of universities in free expression. Perhaps one should take seriously that "[e]ducation is different"[389] and build on the tradition of judicial deference to

381. *Id.* at 326 ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995))).

382. *E.g.*, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 376–77 (2016).

383. *See* Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006); Secunda, *supra* note 373, at 1805–06.

384. *See* Greenfield, *supra* note 2, at 210–11.

385. *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting).

386. *Id.* at 362 (Thomas, J., concurring in part and dissenting in part).

387. *Id.*

388. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 332–33 (2023) (Sotomayor, J., dissenting).

389. Horwitz, *supra* note 68, at 1499 (quoting Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1779 (1996)).

universities' decisions in the First Amendment context (e.g., in *Grutter*[390]) and elsewhere.[391]

Paul Horwitz argues that one should explicitly recognize universities as part of a unique set of institutions (including "the press, religious associations, libraries, and others") that "play a fundamental role in our system of free speech"; in his view, they are "First Amendment institutions" and should be treated differently as a doctrinal matter.[392] Such institutions should be "granted significant presumptive authority to act, and courts [should] defer substantially to actions taken by those institutions within [their] sphere of autonomy."[393]

Universities are well-suited for such treatment because they're easy to recognize, are environments for pursuing truth and finding meaning, operate within highly structured "disciplines," comply with "scholarly standards," and are characterized by "myriad bureaucratic rules" and other "structural mechanisms."[394] (This recognition needn't be pro-free-speech: Horwitz argues that courts should even uphold a university's speech restrictions if they're grounded in the university's values related to "the nature of desirable speech on campus" or the university's "academic mission."[395]) In the strongest form of "First Amendment institution" university deference (which Horwitz doesn't favor[396] and which certainly isn't the law), universities could be given "near-absolute discretion" in areas including "the composition of the student body based explicitly on considerations of race or gender."[397]

This "universities as First Amendment institutions" view would be a departure from current doctrine; the current view is what Horwitz calls the acontextual or "institutionally agnostic" view,[398] which embodies, at most, what he calls "weak-form

390. *See supra* text accompanying notes 60–75.

391. Horwitz, *supra* note 68, at 1501.

392. *Id.* at 1502–04, 1510.

393. *Id.* at 1510. This has a similar flavor to Meir Dan-Cohen's view of universities that (*qua* organizations) lack original autonomy rights but (as "protective organizations" devoted to academic freedom) have derivative autonomy rights, even against other protective organizations like the EEOC. MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 66–69, 176 (2d ed. 2016).

394. Horwitz, *supra* note 68, at 1514–15.

395. *Id.* at 1519.

396. *Id.* at 1522.

397. *Id.* at 1520; *see also id.* at 1553–57.

398. *Id.* at 1503–10, 1523. I myself favor this view (in which organizations are pure conduits for the rights of their members but otherwise have no special treatment), though this is again beyond the scope of this Article.

treatment of universities as First Amendment institutions."[399] Moreover, if a university significantly abandons academic-freedom and free-speech norms to fit in the *Boy Scouts* theory, the "First Amendment institutions" theory might not even apply on its own terms.[400]

### 3. Noncoercive Competitors as Not State Actors

Finally, one might question whether public universities should be considered state actors at all.

Usually, private parties aren't considered state actors and don't need to observe constitutional rights. For instance, private schools aren't state actors—even if their money largely comes from public contracts.[401] But private parties can be considered governmental if they have clear indicia of publicness, such as fulfilling a traditionally exclusive public function or somehow being entwined with the public sector.[402] Thus, private prisons are always state actors—at least with respect to their prisoners—because they perform a coercive function that's unavailable to ordinary private people.[403]

On the public-sector side, though, the rule is much more automatic: public employees and formally public entities (i.e., ones that are part of the traditional apparatus of state government) are virtually always considered state actors.[404] One exception to this principle is public defenders, because their relationship to their clients is similar to any other lawyer-client relationship, because they need to be independent, and because they're in a role that's adverse to the government.[405] But that's a narrow exception: otherwise, public employees are classified as state actors with no further analysis.

Do we need to do this? If we can follow a functional analysis, whereby nominally private parties can sometimes be considered state actors if they act in a way that's somehow

399. *Id.* at 1516–17.

400. *See id.* at 1518, 1538, 1555.

401. Blum v. Yaretsky, 457 U.S. 991, 1010–11 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 839–41 (1982).

402. *E.g.*, Volokh, *supra* note 337, at 1006–10.

403. *E.g.*, Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 460–61 (5th Cir. 2003); Smith v. Cochran, 339 F.3d 1205, 1215–16 (10th Cir. 2003); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991); *cf.* West v. Atkins, 487 U.S. 42, 54–57 (1988) (finding that a private doctor providing medical care for prisoners was a state actor); *see also* Volokh, *supra* note 337, at 1006–10.

404. Lugar v. Edmonson Oil Co., 457 U.S. 922, 936 n.18 (1982) ("[S]tate employment is generally sufficient to render the defendant a state actor . . . .").

405. Polk Cnty. v. Dodson, 454 U.S. 312, 317–24 (1981).

governmental, why not follow the same analysis in reverse and sometimes (beyond the narrow context of public defenders) consider nominally public actors as though they were private? Perhaps "the automatic treatment of all actions of the government as 'state action'—or at least as all *equally* state action—should be qualified in favor of a more thoroughgoing functionalism."[406]

If we did this, a good candidate for non-state-actor status would be public universities. They're non-coercive (nobody attends or works at a university unless they want to), their relationship with students or faculty is regulated by contract, and public universities compete with (and can sometimes be hard to distinguish from) private universities. Moreover—perhaps like public defenders—academic-freedom and free-speech norms suggest that professors and students are expected to be independent from (and sometimes adverse to) the government. And people at universities often have their own ethical norms, from generalized academic-freedom norms to field-specific codes such as legal or medical ethics. So perhaps public universities should be considered just like private universities—and thus have First Amendment rights, including expressive-association rights.

This slightly resembles Richard Epstein's argument in favor of a "flexible standard that measures the constitutionality" of public-university affirmative action, when done on those universities' own initiative, "by comparing it with the practices done by private, competitive institutions on a voluntary basis."[407] Public universities' "resemblances to private universities are far greater than those to public police forces"; public universities should therefore "be able to imitate the set of practices undertaken by private universities."[408]

Epstein isn't denying that universities are state actors, though; under his view, public universities would merely be subject to a sort of reasonableness review where the standard is the prevailing practice in comparable private-sector

406. David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 411 (1993); *see also id.* at 416 (arguing that the doctrine should be extended to provide less stringent limitations on government action where government action is similar to private action).

407. Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense*, 100 MICH. L. REV. 2036, 2037 (2002); *see also id.* at 2059–60 (arguing that public institutions of higher education should be seen as "voluntary associations" and should be able to adopt similar strategies of affirmative action as private institutions).

408. Epstein, *supra* note 51, at 1385.

institutions: "[W]e take as the measure of the reasonableness of the state action the question of whether it follows the voluntary patterns and choices made by the private institutions with which it competes."[409]

Epstein's argument—a sort of "constitutional variation of the business judgment rule"[410]—is one way to allow public-university affirmative action; the no-state-action rule is another. Both are premised on the idea that public universities are essentially voluntary organizations that compete with and resemble private universities. However, neither of these positions has much support in current doctrine. I'm sympathetic to the no-state-action position (and thus the expressive-association rights of public universities)—and, more generally, I would welcome a functionalist rethinking of state action. But that rethinking would be a fundamental change in state-action doctrine.

## III. WHAT ARE THE LIMITS OF THIS THEORY?

### A. *Where the Doctrine Is*

Let's recap. A lot is uncertain about the *Boy Scouts* doctrine. I've suggested how universities can look more like the Boy Scouts—make faculty and students into mouthpieces for inculcating university values. That might involve abandoning some academic-freedom norms (at least as it concerns diversity values); many universities might not want to adopt this modest proposal, for good and obvious reasons.

Can a university take advantage of this theory without becoming a Boy Scouts clone? Perhaps, but it's hard to know for sure, because *Boy Scouts* is the only Supreme Court case that clearly shows how expressive-association norms can overcome antidiscrimination law.

*Rumsfeld v. FAIR* says, though, that we get no exceptions when the behavior isn't inherently expressive, i.e., when the behavior can be engaged in nonexpressively and you need words surrounding the conduct to explain that the behavior is expressive.[411] This is what guarantees the constitutionality of antidiscrimination laws in most circumstances.[412]

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409. Epstein, *supra* note 407, at 2056.

410. *Id.* at 2057.

411. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 65–66 (2006).

412. Volokh, *supra* note 115, at 733 ("Decisions not to buy or sell goods or services are generally not protected by the First Amendment. That is the necessary

And the lesson of *Roberts* is that even when an organization engages in expression, it must show a substantial burden on its ability to express its message[413]—which is difficult with an antidiscrimination law, except if the law alters the message or affects the choice of leaders or authority figures who speak for the organization.

### B. *Where the Doctrine Might Go*

Where are some of flexibilities in the doctrine—i.e., where can we imagine that the doctrine might move in the future? Here, I discuss three areas: what constitutes a substantial burden, whether a governmental interest is compelling, and what activities count as expressive. The easier it is to find a substantial burden, the less compelling the governmental interest, and the more activities are expressive, the more likely an affirmative action program—even outside of universities—will be to survive under the expressive-association theory.

#### 1. Substantial Interference

One area is what it takes to show substantial interference with an organization's expression. The Supreme Court held in *Associated Press v. NLRB* that a newspaper *couldn't* fire a reporter for his pro-union activity,[414] but the Washington Supreme Court held in *Nelson v. McClatchy Newspapers*[415] that a newspaper *could* fire a reporter for violating its policy against engaging in high-profile political activity.[416] In both cases, the newspaper had asserted an interest in maintaining the appearance of unbiased and impartial reporting.[417] Of course, the U.S. Supreme Court is supreme; but this shows that a lot depends on how willing a court is to accept that there's a real burden in a particular case.

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implication of *Rumsfeld v.* [*FAIR*], and it is the foundation of the wide range of antidiscrimination laws, public accommodation laws, and common carrier laws throughout the nation.").

413. Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984).

414. Associated Press v. NLRB, 301 U.S. 103, 132 (1937); *see also supra* text accompanying notes 161–164.

415. 936 P.2d 1123 (Wash. 1997).

416. *Id.* at 1131–33. The court came to the same result under both the federal and state constitutions.

417. The *Nelson* court distinguished *Associated Press* on the grounds that *Associated Press* was about "internally unionizing a small work force" rather than maintaining a "publication's credibility and integrity," *id.* at 1132, but that seems inconsistent with AP's emphasis on bias and partiality in *Associated Press*, *Associated Press*, 301 U.S. at 131.

For instance, in *McDermott v. Ampersand Publishing, LLC*,[418] the Ninth Circuit held that a newspaper was entitled to a First Amendment exemption from the National Labor Relations Act, but this was against the background of a strike that was largely motivated by reporters' desire to assert their independence from the newspaper owner's editorial control.[419] (Properly, this is somewhat less than a holding: under the procedural posture in this case, the court decided not whether the First Amendment protected the newspaper's activity, but just whether there was "at least some risk" of a First Amendment violation.[420])

This also relates to whether organizations can choose their listeners. Usually, it doesn't burden an organization's message to prevent it from discriminating between different groups of listeners. But what if the organization's message is tailored to a certain group in a mission-relevant way, as in the Nation of Islam cases? As I've noted above, there are various sources on point from a state court and a lower federal court, but none from the Supreme Court. If the Court decides to move toward more strong-form expressive-association protection, one way to do so will be to say that certain types of antidiscrimination laws are per se burdens on an association's expression.

### 2. Compelling Government Interests

Another potential flexibility is in how courts characterize the governmental interest that might overcome an associational claim. I've said earlier that overcoming discrimination is generally considered a compelling interest, regardless of the basis of the discrimination, and the market context may not make a difference.

But at least one lower-court case has questioned the government's nondiscrimination interest by characterizing it narrowly. The Gay Softball World Series had a rule permitting a "maximum of two Heterosexual players" on any participating team.[421] This rule violated a Washington statute prohibiting sexual-orientation discrimination.[422] However, the North American Gay Amateur Athletic Alliance asserted an

418. 593 F.3d 950 (9th Cir. 2010).

419. *Id.* at 960–61.

420. *Id.* at 959.

421. Apilado v. N. Am. Gay Amateur Athletic All., 792 F. Supp. 2d 1151, 1155 (W.D. Wash. 2011).

422. *Id.* at 1157–60.

expressive-association right to keep its teams predominantly gay, lest its pro-gay-athletics message be diluted.[423]

The district court agreed with the expressive claim (see the next Subsection).[424] But the court also examined "whether or not [the athletic league's] interest in expressive association outweighs the state's interest in eradicating discrimination."[425] It acknowledged the Supreme Court's past endorsement of "the State's compelling interest in eliminating discrimination against women."[426] But it went on to state that "[p]laintiffs have failed to argue that there is a compelling state interest in allowing heterosexuals to play gay softball."[427]

Gay softball is admittedly different from a broadly intellectual organization such as a university. But the example illustrates a fact that is unsurprising and familiar in the constitutional law world: whether an interest wins, depends on the level of generality at which a judge can be convinced to characterize it.

### 3. Inherently Expressive Activities

Another question is what counts as expressive. As the *303 Creative* Court wrote, "Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions."[428] Though the Court denied that that "pure speech" case was one of the difficult ones,[429] other cases might test the limits of the concept.[430]

Consider, for instance, the gay softball case discussed above, where the gay athletic league won the right to discriminate in favor of gay players.[431] Consider, too, these food distribution cases:

- Fort Lauderdale Food Not Bombs wanted to share free vegetarian food in a public park to communicate its message that "society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a

423. *Id.* at 1160.
424. *Id.* at 1160–63.
425. *Id.* at 1163.
426. *Id.*
427. *Id.*
428. 303 Creative LLC v. Elenis, 600 U.S. 570, 599 (2023).
429. *Id.*
430. *See* Yoshino, *supra* note 22, at 275–79.
431. *Apilado*, 792 F. Supp. 2d at 1160–63.

responsibility to provide for all."[432] The city wanted to regulate this under food-distribution and other regulations.[433] The group asserted that its food sharing was expressive, and the Eleventh Circuit agreed.[434]

- Adherents of the Krishna consciousness religion wanted to serve students vegan lunch at the University of California, Los Angeles (UCLA) in conjunction with literature distribution and religious activities.[435] UCLA refused to grant permission to conduct Krishna Lunch.[436] The group asserted that its vegan-food distribution, in context, was expressive and that UCLA's restriction violated its expressive-association rights; the Ninth Circuit agreed (in an unpublished opinion) that this claim was plausibly pleaded.[437]

Consider also these donation cases, the second of which relates to affirmative action:

- Amazon's AmazonSmile program allowed a customer to direct 0.5% of the price of their Amazon purchase to "an eligible charity selected by the customer."[438] Amazon chose to exclude charities that were designated as "hate groups" by the Southern Poverty Law Center.[439] Coral Ridge Ministries Media, a Christian group classified as a hate group because of its opposition to homosexuality, sued Amazon under Title II for religious discrimination.[440] Amazon argued that its "choice of what charities are eligible to receive donations" is "expressive conduct."[441] The Eleventh Circuit concluded that forcing Amazon "to donate to an organization it does not wish to support" would "modify the content of [Amazon's] expression" and violate the First Amendment.[442]
- The Fearless Foundation "seeks to bridge the gap in venture capital funding for women of color founders building

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432. Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale, 901 F.3d 1235, 1238 (11th Cir. 2018).

433. *Id.* at 1239.

434. *Id.* at 1240–45.

435. Appellants' Opening Brief at 4–5, Krishna Lunch of S. Cal., Inc. v. Gordon, 797 F. App'x 311 (9th Cir. 2020) (No. 18-55316), 2018 WL 4621133, at *4–5.

436. *Id.* at 5, 2018 WL 4621133, at *5.

437. Krishna Lunch of S. Cal., Inc. v. Gordon, 797 F. App'x 311, 313–14 (9th Cir. 2020).

438. Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1250 (11th Cir. 2021).

439. *Id.*

440. *Id.* at 1251.

441. *Id.* at 1255.

442. *Id.* at 1256.

scalable, growth aggressive companies. To bridge this gap, the Foundation operates the Fearless Strivers Grant Contest . . . , which awards $20,000 grants to small businesses owned by Black women."[443] This contest was challenged for violating § 1981,[444] but the Foundation asserted an expressive-association right to donate to groups that are consistent with its mission.[445] The Foundation won in district court, but lost in the Eleventh Circuit.[446]

And here's an affirmative action case related to scholarship, though not at universities:

- *Health Affairs*, published by Project Hope, is a prestigious medical journal that has a "Health Equity Fellowship for Trainees, which provides mentorship and publication opportunities for health policy scholars."[447] White applicants were excluded from applying for this fellowship.[448] A would-be applicant argued that this restriction violates Title VI (since Project Hope accepts federal funding[449]) and other antidiscrimination laws.[450] But the journal asserted an expressive-association interest in maintaining race-conscious selection criteria.[451] The fellowship "exists to increase the quality and quantity of health policy research focused on racial equity and authored by members of racial and ethnic groups that have historically been underrepresented in *Health Affairs*": "[d]iverse scholars produce research with unique insight and value as to racial equity issues," and the race-

443. Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 2023 WL 6295121, at *1 (N.D. Ga. Sept. 27, 2023), *aff'd in part, rev'd in part*, 103 F.4th 765 (11th Cir. 2024).

444. *Id.*

445. *Id.* at *5–6.

446. Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, 103 F.4th 765, 777–79 (11th Cir. 2024).

447. *We're Suing Health Affairs for Racial Discrimination*, DO NO HARM (Sept. 6, 2022), [hereinafter *We're Suing*], https://donoharmmedicine.org/2022/09/06/were-suing-health-affairs-for-racial-discrimination/ [https://perma.cc/DL8W-FPZU].

448. *Id.*

449. Aaron Sibarium, *Meet the Left-Wing Health Group Citing the Boy Scouts of America to Justify Excluding Whites from a Prestigious Fellowship*, WASH. FREE BEACON (Oct. 31, 2022), https://freebeacon.com/courts/meet-the-left-wing-health-group-citing-the-boy-scouts-of-america-to-justify-exclusion-of-whites-from-a-prestigious-fellowship/ [https://perma.cc/X3X3-TXQQ]; *We're Suing*, *supra* note 447; Amended Verified Complaint at 6, 10–14, Do No Harm v. Health Affs., No. 22-cv-02670 (D.D.C. Nov. 21, 2022).

450. Plaintiff Do No Harm's Memorandum in Opposition to Defendants' Motion to Dismiss Amended Complaint at 3, *Do No Harm*, No. 22-cv-02670.

451. Opposition to Motion for Preliminary Injunction at 2, *Do No Harm*, No. 22-cv-02670.

conscious criteria "cannot be separated from the overall expressive goals of Project HOPE and Health Affairs in the health equity field."[452] The journal dropped its race-restrictive criteria, and the case was voluntarily dismissed.[453]

The *Health Affairs* case is about policy research—i.e., writing. That's expressive. But . . . softball, food distribution, charitable donations? There's some lower-court willingness to find that various non-pure-speech activities are expressive enough to merit First Amendment protection, whether under a free-speech or an expressive-association theory.

Are these cases consistent with Supreme Court case law? On the one hand, if you can't make nonexpressive conduct expressive by saying it's ideological, softball and food distribution will probably have a hard case.

On the other hand, we should read the no-unilateral-characterization rule in context. In determining whether conduct is expressive, there's a subjective component—"[a]n intent to convey a . . . message"—and an objective component—whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[454] (Though "[a]n intent to convey a *particularized* message"[455] certainly helps, the "particularized" component is optional, because we need to also protect Jackson Pollock, Arnold Schoenberg, and Lewis Carroll.[456]) Even disregarding explanatory words, some conduct is already expressive just because of how it's socially perceived. "[C]ontext may give meaning to [a] symbol,"[457] from flags to black armbands.

Thus, flag burning's expressive nature is "overwhelmingly apparent,"[458] whereas "the point of requiring military interviews to be conducted on the undergraduate campus is not 'overwhelmingly apparent.'"[459] Consider parades:

> If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the

452. *Id.* at 13–14.

453. Notice of Voluntary Dismissal at 1–2, *Do No Harm*, No. 22-cv-02670.

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

455. *Id.* (emphasis added).

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

457. *Spence*, 418 U.S. at 410.

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

459. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006).

> march itself. . . . Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.[460]

How do we know that a parade is expressive and not just "march[ing] from here to there"? Even without reading the signs, we can observe that people are walking in a large group and holding signs—which invokes a social expectation of a protest, an expressive act.

This is a reasonable, moderate position: you can't make conduct expressive by talking about it, but conduct isn't necessarily nonexpressive just because there exist potential nonexpressive explanations. We look, objectively, to how it's likely to be perceived in the current social context—Justice Thomas's concurrence in *Masterpiece Cakeshop*, explaining why a wedding cake is expressive, suggests just how contextual such an analysis might be.[461] These social expectations extend not only to particular acts but also to a particular medium's role—for instance, when a medium is forced to accommodate someone else's message.[462] Newspaper owners and parade organizers are speakers, not conduits for other people's speech, but the answer is the opposite when it comes to cable systems or shopping mall owners.[463]

The Supreme Court hasn't been very clear about precisely how to do this expressive-conduct inquiry.[464] This gives courts leeway in finding expressive conduct in a variety of circumstances. It also suggests where litigants might want to act strategically to increase the chances that a court will find

460. *Hurley*, 515 U.S. at 568.

461. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 658–60 (2018) (Thomas, J., concurring in part and concurring in the judgment); Yoshino, *supra* note 22, at 278 ("For each [future case], the Court will have to engage with the history of the particular genre of putative expression, becoming historians of the dessert, the epitaph, the birth announcement, and the family portrait.").

462. *Masterpiece Cakeshop,* 584 U.S. at 659–60.

463. *Hurley*, 515 U.S. at 575; Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

464. *See, e.g.*, Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 250 (2015) ("[T]he existing doctrine has not yet resolved questions such as whether conduct deemed expressive must be inherently expressive and what role context plays in that analysis, whether the audience is actual or hypothetical, and at what level of generality the conduct ought to be described.").

their conduct artistic or expressive.[465] And it suggests where the Supreme Court may have flexibility in the "brutally difficult line-drawing exercises" this area of doctrine will require.[466] Maybe the gay softball case went too far. Maybe food distribution is more arguable: distributing food in a park or on a university campus isn't itself communicative, but perhaps doing so in the context of handing out literature and doing religious observances would be perceived differently. (It's not that the government couldn't regulate it, but it would be evaluated under *O'Brien* intermediate scrutiny.[467])

What about cases involving giving money? Exchanging money for goods and services is usually nonexpressive: "[T]he First Amendment does not generally protect liberty of contract,"[468] and giving money for something of value is overwhelmingly likely to be perceived as merely one's attempt to get the thing. Thus, if a venture capital fund invested only in black-owned businesses—giving money for voting rights, cash flow rights, or both—this would violate § 1981 and wouldn't be considered expressive for First Amendment purposes.

But what about giving money for free, no strings attached?

Asking for donations is of course expressive, but that's because the asking is itself speech.[469] Some cases have characterized donations as expressive, but that was where money was given to facilitate speech (e.g., campaign finance).[470] This is consistent with the expressive-association right's limitation to people associating in order to engage in conduct that's itself already expressive.

Similarly, compelled contributions have been characterized as impingements on associational rights—but, again, that was

465. *See* Yoshino, *supra* note 22, at 279 (discussing Subway "Sandwich Artists" and related hypotheticals and highlighting the possibility that courts will distinguish—or will bend over backwards to avoid distinguishing—"highbrow" and "lowbrow" activities).

466. *Id.* at 288; *see also* Ball, *supra* note 123, at 63 ("[T]he Court failed to provide any guidance on what constitutes sufficiently expressive business conduct, leaving the issue entirely for future adjudication.").

467. United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

468. Volokh, *supra* note 115, at 735; *see also* Greenfield, *supra* note 2, at 251–52 ("Universities and colleges are distinctly expressive in ways that most businesses are not.").

469. *E.g.*, Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 788 (1988); Sec. of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 967–68 & n.16 (1984).

470. *E.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

in the context of compelled contributions to someone else's expression, such as required donations to a union's political activity.[471]

That said, there is some support for the idea that donations can be expressive as such. *Buckley v. Valeo*[472] said that "[a] contribution serves as a general expression of support for the candidate and his views" and spoke of "the symbolic expression of support evidenced by a contribution."[473] This was of course in the context of political campaigns (i.e., speech). But the Court later reasserted the same idea in a more general context, involving donations to a variety of charities, not all of which were speech related.[474]

Ultimately, it comes down to how donations are socially perceived. Merely giving money to a charity is usually perceived as just wanting to promote the charity's work. Merely giving money to a black-woman-owned business could be perceived as just supporting that business's work, rather than as a broad social statement about the importance of black-woman-owned businesses in society. But giving out that money as part of an organized and widely advertised campaign can be perceived differently.

The lower-court post–*Boy Scouts* activity shows that courts have been flexible on what can be considered expressive. If that hurdle isn't cleared, then any expressive-association theory is a non-starter. But if a court does find expressive activity, a *Boy Scouts*–based expressive-association theory is more likely to prevail.

## CONCLUSION

The primary moral of this story is: When one door closes, another door opens.

Because of *Students for Fair Admissions*, a lot of race-conscious affirmative action might now be illegal under Title VI and § 1981, but *at least some private universities might* have a constitutional right to do it anyway, based on the expressive-association right recognized over twenty years ago in *Boy*

471. *E.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977), *overruled in part by* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878 (2018); Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 456 (1984); Chi. Teachers Union v. Hudson, 475 U.S. 292, 302 (1986).

472. 424 U.S. 1 (1976).

473. *Id.* at 21; *see also Nixon*, 528 U.S. at 386.

474. *Cornelius*, 473 U.S. at 799.

*Scouts* and recently beefed up in the compelled-speech context in *303 Creative*.[475] Some high points:

- The doctrine should carry over to the racial context.
- The market context should be irrelevant.
- The government should retain the ability to induce race neutrality using its conditional spending under Title VI. But the unconstitutional conditions doctrine should guarantee that the threat of pulling funding is limited to the specific units that discriminate, instead of affecting the entire institution. As a result, universities should retain substantial ability to engage in race-conscious affirmative action, at least in some units.
- This theory won't help public universities.

Many of those who like affirmative action may dislike the *Boy Scouts* doctrine and may hesitate to be very *(303) Creative* with it.[476] But (to borrow an expression from the petitioner in *Rumsfeld v. FAIR*) you litigate with the case law you have, not the case law you wish you had.

The secondary moral of this story is: Mind the "*at least some private universities might*" that I italicized above. Despite fears that *Boy Scouts* would massively undermine antidiscrimination law, the actual *Boy Scouts* exception is likely fairly narrow. To most cleanly fit within it, those covered by an expressive-associational right to affirmative action should be authority figures who speak for the institution. The closest fits will be at universities that *do* have strong faculty- and student-governance norms but *don't* have strong faculty or student academic-freedom or free-speech norms, so their faculty and students can really be described as, in some way, leaders who speak for the institution.

That's not to say that other universities won't be able to qualify for the *Boy Scouts* exemption, but the looser the resemblance with the Boy Scouts, the less sure we can be that the doctrine will apply.

And a final moral is: Let's look, based on post–*Boy Scouts* lower-court cases, at where the doctrine is flexible and where it

475. Greenfield suggests that Congress could also amend Title VI, *see* Greenfield, *supra* note 2, at 210—and, I would add, § 1981—though he also notes that this would be "unlikely, . . . given the lack of political consensus" as well as modern-day congressional "institutional gridlock and chaos." *Id.*

476. *Cf. Id.* at 204–05 (discussing "the possible cost of extending an already unfortunate line of doctrine to protect more nefarious behavior"); *id.* at 234, 251–52; Khorri Atkinson, *Backing Diversity as First Amendment Expression Comes with Risks*, BLOOMBERG L. (June 13, 2024, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/backing-diversity-as-first-amendment-expression-comes-with-risks [https://perma.cc/J82U-B4QQ].

might be headed. There's some flexibility in when a burden on an organization becomes "substantial" and also in whether some antidiscrimination interests that the government might present to overcome the expressive-association right would be considered "compelling."

But the main question is whether certain activities are considered "expressive" to begin with. Because the test for whether an activity is considered expressive relies a lot on social expectations and how people interpret an activity, this element is key to whether any expressive affirmative-action right can be viable outside the educational context.