Denver Law Review

Volume 91 | Issue 2 Article 7

January 2014

Speech, Association, Conscience, and the First Amendment's Orientation

Mark Strasser

Speech, Association, Conscience, and the First Amendment's Orientation

SPEECH, ASSOCIATION, CONSCIENCE, AND THE FIRST AMENDMENT'S ORIENTATION

MARK STRASSER†

ABSTRACT

More and more states are permitting same-sex unions to be celebrated, which will likely result in an increase in the number of individuals claiming that they are precluded by conscience from providing goods or services to such families. While the First Amendment to the United States Constitution provides great protection to religious belief, it provides much less protection to conscience-based conduct in violation of nondiscrimination statutes, especially when such refusals of conscience are in a commercial context.

This Article discusses a variety of cases that are often thought to implicate matters of conscience—compelled speech, symbolic conduct, conscientious objection—as well as several unemployment benefits and right of association cases. While these cases might be interpreted in a number of ways, they nonetheless seem to provide relatively little protection to conscience-based refusals to engage in allegedly symbolic activities that themselves might be interpreted in a number of ways.

After providing an analysis of existing constitutional protections, the Article focuses on *Elane Photography v. Willock*, explaining how the case should be decided in light of existing constitutional guarantees as they have been explained by the Court. The Article concludes that were the Court to ignore the current jurisprudence and find such conscience-based actions protected under the Federal Constitution, the Court would thereby create an exception that was difficult if not impossible to cabin, which would lead to a variety of regrettable consequences.

† Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

TABLE OF CONTENTS

I. INTRODUCTION

More and more states are affording recognition to same-sex relationships either by amending their marriage statutes or by creating a separate civil union or domestic partnership status. These developments have not been greeted with universal acclaim. Indeed, some claim that the promotion of same-sex marriage contravenes their religious principles and that they should not be forced to violate their consciences by providing services to same-sex couples and their families. As more states accord rights to sexual minorities, an increasing number of individuals will likely claim that the First Amendment immunizes their conscience-based refusals to provide goods or services to such allegedly objectionable families.

Last term, the United States Supreme Court heard two cases with implications for same-sex couples and their families: *United States v. Windsor*[1] and *Hollingsworth v. Perry*.[2] The former resulted in Section 3 of the Defense of Marriage Act (DOMA) being struck down,[3] whereas the denial of standing in the latter[4] resulted in California again permitting same-sex marriages to be celebrated.[5] Because more and more states

1. 133 S. Ct. 2675 (2013).
2. 133 S. Ct. 2652 (2013).
3. *Windsor*, 133 S. Ct. at 2696 ("The federal statute is invalid . . . .").
4. *Hollingsworth*, 133 S. Ct. at 2668 ("We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.").
5. Eric Woomer, *Same-Sex Couples Marry in County*, DESERT SUN, July 2, 2013, at A3 ("Same-sex marriages are underway in California . . . .").

(including California) now permit same-sex marriages to be celebrated, the number of individuals who may seek a conscience-based exemption for their refusals to provide services to same-sex couples and their children will likely also increase. Ultimately, the United States Supreme Court will have to clarify the conditions under which individuals are entitled to conscience-based exemptions from the application of neutral laws.

Thus far, the Court has given contradictory signals about the protections afforded to conscience. While individuals cannot be forced to affirm principles that they do not believe, the protections for symbolic conduct are less clear. In addition, the Court has repeatedly emphasized that individuals engaging in commerce do not have the same constitutionally protected associational freedoms as they would in a noncommercial context. Finally, while the Court has sometimes implied that the Constitution takes religious convictions seriously, the Court's decisions do not suggest that such convictions will trump the application of nondiscrimination laws in the commercial context. In short, a significant change in the current jurisprudence would be required for such conscience-based-exemption claims to win the day.

This Article examines several First Amendment grounds upon which an exemption to providing goods or services to same-sex couples and their children might be founded, analyzes how the Court has applied First Amendment jurisprudence when discrimination on the basis of orientation was at issue, and then focuses on how a much discussed case—*Elane Photography, L.L.C. v. Willock*[6]—should be decided. This Article concludes that the First Amendment neither does nor should immunize individuals engaging in commerce from nondiscrimination laws, religious qualms about treating customers and clients equally notwithstanding.

II. FIRST AMENDMENT JURISPRUDENCE

The First Amendment limits the degree to which the state can require private individuals to speak or to remain silent[7]—absent compelling justification, the state cannot force individuals to affirm a principle in which they do not believe.[8] Further, the state cannot require organizations to extend membership to nondesired individuals if so doing would

6. 284 P.3d 428 (N.M. Ct. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013).

7. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988) ("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.").

8. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

change the organization's message.[9] In addition, the Court has recognized that individuals place great importance on being able to act in accord with their religious convictions.[10] In short, the First Amendment offers significant protections against government interference with expression and association, and some protection for conscience.

A. Protections Against Compelled Speech

In *West Virginia State Board of Education v. Barnette*,[11] the Court addressed whether children in public schools could be forced to salute the flag in contravention of their faith.[12] The Court rejected the proposition that the Constitution permits the state to force an individual "to utter what is not in his mind."[13] At least in part because the "sole conflict [wa]s between authority [i.e., the state] and rights of the individual"[14] and because the "freedom asserted by these appellees d[id] not bring them into collision with rights asserted by any other individual,"[15] the Court overruled *Minersville School District v. Gobitis*[16] and struck down the flag salute requirement.[17] In a stirring and frequently cited passage,[18] the Court explained, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[19]

---

9. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) ("In this respect, freedom of association receives protection as a fundamental element of personal liberty. . . . [T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.").

10. *See, e.g.*, Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (holding that it was a violation of the free exercise of religion of the First Amendment to deny unemployment compensation benefits to a claimant who left his job for religious reasons); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that it is unconstitutional to apply eligibility provisions for unemployment compensation such that a claimant who refused employment because it required her to work on Saturdays in contravention of her religious beliefs would be denied benefits).

11. 319 U.S. 624 (1943).

12. *See id.* at 629.

13. *Id.* at 634, 642.

14. *Id.* at 630.

15. *Id.*

16. 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. at 642.

17. *Barnette*, 319 U.S. at 642.

18. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (quoting *Barnette*, 319 U.S. at 642); Clingman v. Beaver, 544 U.S. 581, 616 (2005) (quoting *Barnette*, 319 U.S. at 642); Texas v. Johnson, 491 U.S. 397, 415 (1989) (quoting *Barnette*, 319 U.S. at 642); Wallace v. Jaffree, 472 U.S. 38, 55 (1985) (quoting *Barnette*, 319 U.S. at 642); Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982) (quoting *Barnette*, 319 U.S. at 642); Branti v. Finkel, 445 U.S. 507, 514 n.9 (1980) (quoting *Barnette*, 319 U.S. at 642); Elrod v. Burns, 427 U.S. 347, 356 (1976) (quoting *Barnette*, 319 U.S. at 642); Street v. New York, 394 U.S. 576, 593 (1969) (quoting *Barnette*, 319 U.S. at 641–42); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 244 n.15 (1957) (quoting *Barnette*, 319 U.S. at 642).

19. *Barnette*, 319 U.S. at 642.

Yet it is not always clear when one's required action is equivalent to a forced confession contravening one's beliefs,[20] and the Court has offered too little guidance about how to resolve difficult cases. Instead, the *Barnette* Court simply stated that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."[21] Precisely because the flag salute in that context was a "form of utterance"[22] symbolizing one's "adherence to government as presently organized"[23] and one's "acceptance of the political ideas [the flag] bespeaks,"[24] there was no need to discuss what a more ambiguous physical action in a more neutral context would mean.[25]

In *Wooley v. Maynard*,[26] the Court was afforded another opportunity to discuss the conditions under which behavior would constitute a forced affirmation. At issue was a New Hampshire requirement that the state motto, "Live Free or Die," not be obscured on passenger license plates.[27] George and Maxine Maynard were Jehovah's Witnesses who believed the state motto was "repugnant to their moral, religious, and political beliefs"[28] and who began to cover up the motto.[29] The Court framed the legal question as "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[30] But characterizing the legal question in this way almost guaranteed the result—it is as if what was at issue was whether the state could force an individual to post political signs such as "Vote for Jones" in her yard.[31]

---

20. *Cf.* Lee v. Weisman, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting) ("But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a 'reasonable dissenter . . . could believe that the group exercise signified her own participation or approval'?" (quoting *Lee*, 505 U.S. at 593 (majority opinion))).

21. *Barnette*, 319 U.S. at 633.

22. *Id.* at 632.

23. *Id.* at 633.

24. *Id.*

25. *See* Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1126 (2010) ("But for the presence of the flag, the forced salute might be thought to have a much different meaning. For example, were that same movement part of an exercise in a physical education class where no flag was nearby, the compelled movement would not implicate the same constitutional concerns, because it would not carry the same symbolism.").

26. 430 U.S. 705 (1977).

27. *Id.* at 706–07 ("The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.").

28. *Id.* at 707.

29. *Id.* at 708.

30. *Id.* at 713.

31. *See* Laura Jackson, Case Note, *The Constitution—It's What's for Dinner*, 2 WYO. L. REV. 617, 626 (2002) (explaining that *Wooley* "addressed the issue of whether the State could require a person to display a political message on private property"); Katherine Earle Yanes, Note, Glickman v. Wileman Bros. & Elliot, Inc.: *Has the Supreme Court Lost Its Way?*, 27 STETSON L. REV. 1461, 1473 (1998) (same).

The *Wooley* Court referred to *Barnette*, noting that "[c]ompelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate."[32] However, the Court characterized "the difference [a]s essentially one of degree,"[33] holding that the "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[34] Such a holding was unsurprising, given that the Court was in effect characterizing the New Hampshire law as a kind of commandeering of private individuals by the state to disseminate an approved message. The Court described the state measure as "forc[ing] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable,"[35] and held that the state was precluded by the Constitution from using its citizens in this way.[36]

The difficulty was not that the state's message was itself so objectionable, since New Hampshire's attempt to foster a "proper appreciation of history, state pride, and individualism"[37] was likely welcomed by many.[38] Rather, "the State's interest [in] disseminat[ing] an ideology . . . cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[39] While the First Amendment does not impose limits on what the government may say,[40] it does impose limits on what the Government may force an individual to say.[41]

Then-Justice Rehnquist dissented in *Wooley* on the ground that the "State has not forced appellees to 'say' anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture."[42] Rehnquist's dissent might be interpreted to have been making either of two different points. The first is that having the slogan "Live Free or Die" on a license plate should not be construed as speech at all, perhaps because the letters would be too

32. *Wooley*, 430 U.S. at 714–15.
33. *Id.* at 715.
34. *Id.*
35. *Id.*
36. *Id.*; Vikram David Amar, *Reflections on the Doctrinal and Big-Picture Issues Raised by the Constitutional Challenges to the Patient Protection and Affordable Care Act (Obamacare)*, 6 FIU L. REV. 9, 22 (2010) ("[T]he First Amendment prohibits government from mandating that individuals be vessels for government speech.").
37. *Wooley*, 430 U.S. at 717.
38. *Id.* at 715 ("The fact that most individuals agree with the thrust of New Hampshire's motto is not the test.").
39. *Id.* at 717.
40. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause . . . does not regulate government speech." (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005))).
41. *See Johanns*, 544 U.S. at 557 ("We have sustained First Amendment challenges to allegedly compelled expression in . . . true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government.").
42. *Wooley*, 430 U.S. at 720 (Rehnquist, J., dissenting).

small to be seen or because the writing would be viewed as decorative rather than as conveying information.[43] However, current experience belies that such expressions are viewed as not conveying any message. For example, several states permit individuals to choose the message that is on their license plates.[44] The difficult question for the courts has not been whether the specialty license plates constitute speech but, instead, whether the speech is government speech, private speech, or both.[45]

At issue in *Wooley* was not the speech that the Maynards had chosen to place on their license plate but, instead, the speech that New Hampshire required. A different interpretation of Justice Rehnquist's point is that the speech would likely be attributed to the state rather than to the Maynards and that they would not be inferred to be endorsing anything.[46] Thus, someone seeing the Maynards' license plate would not impute any beliefs about freedom or death to the Maynards themselves.

Suppose that the Court had accepted Justice Rehnquist's assessment that no one would impute an endorsement of the state motto to the Maynards. The New Hampshire requirement might nonetheless have been found constitutionally offensive if the license plate was viewed as private[47] rather than governmental property[48] for a reason having nothing to do with expression—for example, that the state was effecting a taking.[49] In that event, however, *Wooley* would not be viewed as a seminal First Amendment case.[50]

---

43. *Cf.* Nancy Cook, *Breaking Silence with Ourselves: Stepping out of Safe Boundaries*, 29 LAW & SOC'Y REV. 757, 759 (1995) (discussing "using words . . . merely as decorative diversions").

44. *See, e.g.*, ACLU of Tenn. v. Bredesen, 441 F.3d 370, 372 (6th Cir. 2006) ("Tennessee statutory law authorizes the sale of premium-priced license plates bearing special logotypes to raise revenue for specific 'departments, agencies, charities, programs[,] and other activities impacting Tennessee.'" (quoting TENN. CODE ANN. § 55-4-201(i) (2013))); *see also* Nelda H. Cambron-McCabe, Commentary, *When Government Speaks: An Examination of the Evolving Government Speech Doctrine*, 274 EDUC. L. REP. (WEST) 753, 762 (2012) ("Today specialty license plates have proliferated as states have opened up a market that generates revenue for the state, and oftentimes to the groups sponsoring specialty plates.").

45. *See* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[T]he speech that appears on the so-called 'special' or 'vanity' license plate could prove to be the quintessential example of speech that is both private and governmental . . . ."); Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1479–80 (2011) (arguing that "the expression emanating from specialty license plates is both governmental and private").

46. *Wooley*, 430 U.S. at 720–21 (Rehnquist, J., dissenting) ("The issue, unconfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.").

47. The Court explained that "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 715. But the Court did not specify whether the license, rather than the license plate, was the private property.

48. Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1680 (2010) ("[L]license plates are considered to be governmental, rather than private property.").

49. *Cf.* Gregory C. Sisk, *Returning to the Pruneyard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 413 (2009) ("[T]he governmentally encouraged physical invasion by strangers onto private property for speech, distribu-

Nonetheless, the Court's rationale in both *Barnette* and *Wooley* affords robust protection against compelled speech;[51] the state cannot force individuals to affirm messages that they do not believe. A separate issue, however, involves the degree to which the symbolic conduct of private individuals is protected.

B. Protections for Symbolic Conduct

In *United States v. O'Brien*,[52] the Court announced the test for determining the conditions under which the state regulation of symbolic conduct violates constitutional guarantees. At issue was the criminal prosecution of an individual for intentionally burning a draft card in front of a courthouse.[53] This act was performed during a period of social unrest due to opposition to the Vietnam War,[54] and O'Brien claimed that Congress was trying to limit speech by targeting the burning of draft cards.[55] The Court held that O'Brien's action was not properly characterized as speech, rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[56]

Even if burning the draft card was not speech per se, a separate question was whether O'Brien's action was nonetheless entitled to some First Amendment protection, and the Court was willing to assume that it was.[57] But that did not settle whether his action was immune from prosecution.[58] The Court outlined the relevant test for the regulation of sym-

---

tion of flyers, or any other purpose that the owner does not authorize is a classic example of a *per se* taking.").

50. *See* Lauren R. Robbins, Comment, *Open Your Mouth and Say 'Ideology': Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 167 (2009) (describing "Wooley v. Maynard [as one of the Court's] . . . seminal speech cases"). *See generally* Lorin Brennan, *The Public Policy of Information Licensing*, 36 HOUS. L. REV. 61, 84 (1999) (discussing "the seminal case of *Wooley v. Maynard*").

51. *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 712 (2011) (describing *Wooley* and *Barnette* as "landmark cases" establishing the right to refrain from speaking); Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1525 (2012) ("The right not to speak is most famously set forth in two Supreme Court cases, *West Virginia State Board of Education v. Barnette* and *Wooley v. Maynard*.").

52. 391 U.S. 367 (1968).

53. *Id.* at 369 ("David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse.").

54. *Cf.* David Kairys, *The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. ILL. L. REV. 195, 209 (2013) ("[T]he actual government purpose in *O'Brien* was to prohibit draft card destruction as an expression of opposition to the draft and the [Vietnam] War . . . .").

55. *O'Brien*, 391 U.S. at 376 ("O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the 'purpose' of Congress was 'to suppress freedom of speech.'").

56. *Id.*

57. *Id.* (proceeding "on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment").

58. *Id.* ("[I]t does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.").

bolic conduct, explaining that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[59] The Court summed up the test in the following way:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[60]

When using the "no greater than is essential" language, the *O'Brien* Court was not implying that narrow tailoring was required. On the contrary, the kind of tailoring required in the symbolic conduct context is less exacting than the kind of tailoring required in the regulation of pure speech.[61] The Court employs intermediate scrutiny to evaluate state regulation of symbolic speech,[62] and strict scrutiny with respect to the regulation of pure expression.[63]

There are two distinct respects in which *O'Brien* may be important to consider in the context of a refusal to provide services for conscience-based reasons. First, the Court is suggesting that merely because an individual believes that her conduct is expressive will not make it so for constitutional purposes. Second, even if a regulation affects conduct that is expressive, that regulation may be subject to intermediate rather than strict scrutiny and thus may be upheld as long as it promotes important state interests.

Two issues should be distinguished. One is whether a particular action should be characterized as pure speech rather than symbolic conduct. A different issue is whether an action is religiously inspired, because then an analysis may be necessary to determine whether the expression at issue—whether or not pure speech—must be accorded special protection because it was required by conscience.

---

59. *Id.*

60. *Id.* at 377.

61. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989) ("[W]ith respect to government regulation of expressive conduct, including conduct expressive of political views . . . we have not insisted that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989))).

62. *See* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 293 (2012) ("[T]he intermediate scrutiny test [is] used in *O'Brien* to determine the validity of government restrictions on symbolic speech.").

63. *See* Laura Markey, Article, *Repairing the Rusty Needle: Recognizing First Amendment Protection for Tattoos*, 21 KAN. J.L. & PUB. POL'Y 310, 311 (2012) ("If the government attempts to restrict pure speech based on the content of the speech, it must overcome a presumption of unconstitutionality and the strictest standard of judicial review, strict scrutiny.").

C. Protections for Conscience

The Court has addressed the protections that should be accorded to conscience-based activity in a few different kinds of cases. Some spelled out the conditions under which conscientious objector status in particular would be accorded, while others helped delimit more generally the extent to which conscience-based activities would be protected.

Consider the Court's discussion of conscientious objector status in *United States v. Seeger*.[64] At issue was the proper interpretation of a federal statute affording an exemption "from combatant training and service in the armed forces of the United States [to] those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[65] David Seeger "declared that he was conscientiously opposed to participation in war in any form by reason of his 'religious' belief,"[66] although his "belief was not in relation to a Supreme Being as commonly understood."[67] The Court interpreted congressional intent to include someone whose "given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[68] This interpretation was a matter of statutory construction,[69] although Justice Douglas suggested in his concurrence that a contrary interpretation would have resulted in a violation of constitutional guarantees.[70] *Seeger* has been interpreted to stand for a robust protection of conscience.[71]

Welsh v. United States[72] involved another conscientious exemption claim, and that plurality opinion also affords robust protections to conscience Elliott Welsh II "held deep conscientious scruples against taking part in wars where people were killed,"[73] although Welsh was "explicit . . . in denying that his views were religious."[74] This case might also be

64. 380 U.S. 163, 166 (1965).

65. *Id.* at 164–65. The relevant section was "6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. s 456(j) (1958 ed.)." *See id.* at 164.

66. *Id.* at 166.

67. *Id.* at 167.

68. *Id.* at 166.

69. *Id.* at 165–66 ("We have concluded that Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views.").

70. *Id.* at 188 (Douglas, J., concurring).

71. *See* Michael Rhea, Comment, *Denying and Defining Religion Under the First Amendment: Waldorf Education as a Lens for Advocating a Broad Definitional Approach*, 72 LA. L. REV. 1095, 1112 (2012) (reading *Seeger* to stand for the proposition that "individual interests in freedom of conscience and of religion are to be protected as sacred even in the face of important state policies").

72. 398 U.S. 333 (1970).

73. *Id.* at 337.

74. *Id.* at 341.

interpreted to be a testament to the required state accommodation of conscience.[75]

There is reason to believe, however, that conscience is not afforded such robust protection after all. For example, *Gillette v. United States*[76] involved whether an individual who had religious objections to a particular war was entitled to conscientious objector status on that account. Guy Gillette "stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as 'unjust.'"[77] Gillette argued that "Congress interferes with free exercise of religion by failing to relieve objectors to a particular war from military service, when the objection is religious or conscientious in nature."[78] The Court recognized that some religions distinguish among just and unjust wars, only prohibiting participation in the latter,[79] and did not question Gillette's sincere conviction that this war was unjust and hence that participation in it would contravene his religious principles.[80] Nonetheless, the Court held that "valid neutral reasons exist for limiting the exemption to objectors to all war,"[81] and affirmed the lower court holding that Gillette was not entitled to an exemption.[82]

Some of the cases implicating conscience concern a refusal to perform a job or work at certain times for religious reasons. *Sherbert v. Verner*[83] involved an individual, Adell Sherbert, who could not work on Saturday because of her religious beliefs.[84] She was not only fired from her job because of her refusal to work on that day[85] but also could not secure any other job for that same reason.[86] Her application for unemployment

75. *See* Rhea, *supra* note 71, at 1112.

76. 401 U.S. 437 (1971).

77. *Id.* at 439.

78. *Id.* at 448–49.

79. *Id.* at 452 ("[S]ome religious faiths themselves distinguish between personal participation in 'just' and in 'unjust' wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience.").

80. *Id.* at 449 (assuming that the "beliefs concerning war have roots that are 'religious' in nature within the meaning of the Amendment").

81. *Id.* at 454.

82. *Id.* at 463 ("[I]n Gillette's case (No. 85) there was a basis in fact to support administrative denial of exemption . . . .").

83. 374 U.S. 398 (1963).

84. *Id.* at 399 ("Appellant, a member of the Seventh-day Adventist Church[,] . . . would not work on Saturday, the Sabbath Day of her faith.").

85. *Id.* ("Appellant . . . was discharged by her South Carolina employer because she would not work on Saturday . . . .").

86. *Id.* ("[S]he was unable to obtain other employment because from conscientious scruples she would not take Saturday work . . . .").

benefits was denied because her refusal to work on Saturdays was viewed as a disqualifying condition.[87]

The United States Supreme Court noted that Sherbert was being forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand,"[88] and held that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."[89] The *Sherbert* Court qualified its holding, expressly rejecting "the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment."[90]

Thomas v. Review Board of the Indiana Employment Security Division[91] also involved the denial of unemployment benefits to someone who could not work for religious reasons. Eddie Thomas quit when he was transferred from a position in the roll foundry to a position making tank turrets.[92] Making war materials contravened his religious beliefs,[93] although a friend of his who was also a Jehovah's Witness did not feel similar compunctions about the work.[94] Thomas's application for unemployment benefits was denied, because he lacked the necessary "good cause" for the loss of his job.[95]

The Court held that "Thomas cannot be denied the benefits due him on the basis of the findings . . . that he terminated his employment because of his religious convictions."[96] The fact that some Jehovah's Witnesses might have had a different view of which work requirements were religiously proscribed did not invalidate Thomas's view. "Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differ-

87. *Id.* at 401 ("The appellee Employment Security Commission . . . found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept 'suitable work when offered . . . .'").

88. *Id.* at 404.

89. *Id.* at 410.

90. *Id.* at 409–10.

91. 450 U.S. 707 (1981).

92. *Id.* at 709 ("Thomas terminated his employment in the Blaw-Knox Foundry & Machinery Co. when he was transferred from the roll foundry to a department that produced turrets for military tanks.").

93. *Id.* ("He claimed his religious beliefs prevented him from participating in the production of war materials.").

94. *Id.* at 711 ("[H]e consulted another Blaw-Knox employee—a friend and fellow Jehovah's Witness [who] . . . advised him that working on weapons parts at Blaw-Knox was not 'unscriptural.'").

95. *Id.* at 712 ("The referee concluded nonetheless that Thomas' termination was not based upon a 'good cause [arising] in connection with [his] work,' as required by the Indiana unemployment compensation statute." (alterations in original)).

96. *Id.* at 720.

ences in relation to the Religion Clauses."[97] While not ruling out that certain claimed religious views might be considered beyond the pale,[98] the Court made clear both that the claim in the instant case was not one of those[99] and that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[100] Where the asserted beliefs are sincerely held[101] and are not "so bizarre"[102] as to fail to trigger First Amendment protection, the state is limited with respect to the conditions it can place on people's actions based on religious faith.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[103]

Both *Sherbert* and *Thomas* suggest that the state cannot condition unemployment benefits upon an individual's sacrificing his or her sincere religious beliefs by working.[104] However, in *Employment Division v. Smith*,[105] the Court suggested that those cases do not provide robust protections to conscience-based action extending beyond the unemployment benefits context.[106] The *Smith* Court noted that the "'exercise of religion' often involves . . . the performance of (or abstention from) physical acts,"[107] and explained that "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions *only* when they are engaged in for religious reasons, or *only* because of the religious belief that they display."[108] Thus, a state runs afoul of constitutional protections if it prohibits a practice *because* it is performed for religious reasons. However, a practice that is prohibited *whether or not* performed for religious reasons does not violate those free exercise guarantees.[109]

---

97. *Id.* at 715.

98. *Id.* ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . .").

99. *Id.* ("[T]hat is not the case here . . . .").

100. *Id.* at 716–17.

101. *Cf.* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Religious experiences which are as real as life to some may be incomprehensible to others.").

102. *Thomas*, 450 U.S. at 715.

103. *Id.* at 717–18.

104. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990) ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc. (2014), *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651, 1655–56 (2011).

105. 494 U.S. 872 (1990).

106. *See id.* at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").

107. *Id.* at 877.

108. *Id.* (alteration in original) (emphases added) (quoting U.S. CONST. amend. I).

109. *See id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes

Thus, on the Court's interpretation, while regulations targeting religious activity will be struck down absent compelling justification,[110] there is no "constitutional right to ignore neutral laws of general applicability."[111]

Smith has been roundly criticized,[112] although it has never been overruled.[113] Yet, even without *Smith*, the Court has not afforded conscience great constitutional protection, as *Gillette* illustrates.[114] Conscience, then, does not seem likely to yield a generalized exemption to the requirements of neutral laws in the commercial context. Nonetheless, because it might be argued that the First Amendment protects conscience-based refusals to provide goods or services out of respect for the freedom of association (and non-association), the Court's association jurisprudence must also be examined.

D. Rights of Association

In *Roberts v. United States Jaycees*,[115] the Court explained that there is "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[116] At issue was the refusal of the United States Jaycees to permit the local St. Paul and Minneapolis chapters to admit women as regular members.[117] After having been notified that their charters might be revoked, "both [local] chapters filed charges of discrimination with the Minnesota Department of Human Rights [alleging] that the exclusion of women from full membership, required by the national organization's bylaws, violated the Minnesota Human Rights Act (Act)."[118] The national organization claimed that

---

(or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

110. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (citation omitted) (citing *Smith*, 494 U.S. at 878–79)).

111. City of Boerne v. Flores, 521 U.S. 507, 513 (1997).

112. Marci A. Hamilton, *Political Responses to Supreme Court Decisions*, 32 HARV. J.L. & PUB. POL'Y 113, 121 (2009) ("Another broadly criticized Supreme Court decision is a religion case, *Employment Division v. Smith* . . . .").

113. Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487, 497 (1998) ("*Employment Division v. Smith* is still good law, despite its many critics.").

114. *See supra* notes 76–82 and accompanying text.

115. 468 U.S. 609 (1984).

116. *Id.* at 618.

117. *Id.* at 614 ("In 1974 and 1975, respectively, the Minneapolis and St. Paul chapters of the Jaycees began admitting women as regular members. Currently, the memberships and boards of directors of both chapters include a substantial proportion of women. As a result, the two chapters have been in violation of the national organization's bylaws for about 10 years. The national organization has imposed a number of sanctions on the Minneapolis and St. Paul chapters for violating the bylaws, including denying their members eligibility for state or national office or awards programs, and refusing to count their membership in computing votes at national conventions.").

118. *Id.*

the members' constitutionally protected right to association was violated by the Minnesota law.[119]

The *Roberts* Court explained that although the national organization and the local Jaycees chapters did distinguish on the basis of "age and sex,"[120] they were "large and basically unselective groups."[121] Lack of selectivity notwithstanding, the Court nonetheless noted that there "can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[122] After all, a required modification of membership might "impair the ability of the original members to express only those views that brought them together."[123] That said, however, there was no claim that the Act was being applied against the Jaycees to modify their message.[124]

The *Roberts* Court minimized the burden that would be placed on the Jaycees were they forced to admit women as regular members.[125] While it was possible that some "women members might have a different view or agenda"[126] than would some men members, the Court was unwilling to credit such a claim absent more support in the record.[127] For example, the Court was not confident that women would have a different viewpoint "about such issues as the federal budget, school prayer, voting rights, and foreign relations."[128] Finally, even if the Act's enforcement "causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes."[129] For this reason and because of the importance of the state's interest, the Court rejected the Jaycees' association claims.[130]

In her *Roberts* concurring opinion, Justice O'Connor emphasized an aspect of the case that the Court did not explore. The Jaycees had been construed as a business "in that it sells goods and extends privileges in

119. *Id.* at 612 ("This case requires us to address a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization.").

120. *Id.* at 621.

121. *Id.*

122. *Id.* at 623.

123. *Id.*

124. *Id.* at 624 ("Nor does the Jaycees contend that the Act has been applied in this case for the purpose of hampering the organization's ability to express its views.").

125. *See id.* at 626 ("[T]he Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984))).

126. *Id.* at 627.

127. *Id.* (noting that the change in view claim was not "supported by the record").

128. *Id.* at 627–28.

129. *Id.* at 628.

130. *See id.* at 623 ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.").

exchange for annual membership dues."[131] She questioned the Court's apparent position that "the Jaycees' right of association depends on the organization's making a 'substantial' showing that the admission of unwelcome members 'will change the message communicated by the group's speech.'"[132] Her fear was that "certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination."[133] Justice O'Connor believed that the *Roberts* majority opinion might be interpreted to grant commercial entities more constitutional protection than they actually have, because the "Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."[134] Thus, in her view, commercial organizations simply do not enjoy the same kinds of associational freedoms as do noncommercial organizations, and the Court having used the same approach in this commercial context as it would have used in a noncommercial context might mislead lower courts with respect to the proper approach to be taken in such cases, correct result in this particular case notwithstanding.

Basically, Justice O'Connor linked the protections afforded by the Constitution to the kind of entity seeking protection. When an entity "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[135] Entities primarily engaged in commerce simply do not enjoy the protections that other entities might enjoy.[136]

In the aforementioned cases, the Court has spelled out First Amendment protections against state-required speech. The state cannot require individuals to affirm principles in which they do not believe. Symbolic conduct is not afforded the same degree of protection as is pure speech, however, and the Court has given mixed signals with respect to the degree of protection afforded to conscience-based activity. The next section examines Supreme Court cases that have explored the degree to which the First Amendment affords protection when claims involving discrimination on the basis of sexual orientation are at issue.

---

131. *Id.* at 616.

132. *Id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Roberts*, 468 U.S. at 626–27 (majority opinion)).

133. *Id.*

134. *Id.* at 634.

135. *Id.* at 636.

136. A separate issue involves the degree to which the First Amendment protects corporate political speech. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 315 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

III. ORIENTATION DISCRIMINATION AND THE FIRST AMENDMENT

First Amendment guarantees involving expression, association, and free exercise have been implicated in cases involving discrimination on the basis of sexual orientation. The Court has not been consistent with respect to the proper approach when constitutional values come into conflict, although the cases do suggest that commercial entities cannot immunize discriminatory practices by asserting First Amendment guarantees.

A. Compelled Speech

The United States Supreme Court addressed the conflict between First Amendment and equal protection values in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston (GLIB)*.[137] At issue was whether First Amendment guarantees permitted those organizing the annual Saint Patrick's Day Parade, the South Boston Allied War Veterans Council, to preclude GLIB from marching in the parade.[138] GLIB was formed so that its members could march "in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants."[139] The parade organizers did not want the group to march in the parade, although the reason for the exclusion was unclear.[140] Differing reasons for the exclusion were offered at different times during the trial,[141] and the trial court found that the reasons proffered were not the real reasons anyway.[142]

Perhaps because of the difficulty associated with determining the organizers' actual reasons, the Court decided to discuss some of the reasons that *might* have motivated the parade organizers. The Court reasoned that a GLIB "contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual."[143] In addition, permitting GLIB to march might be perceived as lending support to GLIB's "view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around oth-

137. 515 U.S. 557 (1995).

138. *Id.* at 559–60.

139. *Id.* at 570.

140. For example, the trial court judge had found that the exclusion was based on the group members' sexual orientation. *See* Irish-American Gay, Lesbian & Bisexual Grp. of Bos. (*GLIB*) v. City of Bos., 636 N.E.2d 1293, 1295 (Mass. 1994) ("The judge found that GLIB was excluded from the parade because of the sexual orientation of its members."), *rev'd*, *Hurley*, 515 U.S. 557 (1995). There had been testimony that the group had been excluded because of the unsubstantiated belief that the group's members were also members of Act-Up and Queer Nation and that they might become disorderly. *Id.* at 1295 n.8.

141. *Id.* at 1295 ("At trial, Hurley 'equivocated about his reasons for excluding GLIB' but ultimately testified that he would never allow them to march in the parade.").

142. *Id.* ("The judge concluded that the inconsistent and changing explanations for excluding GLIB demonstrated the 'pretextual nature' of those explanations.").

143. *Hurley*, 515 U.S. at 574.

er identifying characteristics."[144] The march organizers might have had a different view; for example, they "may not [have] believe[d] these facts about Irish sexuality to be so."[145] Or, even if the organizers realized that some GLIB members were of Irish descent, the organizers might nonetheless have "object[ed] to unqualified social acceptance of gays and lesbians or [might] have some other reason for wishing to keep GLIB's message out of the parade."[146] Perhaps the Council feared that permitting GLIB to participate would be perceived as a Council endorsement that GLIB's "message was worthy of presentation and quite possibly of support as well."[147]

The Supreme Judicial Court of Massachusetts had held that GLIB must be included in the parade.[148] That holding was based in part on a finding that the parade had no expressive purpose,[149] both because so many divergent viewpoints were represented in the parade[150] and because of the Council's nonselectivity—"in essence, almost any individual or group would be admitted to the parade if they either apply or show up at the start of the parade and offer to make a contribution to the council."[151] Indeed, the trial judge had found that "since 1947 the only groups that have been excluded from the Parade besides GLIB have been the Ku Klux Klan and ROAR (Restore our Alienated Rights) [an anti busing group]."[152]

The United States Supreme Court rejected the approach taken by the Supreme Judicial Court of Massachusetts, explaining that "the word 'parade' . . . indicate[s] marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[153] In this case, it was not entirely clear what that point was, since "the Council [was] rather lenient in admitting participants."[154] Nonetheless, the lack of a clearly defined message did not mean that there was no message at

144. *Id.*
145. *Id.*
146. *Id.* at 574–75.
147. *Id.* at 575.
148. *Id.* at 563–64.
149. *See id.* at 564 (discussing the Massachusetts court's view that "it was impossible to detect an expressive purpose in the parade"); *see also GLIB*, 636 N.E.2d 1293, 1300 (Mass. 1994) ("[T]here was no error in his finding that the parade was not used by the council for expressive purposes, and that, as a result, the defendants could not cloak their discriminatory acts in the mantle of the First Amendment."), *rev'd*, *Hurley*, 515 U.S. 557 (1995).
150. *See GLIB*, 636 N.E.2d at 1296 n.9.
151. *Id.* at 1298.
152. *Id.* at 1296. *But see id.* at 1296 n.10 (noting the council's claim that "the Massachusetts Right to Life group and a truck carrying antihomosexual signs also were excluded").
153. *Hurley*, 515 U.S. at 568.
154. *Id.* at 569; *see also GLIB*, 636 N.E.2d at 1296 (noting the trial court's finding that there were "no written procedures, criteria, or standards for selecting participants or sponsors of the parade").

all.[155] Further, even if there was no particular message that the Council wished to express, there may have been messages that the Council wished to refrain from expressing.[156] The Court explained that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[157]

Certainly, there are other ways for speakers to disassociate themselves from particular messages. For example, individuals may post signs disavowing approval or disapproval of a particular position,[158] although "such disclaimers would be quite curious in a moving parade."[159] Not only was there "no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants" in a parade like this,[160] but choosing to do this for one marcher in the parade would raise questions about which other views were implicitly being authorized or disavowed. Thus, if there were someone marching immediately in front of GLIB disavowing the inference that the Council agreed or disagreed with any particular group's message, then bystanders might wonder whether that meant that the Council was implicitly endorsing all of the other groups or, perhaps, was also disavowing the messages of those groups following GLIB.

The Council could instead have had someone marching at the head of the parade holding a disclaimer sign indicating that the views expressed by individual marchers did not necessarily reflect those of the organizers. That way, there would be no implication that the disclaimer applied to one marching group in particular. However, such a disclaimer might well be missed by parade watchers who arrived late or were momentarily distracted, thereby undermining the disclaimer's intended effect.[161]

---

155. *Hurley*, 515 U.S. at 569–70 ("But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.").

156. *See id.* at 573 ("[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . ." (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995))).

157. *Id.* at 576.

158. *Cf.* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) ("[A]ppellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.").

159. *Hurley*, 515 U.S. at 576–77.

160. *Id.* at 576.

161. *Cf.* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.").

The *Hurley* Court emphasized that noncommercial speech was at issue,[162] and treated the restriction as "amount[ing] to nothing less than a proposal to limit speech in the service of orthodox expression."[163] Such a proposal was incompatible with First Amendment protections.[164] Because parades are not only "a form of expression"[165] but also have "inherent expressiveness,"[166] and because "the Council clearly decided to exclude a message it did not like from the communication it chose to make,"[167] the First Amendment precluded Massachusetts from forcing a private group to change its message by requiring GLIB's message to be expressed.

While a straightforward reading of *Hurley* is that the First Amendment precludes the state from forcing private entities to modify their message absent compelling justification, there are other ways to read the opinion. For example, *Hurley* might be read as permitting or even endorsing orientation-based animus.[168] Because virtually no other groups had been excluded from marching in the parade, the Court's upholding this exclusion might be read to suggest that the Court believed that there was something peculiarly objectionable about this particular group.[169] Whether orientation was appropriately subject to disadvantageous treatment was one of the issues discussed in *Romer v. Evans*.[170]

B. Orientation and Association

While *Romer* was decided on equal protection grounds,[171] the state had asserted the protection of association rights as a justification for the ballot measure.[172] At issue was a Colorado amendment designed to withdraw antidiscrimination protections on the basis of sexual orientation.[173]

---

162. *Hurley*, 515 U.S. at 579 ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment . . . .").

163. *Id.* ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment . . . .").

164. *Id.* ("The Speech Clause has no more certain antithesis.").

165. *Id.* at 568.

166. *Id.*

167. *Id.* at 574.

168. *See* Catherine Connolly, *Gay Rights in Wyoming: A Review of Federal and State Law*, 11 WYO. L. REV. 125, 135 n.57 (2011) (reading *Hurley* to "permit discriminatory animus regarding LGBT individuals and groups"). *See also* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2459 (1997) ("More realistically, there is no reason to believe the Council ever had a message, and some reason to think they were simply excluding GLIB because of antihomosexual animus . . . .").

169. *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000) ("[T]he purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude *certain* participants nonetheless." (emphasis added)).

170. 517 U.S. 620, 626 (1996).

171. *Id.* at 635–36 ("Amendment 2 violates the Equal Protection Clause . . . .").

172. *Id.* at 635.

173. The amendment was titled "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation" and provided as follows:

The Court noted that the "amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[174]

When striking down the amendment, the Court reasoned that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[175] The state had sought to justify the amendment by saying that it represented "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[176] In rejecting that this purpose could justify the amendment's enactment, the Court reasoned that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[177]

In his dissent, Justice Scalia argued that sexual orientation not only could "be singled out for disfavorable treatment,"[178] but also that it already had been in *Bowers v. Hardwick*.[179] Even worse in Justice Scalia's eyes was the Court's implicit message that "opposition to homosexuality is as reprehensible as racial or religious bias."[180] Rather than contest that the amendment was animus-based, Justice Scalia instead dissented from the proposition that "'animosity' toward homosexuality is evil."[181] He would have upheld the amendment precisely because it was allegedly based on "moral disapproval of homosexual conduct."[182]

Romer seems to stand for the proposition that orientation-based animus, whether understood as "a Kulturkampf"[183] or, instead, "a fit of spite,"[184] does not survive even rational basis review.[185] However, such a

---

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id. at 624 (quoting COLO. CONST. art. II, § 30b, *held unconstitutional by* Romer v. Evans, 517 U.S. 620 (1996)).

174. *Id.* at 627.

175. *Id.* at 634.

176. *Id.* at 635.

177. *Id.*

178. *Id.* at 636 (Scalia, J., dissenting).

179. *See id.* ("[T]he Court contradicts a decision, unchallenged here, pronounced only 10 years ago . . . ." (citing Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003))).

180. *Id.*

181. *Id.*

182. *Id.* at 644.

183. *See id.* at 636. For a brief definition of Kulturkampf, see Jeffrey M. Shaman, *Justice Scalia and the Art of Rhetoric*, 28 CONST. COMMENT. 287, 290 n.19 (2012) ("'Kulturkampf' translates literally as 'culture struggle.' The phrase was originally used as a political slogan in reference to the ongoing struggle that occurred in the 1870s between the Roman Catholic Church and the German government for control over school and church appointments and civil marriage.").

184. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

conclusion might have been thought premature[186] after the Court issued *Boy Scouts of America v. Dale*[187] five years later.

At issue in *Dale* was whether the Boy Scouts had violated New Jersey's public accommodation law[188] when precluding James Dale from being a scoutmaster once the organization had discovered that he was gay.[189] The *Dale* Court reasoned that the "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[190] After finding that "the Boy Scouts [of America] engages in expressive activity,"[191] the Court set out to determine whether the inclusion of Dale would modify the Scouts' message. The Court explained, "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."[192] Yet, the *Roberts* Court had refused to defer to the Jaycees about what would impair that organization's message,[193] so the Court's commitment to deference was hardly as established as the *Dale* Court had implied.

The *Dale* Court denied that "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[194] Such a denial would seem to have disposed of the case, because Monmouth Council Executive James Kay had expressly stated in writing

185. *See id.* at 635 (majority opinion) ("We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective."); *see also* Anthony Michael Kreis, Lawrence *Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L.J. ONLINE 125, 137 (2012) ("*Romer v. Evans* was the Supreme Court's first authoritative statement that the entanglement of state action with anti-LGBT animus is constitutionally impermissible.").

186. Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 SAN DIEGO L. REV. 565, 610–11 (2001) ("Dale sanctioned the marginalization of gay people through the First Amendment . . . . Some have called anti-gay animus the last socially acceptable form of prejudice existing today.").

187. 530 U.S. 640 (2000).

188. *Id.* at 644 ("The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale.").

189. *Id.* ("Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual . . . ."); *see also id.* at 645 ("Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts 'specifically forbid membership to homosexuals.'").

190. *Id.* at 648 (citing N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988)).

191. *Id.* at 650.

192. *Id.* at 653 (citing Democratic Party of the U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 123–24 (1981)).

193. *See* James E. Fleming, *Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435, 1471 (2004) ("Nor did Brennan's opinion for the Court in *Roberts* do what Rehnquist's opinion for the Court subsequently did in *Boy Scouts*: simply defer to the Jaycees' claims that being forced to admit women would impair their expression or impede their ability to disseminate their views or message.").

194. *Dale*, 530 U.S. at 653.

that the Boy Scouts "specifically forbid membership to homosexuals."[195] This meant that Dale's orientation rather than the fact that he had been a co-president of a gay and lesbian organization while at college[196] was the decisive factor. For example, his Scouts membership presumably would not have been revoked if he had been straight and a co-president of a Gay-Straight Alliance.[197] Nonetheless, the Court held that the New Jersey public accommodations law violated the Boy Scouts' "rights to freedom of expressive association."[198]

The Court's position became even more confused and confusing when it cited *Hurley* for support, explaining that the Saint Patrick's Day Parade organizers "did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner."[199] After distinguishing between an orientation-based and a message-based exclusion, the *Dale* Court continued,

> As the presence of GLIB in Boston's St. Patrick's Day [P]arade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.[200]

But it was not as if Dale was carrying a banner saying that he was gay or even saying that he supported gay rights. Rather, he was being rejected because he was gay. Ironically, Dale could have marched in the Saint Patrick's Day Parade (as long as he marched, say, with the ACLU rather than with GLIB), but could not be an assistant scoutmaster.

Suppose that a straight man actively supported gay rights. He, too, would not be permitted to be a scoutmaster if he expressed that position to the youth in his troop.[201] Dale had not been accused of having said anything inappropriate to the Scouts, however, so such a point was not relevant to the case at hand.[202]

The *Dale* Court implied that because Dale was a gay rights activist outside of the Scouts,[203] permitting him to be a scout leader would impair the Boy Scouts' message. But suppose a straight scout leader advocated

---

195. *Id.* at 645 (internal quotation marks omitted).

196. *See id.* at 653.

197. *See* Mark Strasser, *Leaving the* Dale *to Be More* FAIR*: On* CLS v. Martinez *and First Amendment Jurisprudence*, 11 FIRST AMEND. L. REV. 235, 267 (2012) ("[H]ad Dale been President of a Gay-Straight Alliance at Rutgers, he could have continued to be a Scout leader as long as he self-identified as having a different-sex orientation.").

198. *Dale*, 530 U.S. at 659.

199. *Id.* at 653.

200. *Id.* at 654.

201. *See id.* at 655 n.1.

202. *See id.* at 689 (Stevens, J., dissenting) ("BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop . . . .").

203. *Id.* at 653 (majority opinion) ("Dale . . . remains a gay rights activist.").

for gay rights outside of the Scouts. Permitting that person to be a Scout would presumably impair the Boy Scout message as well, although the Scouts would not have expelled such a person.[204]

The *Dale* Court understood that the Boy Scouts' willingness to continue to employ a straight man dissenting from their sexual orientation policy would seem to undercut their alleged worry about keeping employees on message. But the Court was unpersuaded that the Scout's willingness to employ a straight supporter of gay rights established that the organization was discriminating on the basis of orientation. "The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."[205] The Court conveniently ignored the Boy Scouts' express admission that it would prohibit non-activists who were gay from being scoutmasters[206] and that it would permit activists who were not gay to be scoutmasters. The Court's emphasis on message rather than orientation was both disingenuous[207] and unpersuasive.[208]

The *Dale* analysis is "disappointing,"[209] at least in part, because the Court treated the Boy Scouts' policy as if it only precluded gay activists from being members when it expressly discriminated on the basis of orientation. An additional noteworthy element of the *Dale* opinion is that the Court deferred to the Boy Scouts' assessment of whether its message would be altered by permitting a nondesired person to be a member when the Court had not been at all deferential in *Roberts*. One explanation for the differing degree of deference in the two cases is to say that the Court disapproved of discrimination on the basis of sex[210] but approved of discrimination based on orientation,[211] although a different explanation emphasizes that the Jaycees were viewed as commercial and the Boy Scouts

---

204. *Id.* at 691 n.19 (Stevens, J., dissenting).

205. *Id.* at 655–56 (majority opinion).

206. *See supra* note 195 and accompanying text (noting that "homosexuals" could not be Scouts).

207. *See* Suzanna Sherry, *Warning: Labeling Constitutions May Be Hazardous to Your Regime*, 67 LAW & CONTEMP. PROBS. 33, 39 (2004) ("[T]here is the disingenuous way in which the Court identified both the organization's message and the effect that retaining Dale as a scoutmaster would have on that message.").

208. *Cf.* Strasser, *supra* note 197, at 268 ("*Dale* modifies right to association jurisprudence while claiming to follow it.").

209. *See* Scott Kelly, Note, *Scouts' (Dis)Honor: The Supreme Court Allows the Boy Scouts of America to Discriminate Against Homosexuals in* Boy Scouts of America v. Dale, 39 HOUS. L. REV. 243, 244 (2002).

210. *Cf.* James A. Davids, *Enforcing a Traditional Moral Code Does Not Trigger a Religious Institution's Loss of Tax Exemption*, 24 REGENT U. L. REV. 433, 440 (2012) ("Regarding the judicial branch, someone arguing that prohibiting gender discrimination is a 'fundamental national public policy' would undoubtedly start with *Roberts v. United States Jaycees*.").

211. *See* Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 631, 637 (2011) (describing *Hurley* and *Dale* as "recent First Amendment decisions from the U.S. Supreme Court that favored discrimination against gays over nondiscrimination").

were not.[212] Yet another explanation is that the Court had a change of heart and now believed that great deference was due to an organization's judgment about when its own message might be altered. The deference-to-the-organization's-judgment explanation was subsequently refuted in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*).[213]

At issue in *FAIR* was the constitutionality of the Solomon Amendment,[214] which specified that "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[215] FAIR, an association of law schools and law faculties,[216] "argued that this forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association."[217]

At the time, the military banned gays from serving in the armed forces.[218] Because FAIR members had "adopted policies expressing their opposition to discrimination based on, among other factors, sexual orientation,"[219] law schools were put in a bind. They had "to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities."[220]

The Court suggested both that "Congress has broad authority to legislate on matters of military recruiting"[221] and that Congress could have directly imposed access requirements had it so desired.[222] The Court then reasoned that because Congress could have imposed the requirement directly, it obviously was permitted to adopt the indirect method that it in fact chose.[223] But this reasoning is incorrect if only because the First Amendment may be implicated in one method but not in the other. If Congress had directly imposed such a requirement, then it would be unlikely that students would impute the discriminatory policy to the University.[224] If, however, a university chose to ignore its own policy so that

---

212. *See* Fleming, *supra* note 193, at 1472 ("[O]ne might argue that there is a difference in the character of the freedom of association: that the Jaycees were engaged in commercial association, while the Boy Scouts were involved in civic association . . . .").

213. 547 U.S. 47 (2006).

214. *Id.* at 51 ("The law schools responded by suing, alleging that the Solomon Amendment infringed their First Amendment freedoms of speech and association.").

215. *Id.*; *see* 10 U.S.C.A. § 983 (West 2013).

216. *FAIR*, 547 U.S. at 52.

217. *Id.* at 53.

218. *See id.* at 52 n.1 ("[A] person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex.").

219. *Id.* at 52.

220. *Id.* at 53.

221. *Id.* at 58.

222. *Id.* at 60 ("[T]he First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement . . . .").

223. *See id.*

224. Ironically, the Court recognized this point but somehow believed that it cut the other way. *See id.* at 65 ("We have held that high school students can appreciate the difference between speech

it would not lose federal funds, then the university would be more likely to have a message imputed to it, e.g., that it did not take its own nondiscrimination policy seriously,[225] depending perhaps upon how much money was at stake.[226]

The *FAIR* Court was not at all deferential to the law schools' judgment that they were being forced to support a message with which they disagreed—the Court simply announced that "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."[227] The Court explained, "Nothing about recruiting suggests that law schools agree with any speech by recruiters,"[228] notwithstanding that nonmilitary recruiters with a similar policy would not have been allowed to recruit on campus.[229]

To support the claim that law schools were not being forced by the Solomon Amendment to modify their own messages, the *FAIR* Court emphasized that "nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[230] Thus, a school could post a sign saying that the military's policy should not be attributed to the school or, perhaps, that the school affirmatively disagreed with the military's discriminatory policy. But suppose that the law school did not believe that such signs would be effective.[231] That did not matter, because the law schools were mistaken in thinking that they were being forced to speak at all—"accommodating the military's message does not

---

a school sponsors and speech the school permits because legally required to do so . . . ." (citing Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion))).

225. Some commentators seem not to appreciate that the fact that a university has a choice makes it more rather than less likely that a message will be imputed to it based on the choice made. *See* James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 988 (2011) (reasoning that an important distinction between *FAIR* and cases where public accommodations laws require compliance "is that schools had a choice to continue their educational mission without interference by simply forfeiting federal funding").

226. *Cf.* Major Charles G. Kels, *Free Speech and the Military Recruiter: Reaffirming the Marketplace of Ideas*, 11 NEV. L.J. 92, 127 (2010) ("FAIR called the amount of money at stake—an estimated $400 million annually in the case of Harvard University—'a fiscal gun at the University's head.'" (footnote omitted)); John Curran, *Vt. Law School to Accept Military Recruiters*, TIMES ARGUS (MONTPELIER-BARRE, VT.), Aug. 15, 2011 ("Vermont Law School and . . . the William Mitchell College of Law . . . were the only ones in America that barred the recruiters despite a measure known as the Solomon Amendment . . . . Both are independent law schools unaffiliated with larger universities or state institutions, which allowed them to stand on principle without costing affiliated schools millions of federal dollars for scientific research and other academic pursuits.").

227. *FAIR*, 547 U.S. at 64.

228. *Id.* at 65.

229. *Cf. id.* at 58 ("It is insufficient for a law school to treat the military as it treats all other employers who violate its nondiscrimination policy. Under the statute, military recruiters must be given the same access as recruiters who comply with the policy.").

230. *Id.* at 65.

231. *Cf. supra* notes 158–61 and accompanying text (discussing why a disavowal might not be effective in the context of a parade).

affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."[232]

The *FAIR* Court also addressed whether "the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection."[233] Citing *O'Brien*, the Court noted that "some forms of 'symbolic speech' [a]re deserving of First Amendment protection,"[234] but then reaffirmed its rejection of "the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'"[235] Instead, the "First Amendment [extends] protection only to conduct that is inherently expressive."[236]

An important question, then, is which behaviors are inherently expressive. The Court explained why the conduct at issue did not qualify. "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."[237] The observer would not know that the law school was making a statement by having the recruiting elsewhere unless the law school had made a statement about it.[238] "The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*."[239] Nor should it be thought that combining speech with conduct would transform the conduct into expression. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."[240] Furthermore, there would be undesirable consequences if expressive conduct were viewed more expansively. For example, "if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, [the Court] would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment."[241] Needless to say, the Court would not treat such a protest as expressive conduct.[242] Nor for that matter has the Court been willing to recognize a constitutional right to avoid

232. *FAIR*, 547 U.S. at 64.
233. *Id.* at 65.
234. *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968) (internal quotation marks omitted)).
235. *Id.* at 65–66 (quoting *O'Brien*, 391 U.S. at 376).
236. *Id.* at 66.
237. *Id.*
238. *Id.* ("The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it.").
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*

paying taxes even if doing so violates sincerely held religious beliefs.[243] In *United States v. Lee*,[244] the Court explained, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[245]

The *FAIR* Court also addressed whether the Solomon Amendment "violates law schools' freedom of expressive association."[246] Dispensing with that challenge rather quickly, the Court noted that "[s]tudents and faculty are free to associate to voice their disapproval of the military's message."[247] Because that was so, a "military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."[248]

The Court's analysis of First Amendment freedoms in the orientation discrimination context is not free from interpretive difficulty. Sometimes the Court seems to weigh rights to expression and freedom of association more heavily than at other times.[249] Further, the Court has been inconsistent with respect to the degree to which it would give deference to an organization's judgment that unwanted association would change that organization's message. Nonetheless, the Court has embraced at least two principles applicable to the kind of conscience-based activity envisioned in this Article: (1) commercial organizations do not have the same association rights as do noncommercial organizations, and (2) symbolic activity that requires explanation to be understood may well not trigger the First Amendment protections for expressive conduct. The current jurisprudence makes clear how a case like *Elane Photography, L.L.C. v. Willock*[250] should be decided.

C. Elane Photography v. Willock

At issue in *Willock* was a refusal by Elane Photography to photograph the commitment ceremony of Vanessa Willock and her same-sex partner,[251] because the owners did not wish to "convey the message that marriage can be defined to include combinations of people other than the

243. *See infra* notes 244–45 and accompanying text.
244. 455 U.S. 252 (1982).
245. *Id.* at 261.
246. *FAIR*, 547 U.S. at 68.
247. *Id.* at 69–70.
248. *Id.* at 70.
249. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (holding that the University of California, Hastings College of Law could maintain a limited purpose public forum requiring that all student clubs receiving official university recognition admit all students regardless of religion or sexual orientation).
250. 284 P.3d 428 (N.M. Ct. App. 2012).
251. *Id.* at 432 ("This appeal arose from the refusal of Elane Photography, LLC (Elane Photography), to photograph the commitment ceremony of Vanessa Willock (Willock) and her same-sex partner (Partner).").

union of one man and one woman."[252] The New Mexico appellate court hearing the case affirmed the lower court decision that the refusal was in violation of the New Mexico Human Rights Act.[253]

Elane Photography is a commercial enterprise that "primarily photographs significant life events such as weddings and graduations."[254] It advertises "its services through its website, advertisements on multiple search engines, and in the Yellow Pages."[255] Nonetheless, Elane Photography argued that it is not a public accommodation for purposes of the New Mexico law.[256] The appellate court rejected that contention, at least in part, because Elane Photography "advertises its services to the public at large, and anyone who wants to access Elane Photography's website may do so."[257]

Elane Photography denied that it was discriminating on the basis of orientation, arguing that it would have taken portrait photographs of Willock[258] and would have been willing to photograph a different-sex wedding even if one or both of the participants had a same-sex orientation.[259] So, too, Elane Photography might have noted that it would have refused to photograph two straight men or two straight women who wished to commission a commitment ceremony photograph.[260] Yet, such a policy of refusing to photograph two people of the same sex in a commitment ceremony is "directed toward gay persons as a class,"[261] because "the conduct targeted by this law [the NMHRA] is conduct that is closely correlated with being homosexual."[262] Thus, it is unlikely that many straight individuals would wish to participate in a commitment ceremony,[263] and the mere possibility that straight people might desire such a photograph would not undermine that the policy was directed towards those with a same-sex orientation. As a separate matter, the defense to the orientation discrimination claim would be that Elane Photography's refusal to photograph was based on the sexes of the parties, and discrim-

252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 433.
257. *Id.* at 436.
258. *See id.* at 437.
259. *See id.* ("Elane Photography would photograph opposite-sex weddings between persons of any sexual orientation.").
260. *See* Gottry, *supra* note 225, at 984 ("Elane Photography would agree to photograph a traditional wedding between a lesbian woman and gay man, and would refuse to photograph a same-sex commitment ceremony between two straight men.").
261. *Willock*, 284 P.3d at 437 (quoting Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring)) (internal quotation mark omitted).
262. *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring); *see also Willock*, 284 P.3d at 437 (quoting *Lawrence*, 539 U.S. at 583).
263. *See* Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 233 (2012) (noting that most "heterosexual men and women . . . would not be tempted to enter a marriage with someone of the same sex").

ination on the basis of sex was also precluded by the New Mexico public accommodations law.[264]

Once determining that the refusal to photograph Willock and her partner was in violation of the law, the New Mexico court then examined whether application of the public accommodations act "violate[d] Elane Photography's freedom of expression protected by the federal and state constitutions."[265] The court noted that "the mere fact that a business provides a good or service with a recognized expressive element does not allow the business to engage in discriminatory practices."[266] Citing *FAIR* for support, the *Willock* court explained that "Elane Photography's commercial business conduct, taking photographs for hire, is not so inherently expressive as to warrant First Amendment protections."[267]

When discussing the degree to which commercial business conduct is expressive, one might focus on whether the good or service itself is "'artistic' and 'personally expressive'"[268] or on the degree to which the refusal to provide the good or service is "inherently expressive."[269] These differing possible points of focus suggest that at least three distinct issues might be addressed when analyzing whether a conscience-exemption policy for commercial entities must be afforded: (1) which goods or services qualify as artistic or personally expressive?; (2) in what ways can conscience-based exemptions be limited without violating constitutional guarantees?; and (3) under what conditions, if any, should the forced provision of a good or service be thought to communicate a message of which the provider disapproves?

1. Goods or Services that Qualify as Artistic or Personally Expressive

The difficulty in applying this criterion is not that commercial photographers fail to engage in artistic or personally expressive work but, rather, that affording an exemption on that basis would be very difficult to cabin. Many individuals (rightly) view their jobs as artistic or personally expressive, because those occupations require the use of judgment or

264. *See Willock*, 284 P.3d at 433.

265. *Id.* at 438.

266. *Id.* at 439 (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984)); *cf.* Jennifer Ann Abodeely, Comment, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 SCHOLAR 585, 597 (2010) ("*Hurley* may be distinguished from *Elane Photography* in that the Veterans Council was a private organization engaged in an act of free speech and association, whereas Elane Photography is a business that offers its services to the public.").

267. *Willock*, 284 P.3d at 439.

268. *See* Gottry, *supra* note 225, at 979 ("Elaine is a trained professional photographer who approaches her work with a photojournalist style, which she considers both 'artistic' and 'personally expressive.'").

269. *FAIR*, 547 U.S. at 66.

creativity.[270] Anyone who makes goods might be thought to engage in an artistic endeavor.[271] In addition, a vast array of individuals providing services can plausibly claim that they are also engaged in providing artistic or expressive services. One commentator has suggested that such a policy might result in "endless litigation and factual analysis of what types of businesses are expressive."[272]

Recognizing an exemption to public accommodations statutes for individuals who perform artistic or expressive conduct would likely afford such a wide-ranging exemption that the central purpose behind public accommodation laws—the "elimination of discrimination"[273]—would be severely undermined, if not gutted. While one might believe such a result welcome,[274] those supporting the purposes behind public accommodation laws might well fear that the creation of such an "exception could swallow the general rule."[275]

2. What Counts as Offensive to Conscience

Suppose that an individual claims that her conscience is offended by being forced to do something that she believes promotes a message of which she disapproves. Must such a claim be accepted or are there some claims of conscience that need not be given effect?

The *Thomas* Court suggested that certain religious beliefs are "so bizarre" as not to be afforded constitutional protection.[276] Very few beliefs would fall into that category, however.[277] For example in *United States v. Ballard*,[278] the Court reviewed a mail fraud conviction.[279] The defendants had claimed to have "the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable

---

270. *Cf.* Daniel E. Eaton, *Writers Gone Wild: "The Muse Made Me Do It" as a Defense to a Claim of Sexual Harassment*, 12 UCLA ENT. L. REV. 1, 8 n.54 (2004) (discussing "the inherently creative nature of many occupations not generally considered 'creative,' but require the same kind of creative freedom considered indispensable in the arts"); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139 (2000) (noting that "the line between expressive and nonexpressive organizations does not leap out").

271. *See* Nabet, *supra* note 51, at 1550 (discussing "the vast array of artistic businesses that are potentially expressive").

272. *Id.*

273. *Id.* at 1535.

274. *Cf.* Karen L. Dayton, Note, Dale v. Boy Scouts of America: *New Jersey's Law Against Discrimination Weighs the Balance Between the First Amendment and the State's Compelling Interest in Eradicating Discrimination*, 16 GA. ST. U. L. REV. 387, 399 n.101 (1999) ("Tennessee and South Carolina even went so far as to repeal their state public accommodation laws, which left businesses with the complete freedom to choose their customers.").

275. Bailey v. United States, 133 S. Ct. 1031, 1044 (2013).

276. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).

277. *See* United States v. Ballard, 322 U.S. 78 (1944). For discussion of *Ballard*, see *infra* notes 278–86 and accompanying text.

278. *Ballard*, 322 U.S. 78 (1944).

279. *Id.* at 79 ("Respondents were indicted and convicted for using, and conspiring to use, the mails to defraud.").

diseases."[280] These "religious doctrines or beliefs"[281] were asserted to convince others to contribute "money, property, and other things of value"[282] to the defendants.

While members of the *Ballard* Court rejected that the defendants actually had the powers in question,[283] the Court held that the Constitution precluded the jury from deciding that issue.[284] The only question that could be submitted to the jury without offending constitutional guarantees was the sincerity of the defendants' beliefs,[285] i.e., whether the defendants sincerely believed that they had the asserted powers. Thus, even the claims at issue in *Ballard* were not sufficiently "bizarre" to fail to trigger First Amendment protection.[286] Further, as the *Thomas* Court made clear, unanimity of belief among sect members is not required for beliefs to qualify as religious and deserving protection.[287]

Some commentators would permit exemptions for individuals for whom providing a service would violate sincerely held religious beliefs but not for individuals for whom providing a service would violate sincerely held moral beliefs.[288] *Seeger* and *Welch* suggest that such a distinction might well be constitutionally problematic.[289] Further, given the great latitude afforded to claims that certain actions contravene sincere religious beliefs, distinguishing between religious and moral compunctions would likely do little if any work, even if constitutionally permissible. An objector could always claim (and might well sincerely believe) that his or her compunctions were religious rather than "merely" moral.

Other commentators equate religious and moral compunctions and suggest that to say that "the owners of Elane Photography can honor their consciences by keeping their moral beliefs out of the marketplace ignores the external orientation of conscience: *conscientia* refers to moral belief

280. *Id.* at 80.

281. *Id.* at 84.

282. *Id.* at 80.

283. *Id.* at 87 ("The religious views espoused by respondents might seem incredible, if not preposterous, to most people."); *id.* at 92 (Jackson, J., dissenting) ("I can see in their teachings nothing but humbug, untainted by any trace of truth.").

284. *See id.* at 86 (majority opinion) ("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury.").

285. *Id.* at 91–92 ("[I]t was agreed at the outset of the trial, without objection from the defendants, that only the issue of respondents' good faith belief in the representations of religious experiences would be submitted to the jury. . . . On the issue submitted to the jury in this case it properly rendered a verdict of guilty.").

286. *See* McGowan v. Maryland, 366 U.S. 420, 575 (1961) (Douglas, J., dissenting) ("Some have religious scruples against eating pork. Those scruples, no matter how bizarre they might seem to some, are within the ambit of the First Amendment.") (citing *Ballard*, 322 U.S. at 87).

287. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981).

288. *See* Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 12, 17 (2011). Professor Wilson explained: "[O]ur proposed exemption is limited to religious objections for a reason. I think personally that if we allow exemptions to the celebration of same-sex marriage for moral reasons, that would encompass people having moral objections to homosexuality, which is not something I can support." *Id.*

289. *See id.*; *supra* notes 64–75 and accompanying text.

applied to conduct."[290] But adopting a principle affording a blanket exemption on matters of conscience would recognize a whole host of exemptions unless the principle could be limited in some non-question-begging way. For example, such a justification would permit people to object to a whole host of marriages—interreligious, intergenerational, or interracial marriages—as long as the objectors sincerely believed that such unions violated religious precepts.[291]

Some commentators claim that the way to cabin the exemptions is to refuse to give them effect if there is a moral consensus that the discrimination at issue, e.g., racial discrimination, is wrong.[292] But that means that if there is a moral consensus that orientation discrimination is wrong, then such discrimination will also not be permitted.[293]

In any event, we should not be deciding which dictates of conscience to respect in light of whether there is general agreement with the contents of those beliefs rather than in light of the secular state interests implicated in affording protection to those beliefs.[294] In *School District of Abington Township v. Schempp*,[295] the Court suggested:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[296]

---

290. Robert K. Vischer, Commentary, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1405 (2012).

291. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (school denied tax exemption because of its refusal on religious grounds to permit students in interracial relationships to matriculate).

292. *See* Chad Flanders, Book Review, 25 J.L. & RELIGION 567, 570 (2009–2010) (reviewing ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2009)) ("Vischer also says that we have reached a moral consensus that associations should not be able to discriminate on the basis of race but not on whether they should be able to discriminate based on sexual orientation."); *cf.* Abodeely, *supra* note 266, at 589 ("If the facts of the case were different and Elane Photography refused to photograph a Jewish wedding or an interracial wedding, even if those unions were against Huguenin's faith, there would be no question that the business could not legally discriminate based on customers' race or religion.").

293. *Cf.* Flanders, *supra* note 292, at 570–71 (noting that some will disagree with Vischer, presumably with respect to whether a consensus has already been reached that orientation discrimination is unacceptable).

294. *Cf.* McGowan v. Maryland, 366 U.S. 420, 575 (1961) (Douglas, J., dissenting) ("But it is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs.").

295. 374 U.S. 203 (1963).

296. *Id.* at 226 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (internal quotation marks omitted)).

The right to act in accord with conscience is not absolute.[297] But the test for whether such conduct is permissible simply cannot be whether it happens to be in accord with majority preferences.[298] It is precisely for this reason that the *Gillette* Court discussed whether there were "valid neutral [secular] reasons"[299] for rejecting a claim of conscience rather than whether there was some consensus about the relative justness of the Vietnam War.[300]

3. When Does the Provision of a Good or Service Constitute Acceptance or Endorsement?

Elane Photography refused to photograph Willock's commitment ceremony because that business did not want to express approval of same-sex marriage.[301] An important issue for the Court has involved the conditions under which particular conduct might be thought to express a view contravening the actor's beliefs. Those cases have ranged from saluting the flag,[302] to displaying something on a license plate,[303] to permitting individuals to be scoutmasters,[304] to permitting the military to interview on campus in contravention of a nondiscrimination policy.[305]

Consider the individual who sees a photographer refusing to photograph a particular couple. The observer would not know whether that refusal was due to a scheduling conflict, an inability to agree about price, or some other reason,[306] especially if there is a public accommodations ordinance requiring commercial establishments not to discriminate. Because it would be unlikely for an observer to impute a particular view to the photographer, the United States Supreme Court would reject that this would be a case of compelled speech, just as the *FAIR* Court rejected that law schools were being compelled to speak.[307] Further, as was true in *FAIR*, taking the photograph would in no way impede Elane Photog-

297. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("[T]he Amendment embraces two concepts, [] freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.").

298. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) ("The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups . . . ."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2014), *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651, 1655–56 (2011).

299. Gillette v. United States, 401 U.S. 437, 454 (1971).

300. For discussion of *Gillette*, see *supra* notes 76–82 and accompanying text.

301. *See* Gottry, *supra* note 225, at 963–64 (arguing that she was being forced "to communicate a particular message about same-sex commitment ceremonies—was compelled to express a viewpoint she disagreed with, in violation of her First Amendment free speech rights").

302. *See supra* notes 11–25 and accompanying text.

303. *See supra* notes 26–51 and accompanying text.

304. *See supra* notes 187–212 and accompanying text.

305. *See supra* notes 213–49 and accompanying text.

306. Elane Photography, L.L.C. v. Willock, 284 P.3d 428, 439–40 (N.M. Ct. App. 2012) ("[A]n observer who merely sees Elane Photography photographing a same-sex commitment ceremony has no way of knowing if such conduct is an expression of Elane Photography's approval of such ceremonies.") (citing *FAIR*, 547 U.S. 47, 66 (2006)).

307. *FAIR*, 547 U.S. at 64.

raphy from communicating its own views regarding whether same-sex marriage should be permitted in New Mexico.[308] Thus, Elane Photography could post a note on its website that the contents of its photos should not be construed as an endorsement of particular views,[309] although it seems doubtful that any views would be imputed to the photographers even absent such a disclaimer.[310]

Willock had sought to have the commitment ceremony photographed when New Mexico did not recognize same-sex marriage or civil unions.[311] Thus, it was not as if the photograph would be of a wedding. Rather, the difficulty was that the photograph might be thought to represent approval of a same-sex wedding. But if photographing a commitment ceremony—something that was neither a marriage nor a civil union—nonetheless qualifies for an exemption because of what the professional thinks the photograph might symbolize, then any photograph that the photographer believed would somehow communicate the wrong message would justify the photographer's telling the customers to take their business elsewhere.

Professor Wilson suggests that it should be permissible for a variety of individuals—e.g., the baker, the photographer, or the reception hall owner—to refuse to provide wedding services if those individuals have moral qualms about such unions,[312] as long as others are available to provide the service.[313] The same argument would presumably apply to restaurants, hotels,[314] movie theaters, and a whole host of public establishments, because providing service might be construed as symbolic approval. Those who provide flowers or sell clothing might also be in-

308. *Id.* at 65. It is for these reasons that the Court would be unlikely to view this as compelled speech. Some commentators do not appreciate some of the implications of *FAIR*. *See, e.g.*, Nabet, *supra* note 51, at 1542–43 ("In *Elane Photography*, however, application of the New Mexico statute would directly impede Huguenin's ability to disseminate her preferred views; it would force the photographer to affirm and possibly even endorse an ideology that she claims she sincerely believes is wrong.").

309. Gottry, *supra* note 225, at 991 ("Elane Photography would find it even more difficult to distance itself from the message, short of posting a disclaimer on its website, or printing a disclaimer on the photos themselves.").

310. *See supra* notes 301, 306–07 and accompanying text.

311. Douglas Nejaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1201 (2012) ("New Mexico does not offer any relationship recognition to same-sex couples, let alone marriage."); Wilson & Singer, *supra* note 288, at 12 ("New Mexico neither recognizes same-sex marriage nor same-sex civil unions.").

312. *See* Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318, 328 (2010) ("[A]ssisting with marriage ceremonies has a religious significance that commercial services that are subject to non-discrimination bans, like ordering burgers and hailing taxis, simply do not.").

313. *See* Wilson & Singer, *supra* note 288, at 13.

314. A separate issue involves those who rent out a few rooms in their own homes. For a discussion of those exemptions, see generally David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326 (2012).

cluded.[315] Presumably, dry cleaning establishments, barbershops, and hairdressers might also want not to participate. Grocery stores might wish not to provide goods to those who wish to have in-home celebrations. In short, most if not all businesses would seem permitted to refuse to provide services so that they could avoid sending an undesired message.

Professor Wilson notes that for "many people, marriage itself is a religious sacrament and the assistance of it may well be a religious act in their minds."[316] Yet, those with religious objections to same-sex marriage might also have religious objections to same-sex couples raising children or living together. Or, they might have religious objections to assisting anyone who appears to be undermining traditional gender roles. Presumably, the justification offered in the same-sex wedding context might be used to refuse to provide any services at all to a vast array of individuals for fear of promoting objectionable lifestyles or practices.[317]

IV. CONCLUSION

The Court's analysis of the conditions under which the First Amendment trumps equal protection values has been far from clear. While the Court has been clear that states cannot force individuals to affirm principles contrary to belief, the Court has also been clear that symbolic conduct is not given as much protection as is speech, and that not all conduct that the actor believes is expressive counts as expressive conduct for constitutional purposes. Further, the Court has vacillated with respect to the deference due to an organization's judgment that following the law would alter its message.

Variations in the jurisprudence notwithstanding, some constitutional principles have been articulated consistently. Commercial entities do not have the same constitutional rights as do noncommercial entities, and conduct that does not communicate a message without further explanation may well not even rise to the kind of activity afforded First Amendment protection.

Businesses do not have the constitutional right to choose their customers and should not be afforded that right as a matter of public policy. If they could refuse to provide goods or services as a matter of conscience whenever providing those goods or services were thought to in-

315. *See* Wilson & Singer, *supra* note 288, at 16. Professor Singer notes these implications of Professor Wilson's position. *Id.*

316. *Id.* at 17.

317. Professor Wilson notes that some object to same-sex marriage but not to providing other services. *See* Wilson, *supra* note 312, at 328 ("Many of these people have no objection generally to providing services to lesbians and gays, but they would object to directly facilitating a same-sex marriage."). But for those who object to providing any services to gays or lesbians for religious reasons, one presumes that Professor Wilson would say that should be respected as long as others are available to provide the needed services.

accurately communicate a message of endorsement or, perhaps, tolerance, then such businesses would have been afforded a "carte blanche to discriminate."[318]

Certain kinds of organizations have associational rights that must be respected. But those associational rights do not include the right to refuse to provide commercial products or services to individuals about whom one has religious reservations. Permitting businesses to engage in such discrimination can only cause the country to become more balkanized and individual groups more stigmatized—results that no one should want.

318. *Cf.* Renee M. Williams, Comment, *The Ministerial Exception and Disability Discrimination Claims*, 2011 U. CHI. LEGAL F. 423, 424 (2011) (discussing a case that she interprets to "provide[] religious organizations carte blanche to discriminate").