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Public Accommodations and the Right to Refrain from Expressing Oneself

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ABSTRACT

The United States Supreme Court has been unable to articulate a coherent position when addressing the right of individuals to refrain from expressing themselves. The Court has applied various tests inconsistently—emphasizing principles in some cases, ignoring them in subsequent cases, and then emphasizing them again in later cases as if those principles had always been applied. The Court's approach is incoherent, offering little guidance to lower courts except to suggest that public accommodations laws may soon be found inconsistent with First Amendment guarantees.

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CONTENTS

I. INTRODUCTION

The United States Supreme Court has been unable to articulate a coherent position when addressing the right to refrain from expressing oneself, especially where that right must be reconciled with public accommodations laws. Part of the difficulty stems from the Court's self-contradictory views about (1) what counts as one's own expression; (2) what might undermine that expression; and (3) how much deference must be given to the speaker's own assessment of what, if anything, is being said, regardless of what others understand. In the Court's meandering jurisprudence regarding compelled speech, hosting other's speech, and freedom of association, the principles emphasized in some cases are trivialized or ignored in other cases and then trumpeted again in still other cases. The Court's inconsistency with respect to the meaning and application of key concepts has resulted in a jurisprudence that is difficult if not impossible to understand and apply.

Part II of this Article discusses the Court's forced expression cases, noting how the Court's rationales frequently undercut, rather than support, the previous case law and result in an incoherent jurisprudence. Part III examines *Masterpiece Cakeshop, Limited v. Colorado Civil Rights Commission*[1] and *303 Creative LLC v. Elenis*,[2] explaining how the Court's position on the intersection of expression and public accommodations law in those cases, if taken seriously, will gut public accommodation laws and will further divide the nation along lines of race, religion, ethnicity, and a host of other lines. The Court's free expression jurisprudence is incoherent and can only lead to a further weakening of bedrock constitutional protections.

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[1] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018).

[2] 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

II. ON FORCED EXPRESSION

The United States Supreme Court discussed the State's power to compel speech in two cases analyzing whether students could be compelled to recite the Pledge of Allegiance. The Court ultimately held that individuals cannot be forced to affirm certain views contrary to belief. In subsequent forced speech cases, the Court asserted or ignored core principles "as a matter of whim or personal disinclination,"[3] offering contradictory analyses of the conditions under which one can be forced to speak or facilitate others' speech. The Court's jurisprudence not only fails to provide guidance for the future, but also undermines First Amendment guarantees of free expression and association, while casting further doubt upon the Court's commitment to neutrality and integrity.

A. The Pledge Cases

The Court addressed compelled expression in the public school context in an examination of state or local laws requiring students to affirm their allegiance to the country at the beginning of the school day. These cases foreshadowed the eventual instability and incoherence of the doctrine—the Court not only quickly reversed itself with respect to the result, but could not even decide upon the correct approach for determining whether the requirement at issue passed constitutional muster.

Minersville School District v. Gobitis[4] involved the expulsion of students who refused to salute the flag[5] based on their sincere religious belief that engaging in this activity would be a violation of their religious duty.[6] Because children were required by law to attend school,[7] and because they could not attend public school unless willing to salute the flag, the children were enrolled in private school.[8] The Gobitis family[9] filed suit challenging the law which in effect required the family to incur private schooling expenses.[10]

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[3] Pub. Affs. Assocs. v. Rickover, 369 U.S. 111, 112 (1962).

[4] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[5] *Id.* at 591 ("Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise.").

[6] *See id.* at 593 (noting that the refusal was based "upon sincere religious grounds").

[7] *Id.* at 592 ("The Gobitis children were of an age for which Pennsylvania makes school attendance compulsory.").

[8] *Id.* ("[T]hey were denied a free education and their parents had to put them into private schools.").

[9] *Id.* ("[T]heir father, on behalf of the children and in his own behalf, brought this suit.").

[10] *Id.* ("To be relieved of the financial burden thereby entailed, their father . . . brought this suit.").

The *Gobitis* Court took seriously "[t]he right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of . . . a majority,"[11] and understood that the "children had been brought up conscientiously to believe that . . . [the flag salute] was forbidden by command of Scripture."[12] But sincere belief that a particular action was a violation of religious duty was not alone enough to establish that the children must be exempted from the requirement—"[c]onscientious scruples have not . . . relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[13] Instead, the Court suggested that "religious convictions which contradict the relevant concerns of a political society do[] not relieve the citizen from the discharge of political responsibilities."[14] That interpretation of the conditions under which individuals with a conscientious objection were exempted from following general laws that were not themselves aimed at religion was affirmed in *Employment Division, Department of Human Resources v. Smith*.[15]

The *Gobitis* Court was unpersuaded that the United States Constitution required an exemption from the flag salute requirement for yet another reason: the Court believed the implicated state interest extremely important: "We are dealing with an interest inferior to none in the hierarchy of legal values."[16] Because "[n]ational unity is the basis of national security"[17] and the Court was unwilling to second-guess the legislature's decision regarding the "appropriate means for [security's] attainment,"[18] the Court reversed the decision below[19] and upheld the pledge requirement's

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[11] *Id.* at 594.

[12] *Id.* at 591–92.

[13] *Id.* at 594.

[14] *Id.* at 594–95.

[15] *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." (citing *Gobitis*, 310 U.S. at 594–95)). Some on the current Court believe that *Smith* should be overruled. *See* Fulton v. City of Phila., Pa., 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in the judgment) ("In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the Court abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.") (additional case reporters omitted).

[16] *Gobitis*, 310 U.S. at 595.

[17] *Id.*

[18] *Id.*

[19] *See* Minersville Sch. Dist. v. Gobitis, 108 F.2d 683, 693 (3d Cir. 1939), *rev'd*, 310 U.S. 586 (1940) (affirming the district court's injunction); *see also* Gobitis v. Minersville Sch. Dist., 24 F. Supp. 271, 275 (E.D. Pa. 1938), *decree aff'd*, 108 F.2d 683 (3d Cir. 1939), *rev'd*, 310 U.S. 586 (1940) (granting "an injunction against the defendants restraining them from continuing in

constitutionality.[20] Refusing to weigh in on the best way "of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncra[s]ies among a people so diversified in racial origins and religious allegiances,"[21] the Court instead deferred to the legislative judgment with respect to how to achieve "the binding tie of cohesive sentiment,"[22] which is "[t]he ultimate foundation of a free society."[23]

The *Gobitis* decision to uphold the Pledge of Allegiance requirement did not go unnoticed. For example,[24] the West Virginia State Board of Education adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an [A]ct of insubordination, and shall be dealt with accordingly."[25]

In particular, students were required to make "the 'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all.'"[26] The failure to engage in the prescribed activity was construed as "insubordination,"[27] and students who refused could be expelled.[28] An expelled student would still be required to attend school, but such a student would not be permitted to attend public school unless willing to salute the flag.[29] Children not attending school at all could be found

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force the order expelling the minor plaintiffs from the Minersville Public School and . . . from requiring the minor plaintiffs to salute the national flag as a condition of their right to attend the said school").

[20] *Gobitis*, 310 U.S. at 600.

[21] *Id.* at 598.

[22] *Id.* at 596.

[23] *Id.*

[24] Richard F. Duncan, *Defense Against the Dark Arts: Justice Jackson, Justice Kennedy and the No-Compelled-Speech Doctrine*, 32 REGENT U. L. REV. 265, 267 (2020) ("By 1943, when *Barnette* was decided, all forty-eight states had adopted some version of compulsory flag salute.").

[25] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

[26] *Id.* at 628–29.

[27] *Id.* at 629.

[28] *Id.* ("Failure to conform is 'insubordination' dealt with by expulsion.").

[29] *Id.* ("Readmission is denied by statute until compliance.").

"delinquent"[30] and sent to reformatories,[31] and the parents of a child not attending school would be subject to criminal sanction.[32]

Walter Barnette challenged the pledge requirement in *West Virginia State Board of Education v. Barnette*.[33] The *Barnette* Court characterized the matter at issue as a conflict between state "authority and rights of the individual,"[34] where the "State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child."[35] Yet, it was not as if such state coercion was unprecedented or, perhaps, only permitted at a much earlier time in our history—the Court had upheld the state's power to coerce student pledge participation a mere three years earlier in *Gobitis*.[36]

The *Barnette* Court made clear that "in connection with the pledges, the flag salute is a form of utterance."[37] The symbolic act at issue was "a primitive but effective way of communicating ideas."[38] The state flag represents the "government as presently organized . . . [and the State] requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] thus bespeaks,"[39] although such an affirmation might well not reflect what the affirmer in fact believed.[40] In challenging the statute, the Barnette family asserted a right to disagree with the State and to "stand on a right of self-determination in matters that touch individual opinion and personal attitude."[41]

As an initial matter, the *Barnette* Court had to establish the standard by which to evaluate the requirement's constitutionality. Had censorship been at issue, the Court would have imposed a very rigorous test—"censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear

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30 *Id.*

31 *Id.* at 630 ("Officials threaten to send them to reformatories maintained for criminally inclined juveniles.").

32 *Id.* at 629 ("His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.").

33 *Barnette*, 319 U.S. 624.

34 *Id.* at 630.

35 *Id.* at 630–31.

36 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596, 598 (1940).

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

38 *Id.*

39 *Id.* at 633.

40 *Cf. id.* ("It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning.").

41 *Id.* at 631.

and present danger of action of a kind the State is empowered to prevent and punish."[42] But the case at hand involved compelled speech rather than the censorship of speech, so it was unclear whether the same demanding standard should be employed.

While understanding that the State requiring someone to speak might be differentiated from the State precluding someone from speaking, the Court nonetheless decided that the same clear and present danger test applied to both.[43] Otherwise, the Court would have been put in the position of asserting that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[44] The Court then proceeded to apply the clear and present danger test to the required affirmation.[45]

The *Barnette* Court struck down the required affirmation as a violation of constitutional guarantees[46] because "the power of compulsion [had been] invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression."[47] Rather than follow the *Gobitis* Court's lead in suggesting that the "ultimate foundation of a free society"[48] was at stake, the *Barnette* Court instead minimized the danger, arguing that "the price of [tolerating] occasional eccentricity and abnormal attitudes . . . is not too great"[49] when "they are so harmless to others or to the State as those . . . here."[50] By suggesting that no danger was posed by permitting children to refrain from saying the Pledge, the Court cast doubt upon the importance of the State interest in enforcing the requirement.

Yet, the *Barnette* Court was not suggesting that the State had free rein to require affirmations whenever more significant costs might be incurred by the failure to require orthodoxy of opinion.[51] Were that the relevant standard, the Court would be suggesting that the "freedom to differ is . . . limited to things that do not matter much."[52] Instead, the Court affirmed "the right to differ as to things that touch the heart of the existing order."[53]

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[42] *Id.* at 633.

[43] *Id.* at 633–34.

[44] *Id.* at 634.

[45] *Id.* at 633–34.

[46] *See id.* at 642.

[47] *Id.* at 633–34.

[48] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1940).

[49] *Barnette*, 319 U.S. at 642.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

When seeking to understand the Court's differing analyses in *Gobitis* and *Barnette*, one must keep in mind that the Court did not have the same focus in the two cases.[54] The *Barnette* Court did not take issue with the *Gobitis* Court's analysis of the conditions under which individuals with religious qualms might be exempted from a general rule,[55] but instead focused on whether the general rule was itself permissible.[56] Thus, when considering whether as a general matter the State could force individuals to make certain affirmations, the *Barnette* Court was not limiting its attention to whether an exemption must be afforded to those objecting on the basis of religious belief to making an affirmation. Instead, the Court was making the broader point 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."[57]

When striking down the Pledge of Allegiance requirement, the *Barnette* Court was not offering an opinion about whether the voluntary affirmation of the Pledge brought about increased patriotism or instead division, noting that it was not addressing whether the flag salute "as a voluntary exercise . . . would . . . be good, bad or merely innocuous."[58] Rather, the Court's focus was on whether "a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by

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[54] *See* Gathie Barnett Edmonds et al., *Recollections of* West Virginia State Board of Education v. Barnette, 81 ST. JOHN'S L. REV. 755, 761 (2007) ("The *Gobitis* case was decided primarily as a religion issue, but the *Barnette* case was decided somewhat differently, on speech grounds."); Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1910 (2011) ("*Barnette* involved the identical religiously motivated refusal of school children to salute the American flag as had *Gobitis*, but the *Barnette* opinion rests on general, religion-neutral grounds.").

[55] *Barnette*, 319 U.S. at 635 ("The *Gobitis* decision . . . assumed . . . that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule.").

[56] *Id.* at 634 (noting that the "validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered"). Some commentators do not seem to appreciate the shift of focus. *See, e.g.*, Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1346 (1995) ("Within three years, the Court in *Board of Education v. Barnette* overruled the simple but constitutionally insensitive doctrine of *Gobitis* and suggested instead that even inadvertent legislative interferences with religion must pass some constitutional scrutiny under the Free Exercise Clause.").

[57] *Barnette*, 319 U.S. at 642.

[58] *Id.* at 634.

official authority."[59] It was thus the State's coercion of citizens to express themselves in particular ways that the *Barnette* Court was holding impermissible.[60]

B. What Counts as Expression?

The required affirmation at issue in *Gobitis* and *Barnette* clearly counted as speech—the State was requiring the student "to communicate by word and sign his acceptance of the political ideas."[61] There was no need to discuss whether expression was at issue and, if so, to whom the expression would be attributed. Both of those issues were implicated in *Wooley v. Maynard*,[62] although the Court's analysis in that case did not shed much light on the best approach to addressing these issues.

Wooley involved whether an individual, George Maynard, could be criminally charged for covering up part of his license plate to obscure the New Hampshire state motto "Live Free or Die."[63] The Maynards considered the motto to be "repugnant to their moral, religious, and political beliefs."[64] The Court framed the relevant 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."[65]

Yet, framing the question that way was not particularly helpful in clarifying the underlying constitutional issues. If the implicated difficulty was that the government is not permitted to require individuals to use their private property in ways that the individuals oppose, then the rationale is not particularly First-Amendment focused but, instead, involves the parameters of individual control with respect to the use of private property.[66] A difficulty in focusing on property rights might be whether the Court's implicit position would be in conflict with the Court's deferential zoning

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[59] *Id.* at 636.

[60] George Anastaplo, *Law & Literature and the Christian Heritage: Explorations*, 40 BRANDEIS L.J. 191, 466 (2001) ("It is the coercion of citizens which proves troublesome in the *Gobitis-Barnette-Engel* line of cases.").

[61] *Barnette*, 319 U.S. at 633.

[62] Wooley v. Maynard, 430 U.S. 705 (1977).

[63] *Id.* at 706–07.

[64] *Id.* at 707.

[65] *Id.* at 713.

[66] Mark Strasser, *Speech, Association, Conscience, and the First Amendment's Orientation*, 91 DENV. U. L. REV. 495, 501 (2014) ("The New Hampshire requirement might nonetheless have been found constitutionally offensive if the license plate was viewed as private rather than governmental property for a reason having nothing to do with expression . . . . In that event, however, *Wooley* would not be viewed as a seminal First Amendment case."); Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 WAKE FOREST L. REV. 983, 1022 (2003) ("The Maynards were carrying New Hampshire's message. They objected to doing so, just as someone might object to a requirement that certain statements accompany employment advertising, or that certain warnings or information be provided in connection with use of one's property.").

jurisprudence,[67] although the Court might find ways to reconcile the apparently conflicting positions.[68]

The *Wooley* Court criticized the New Hampshire statute because it "in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty."[69] Here, too, the Court's meaning is not particularly clear. If the difficulty were that the State was getting a mobile billboard for free rather than paying for that service, then the difficulty might be understood as the State having effected a taking.[70]

Even if the focus is not on private property, but instead on expression, the characterization of the issue as whether the State can "require an individual to participate in the dissemination of an ideological message"[71] was more likely to mislead than to clarify. There are many ways in which one might participate in the dissemination of an ideological message: one might be forced to articulate the message oneself[72] or one might help set up a sound system so that a message could be broadcast[73] or one might pay taxes so that the government would have funding to articulate its preferred message.[74] Although each in some sense might count as participating in the dissemination of a message, a separate question is whether each of

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67 *See* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 1–2 (1974) (upholding zoning ordinance); *see also* Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (upholding another zoning ordinance); Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 853 (2021) (noting that "the Court in *Village of Euclid v. Ambler Realty Co.* adopted a highly deferential standard for judicial review of municipal zoning"); William C. Bunting & James M. Lammendola, *Why Localism Is Bad for Business: Land Use Regulation of the Cannabis Industry*, 17 N.Y.U. J.L. & BUS. 267, 272 (2021) (noting that "courts are strongly deferential to local legislatures when assessing the validity of a zoning ordinance").

68 *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 496 (1977) (striking down ordinance that too severely limited who counts as family for zoning purposes).

69 *Wooley*, 430 U.S. at 715; *see also* Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 541 (1991) (Marshall, J., concurring in part and dissenting in part) ("What was dispositive [in *Wooley*] was the fact that the government was forcing the citizens themselves to be 'courier[s]' of the message with which they disagreed, thereby conscripting their expressive capacities in service of the government's message." (citing *Wooley*, 430 U.S. at 717)).

70 Strasser, *supra* note 66 ("The New Hampshire requirement might nonetheless have been found constitutionally offensive if the license plate was viewed as private rather than governmental property for a reason having nothing to do with expression—for example, that the state was effecting a taking. In that event, however, *Wooley* would not be viewed as a seminal First Amendment case.").

71 *Wooley*, 430 U.S. at 713.

72 *See* Part II.A (discussing *Gobitis* and *Barnette*, where students were required to articulate a particular message contrary to their own beliefs).

73 *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989) (discussing whether control of the sound amplification system implicated First Amendment concerns).

74 *See Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting) (noting that paying taxes might be thought to involve participating in the dissemination of a message).

those provides a basis for attribution of agreement with the content of the message. As then-Justice Rehnquist pointed out, an individual whose taxes are being used to help fund a governmental message would not thereby be thought to be agreeing with that message, notwithstanding that she "participate[d] in the dissemination of an ideological message"[75] by paying those taxes.[76]

Justice Rehnquist argued in his dissent that a reasonable observer would be unlikely to attribute agreement with the State's message to the Maynards.[77] One cannot tell whether the *Wooley* majority agreed with Justice Rehnquist that others would not attribute the State's message to the Maynards[78] but nonetheless held that the State was prohibited from punishing the Maynards for covering up the license plate or, instead, the majority believed that the Maynards' failure to cover up the message would indeed be interpreted by others as tacit agreement with the State's message.[79]

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[75] *Id.* at 713.

[76] *See id.* at 721 (Rehnquist, J., dissenting) (noting that individuals paying taxes may thereby be supporting state messages with which they disagree but that the individuals are not thereby thought to be agreeing with those views).

[77] *Cf. id.* at 720–21 ("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."). A different issue would be raised if the onlooker knew that the driver had himself chosen the message. *See* Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 305 F.3d 241, 244 (4th Cir. 2002) (Williams, J., concurring in the denial of rehearing en banc) ("Plainly, anyone viewing a license plate bearing a motto or logo the viewer knows to have been selected by the driver or owner of the vehicle is more likely to associate the message with that driver or owner than would be the viewer of a state-mandated logo appearing on all noncommercial plates across the state.").

[78] Some commentators simply *assume* that members of the Court agreed that no one could reasonably attribute the view to the Maynards. *See* Eugene Volokh, *Amicus Curiae Brief:* Elane Photography, LLC v. Willock, 8 N.Y.U. J.L. & LIBERTY 116, 131 (2013) ("The *Wooley* majority concluded that the Maynards should prevail, even though observers likely would *not* assume that the Maynards endorsed the license plate motto.").

[79] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219 (2015) ("We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. *See Wooley*, 430 U.S. at 717, n.15 (observing that a vehicle 'is readily associated with its operator.'")); *see also* Joseph J. Martins, *The One Fixed Star in Higher Education: What Standard of Judicial Scrutiny Should Courts Apply to Compelled Curricular Speech in the Public University Classroom?*, 20 U. PA. J. CONST. L. 85, 91 (2017) ("[T]he government can neither compel citizens to personally affirm a belief (*Barnette*) nor force them to foster a belief to third parties such that their endorsement is reasonably presumed (*Wooley*)."); Genevieve Lakier, *Not Such a Fixed Star After All:* West Virginia State Board of Education v. Barnette*, and the Changing Meaning of the First Amendment Right Not to Speak*, 13 FIU L. REV. 741, 747 (2019) ("The law at issue in *Wooley*, like the law at issue in *Barnette*, compelled speakers to endorse—albeit, in this case, only tacitly—a contestable belief."). *But see* Bezanson, *supra* note 66, at 1021–22 ("In *Wooley*, however, there was no evidence whatsoever that anyone witnessing the Maynards' display of the license plate and motto understood them to express personal beliefs, much less agreement

Justice Rehnquist implied that the other Justices believed the latter—had he believed that the other Justices understood that no one would attribute the view to the Maynards, he likely would not have bothered to point out that the Maynards could have dispelled the inaccurate characterization of their own beliefs by posting a clarifying bumper sticker on their car.[80]

The *Wooley* Court began its analysis by noting that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[81] The Court explained that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[82] Those propositions had already been established in *Barnette*.[83] Further, as additional support for its position, the *Wooley* Court cited *Miami Herald Publishing Co. v. Tornillo*,[84] explaining that in that case the Court had "held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized."[85]

Yet, *Tornillo* was not as helpful as might first have been thought. The *Tornillo* holding was based upon the First Amendment's protection of the press—as the Court explained in a subsequent case discussing *Tornillo*, the statute at issue might "'dampe[n] the vigor and limi[t] the variety of public debate' by deterring editors from publishing controversial political statements that might trigger the application of the statute."[86] The statute was "an 'intrusion into the function of editors.'"[87] Freedom of

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with the offending 'Live Free or Die' motto. Without such evidence it is unreasonable to assume that the other drivers so interpreted the Maynards' display of the license plate.").

80 *Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting) ("[A]ppellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die' and that they violently disagree with the connotations of that motto."); *see also Walker*, 576 U.S. at 219 ("We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs." (citing *Wooley*, 430 U.S. at 717, 717 n.15, 715)).

81 *Wooley*, 430 U.S. at 714 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943)).

82 *Id.* (citing *Barnette*, 319 U.S. at 637).

83 *See id.* (citing *Barnette*, 319 U.S. at 633–34; *Barnette*, 319 U.S. at 645 (Murphy, J., concurring)); *see also id.* (citing *Barnette*, 319 U.S. at 637).

84 *Id.* (citing Miami Herald Pub. Co., Div. of Knight Newspapers v. Tornillo, 418 U.S. 241 (1974)).

85 *Id.*

86 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (alterations in original) (citing *Tornillo*, 418 U.S. at 257).

87 *Id.* (citing *Tornillo*, 418 U.S. at 258).

the press[88] and editorial discretion of the press[89] were not at issue in *Wooley*,[90] so *Tornillo* can hardly be thought to provide a straightforward explanation of why New Hampshire was precluded from punishing the Maynards for obscuring the plate.

Perhaps it would be thought that *Wooley*, like *Tornillo*, stands for robust editorial control, although in *Wooley* the issue was whether the car owner could control what was on the license plate.[91] Yet, that does not seem to be a plausible interpretation of *Wooley*, as the following hypothetical illustrates. Suppose that Maynard wanted to cover up "New Hampshire" and instead have "Maine" or "Vermont" on the plate. That would have exceeded Maynard's discretion and would been subject to punishment because the State would likely be viewed as having a significant interest in having the state name on the plate,[92] for example, because having the state's name on the plate would facilitate apprehending the driver if that were necessary.[93] As the Court made

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88 *See Tornillo*, 418 U.S. at 256; *see also id.* at 258 ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.").

89 Len Niehoff, *"Catch and Kill": Does the First Amendment Protect Buying Speech to Bury It?*, 34 COMM. LAW. 4, 7 (2019) ("The foundational case with respect to the editorial discretion doctrine is *Miami Herald Publishing Co. v. Tornillo*.").

90 By the same token, the *PruneYard* Court noted that freedom of the press was not at issue in that case. *See PruneYard*, 447 U.S. at 88 ("These concerns obviously are not present here."). And so, *Tornillo* would not help the mall owners press their claim that they could not be forced to allow others to speak.

91 *Cf.* David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 553–54 (1991) ("*Tornillo*'s recognition of an autonomy interest in editorial discretion substantially extended the right to refrain from expression, but the decision has not been given an expansive interpretation in subsequent cases. The Supreme Court has repeatedly refused to find sanctuary in the First Amendment for autonomous control over the expressive use of non-press property unless the concerns of conscience underlying *Barnette* and *Wooley* are at stake.").

92 The importance of the State's implicated interest plays a role in the relevant analysis. *See* Wooley v. Maynard, 430 U.S. 705, 716 (1977) ("We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.").

93 *See also* United States v. Flores-Fernandez, 418 F. Supp. 2d 908, 915 (S.D. Tex. 2006) ("The general purpose of requiring a license plate to be displayed, unobstructed, is to facilitate license plate checks by law enforcement officials, who often only have a brief opportunity to read the information from a moving vehicle. That purpose is frustrated when a frame completely covers the state name, making it nearly impossible for the officer to identify the state in which the vehicle is registered."); *cf.* R. George Wright, *Managing the Distinction Between Government Speech and Private Party Speech*, 34 QUINNIPIAC L. REV. 347, 350 (2016) ("[T]he plates function, in essence, as government IDs.").

clear in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, individuals do not have editorial discretion to decide what is on their license plates.[94]

Barnette might be thought to provide a firmer foundation for *Wooley* than does *Tornillo*,[95] and the *Wooley* Court even suggested that the New Hampshire requirement was akin to the West Virginia requirement that the Court had examined in *Barnette*: "Here, as in *Barnette*, we are faced with a state measure which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[96] But individuals who are forced to pay taxes to support views and practices to which they object might be characterized as being forced to support disfavored views, and the Court has been unwilling to uphold conscientious exemptions to paying taxes.[97]

When offering its First Amendment analysis of the New Hampshire statute's constitutionality,[98] the *Wooley* Court implied that *Barnette* was almost dispositive,[99] even though the two cases differed in a number of respects.[100] *Barnette* involved schoolchildren who were being forced to signify agreement with particular assertions

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94 *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219–20 (2015) ("Texas's specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV's proposed design.").

95 Martins, *supra* note 79 ("[T]he government can neither compel citizens to personally affirm a belief (*Barnette*) nor force them to foster a belief to third parties such that their endorsement is reasonably presumed (*Wooley*)."); Tyler Sherman, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL RTS. J. 219, 226 (2017) (noting that the Court "reaffirmed *Barnette*'s core principles thirty-four years later in *Wooley v. Maynard*"). *But see* Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 851 (2011) ("[E]ven the conception of that holding [*Wooley*] as a proper outgrowth of *Barnette* has met with considerable skepticism.").

96 *Wooley*, 430 U.S. at 715.

97 *See, e.g.*, United States v. Lee, 455 U.S. 252, 259–60 (1982) (upholding requirement to pay Social Security taxes, religious beliefs to the contrary notwithstanding).

98 *Wooley*, 430 U.S. at 715 ("Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however.").

99 *Id.* ("Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.").

100 *Id.* at 721 (Rehnquist, J., dissenting) ("The Court recognizes, as it must, that this case substantially differs from *Barnette*.").

by word and deed,[101] whereas in *Wooley* no such active participation was required.[102] The Court considered the "difference . . . essentially one of degree,"[103] but such a statement illustrates the need to clarify the focus of discussion. Were the issue whether the individual challenging the law had been pressured to state certain words while making certain gestures, the cases would differ in kind and not merely in degree.[104]

The *Wooley* Court implied that both cases involved the "broader concept of 'individual freedom of mind,'"[105] and believed that by requiring the license plate's message to remain unobscured the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[106] But this analysis makes the Court's reasoning even more difficult to understand. Was the worry that the Maynards were being pressured to believe something contrary to faith by having the state motto on their license plate? If thought control is the concern, then requiring schoolchildren to assert something daily seems different in kind—rather than in degree—from prohibiting an individual from obscuring a license plate that the individual might not even notice very often.[107]

Barnette and *Wooley* left open a number of issues requiring clarification. In both cases, the government specified particular language that had to be articulated or posted.[108] Both cases might be understood to involve the State forcing individuals to

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[101] *Id.* at 714 ("The Court in *Barnette* was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures." (citation omitted)).

[102] *See id.* at 715 ("Compelling 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.").

[103] *Id.*

[104] *Id.* at 720 (Rehnquist, J., dissenting) ("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.'"). The Court in other cases has distinguished *Barnette* because it dealt with the express affirmation of belief. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) ("*Barnette* is inapposite because it involved the compelled recitation of a message containing an affirmation of belief.").

[105] *Wooley*, 430 U.S. at 714 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[106] *Id.* at 715 (citing *Barnette*, 319 U.S. at 642).

[107] By the same token, a driver might not notice that the light illuminating the license plate was not working properly. *Cf.* Philip M. Intrieri, *The Numbers Game*, 28 PA. LAW. 52, 52 (May/June 2006) ("So there they were, happily moving down the road, blissfully unaware amid the dreams of youth that the driver had a burned out license plate light. . . ."); Elizabeth Williams, *Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following Lawful Traffic Stop, to Investigate, by Means Other Than Canine Sniff, Other Matters and Admissibility of Evidence Gained Thereby—Federal Cases Post* Rodriguez v. U.S., 53 A.L.R. Fed. 3d Art. 8 (2020) ("The driver said, in response to the officer's question, that he was dropping off a friend and that he had not known that the license plate light was out.").

[108] *See supra* notes 26 and 60 and accompanying text.

appear to agree with a particular state message.[109] Perhaps both cases should be understood to prohibit the State from forcing individuals to "foster[] public adherence to an ideological point of view he finds unacceptable."[110] However, one would think that fostering would involve increasing the acceptability of certain views, and that a child quietly repeating the Pledge of Allegiance or a driver leaving his license plate unobscured likely have no appreciable effect on the public's support of a particular political position.[111] In any event, it is unclear what understanding best captures the developing jurisprudence.

A subsequent case—*PruneYard Shopping Center v. Robins*[112]—provided some clarification of *Barnette* and *Wooley*. At issue in *PruneYard* was whether the First Amendment or property rights of a shopping mall owner were violated when state law required him to allow speakers to exercise their First Amendment rights on his property.[113] The *PruneYard* Court rejected that the state law requirement that the mall owner open up the property to First Amendment activity constituted a taking.[114] The Court then addressed whether the mall owner's First Amendment rights were themselves violated by the state requirement.[115]

The mall owner cited *Wooley* for the proposition that "a State may not constitutionally require an individual to participate in the dissemination of an

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109 *See Barnette*, 319 U.S. at 633 (noting that the State "requires the individual to communicate by word and sign his acceptance of [certain] political ideas"); *see also Wooley*, 430 U.S. at 713 (discussing whether the State can "require an individual to participate in the dissemination of an ideological message"); William D. Araiza, *The Law of License Plates and Other Inevitabilities of Free Speech Context Sensitivity*, 87 BROOK. L. REV. 247, 271 (2021) ("*Wooley* instead stressed the New Hampshire license plate law's requirement that the individual affirm an ideological position with which he disagreed.").

110 *Wooley*, 430 U.S. at 715.

111 Perhaps many people voluntarily espousing a particular view would promote others accepting that view. *Cf.* Will Soper, *A Purpose-and-Effect Test to Limit the Expansion of the Government Speech Doctrine*, 90 U. COLO. L. REV. 1237, 1261 (2019) ("The Fourth Circuit's determination that specialty license plates are government speech leaves the state's DMV free to offer only pro-life messages to drivers and to reject any pro-choice plate. If the government did so, the viewing public—unaware that pro-choice viewpoints are simply unable to access the license plate medium—might believe that pro-life supporters vastly outnumber pro-choice supporters."); *see also* Patrick J. McKenna, *You Never Win by Imitating Competitors*, 41 OF COUNSEL 5, 9 (Aug. 2022) ("[I]n an attempt to fit in with the crowd, we go along with the consensus.").

112 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87–88 (1980).

113 *Id.* at 76–77.

114 *Id.* at 83 ("Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause.").

115 *Id.* at 85 ("Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.").

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."[116] But the *PruneYard* Court distinguished *Wooley* by making several points, the first of which was "[m]ost important"[117]—the Court noted that "the shopping center by choice of its owner is not limited to the personal use of appellants . . . [but] is instead a business establishment that is open to the public to come and go as they please."[118] The Court thereby suggested that the shopping mall being open to the public was one of the reasons that the mall owner could not prevent the would-be speakers from expressing their opinion.[119]

As a related matter, the Court noted that the "views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner."[120] However, the latter point might analogously have been made in *Wooley*—because the public knew that all state drivers must carry the state motto on their license plates or face a penalty, the public would be unlikely to attribute the state's message to the driver.[121] If indeed the public would be no more likely to attribute the contested message in *Wooley* to the Maynards than attribute the contested message in *PruneYard* to the mall owner,[122] then the more telling consideration in distinguishing *Wooley* from *PruneYard* would be that the mall was open to the public whereas the car was not.

An additional point made by the *PruneYard* Court was that "no specific message is dictated by the State to be displayed on appellants' property . . . [which meant that there was] no danger of governmental discrimination for or against a particular message."[123] In both *Wooley* and *Barnette*, the State had prescribed a particular

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116 *Id.* at 86–87.

117 *Id.* at 87.

118 *Id.*

119 David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1, 29 (1998) ("[T]he Court in *PruneYard* rejected the shopping mall operator's claim of a First Amendment infringement for two reasons: first, because the use of the mall was not limited to the owner's personal use . . . .").

120 *PruneYard*, 447 U.S. at 87; *see also* Goldstone, *supra* note 119 ("[T]he views expressed by the public coming and going would not be identified with those of the owner.").

121 *See* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1566 (1998) (suggesting that "other drivers (required by law to cart around their own license plates) would [not] be prone to believe that George Maynard preferred death to living in bondage").

122 *See id.* at 1566–67 (suggesting that the public would be no more likely to attribute the contested message to the Maynards than to attribute the contested message to the mall owner).

123 *PruneYard*, 447 U.S. at 87; *see also* Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 711 n.536 (1987) ("[T]he Court distinguished *Barnette* and *Wooley* . . . . [I]n those cases the state had prescribed the message, whereas in *PruneYard* another private speaker chose the message."); David Ehrenfest Steinglass, *Extending* PruneYard*: Citizens' Right to Demand Public Access Cable Channels*,

message that the individuals were forced to state or post.[124] Finally, the *PruneYard* Court explained that the "appellants [could] expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs . . . could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law."[125] While the Court was correct that such signs could be posted, Justice Rehnquist had made a similar point in his *Wooley* dissent[126] and that did not save the New Hampshire requirement.[127]

The difficulty in understanding *PruneYard* is not that the Court's points were inaccurate, but rather that at least two of the Court's points were also applicable in *Maynard* and nonetheless did not win the day in the latter decision. In both *Wooley* and *PruneYard*, the message was unlikely to be imputed to the speaker,[128] and the individual who did not want to be thought agreeing with the message might have taken affirmative steps to manifest that lack of agreement with the message at issue.[129] When one considers the Court's analysis in *PruneYard* and also considers which points were also applicable in *Wooley*, one sees that the features differentiating *PruneYard* from the other cases were that the property had been opened up for use by the public[130] and the government had not prescribed a particular message.[131]

The compelled speech doctrine in *Gobitis*, *Barnette*, *Wooley*, and *PruneYard* is rather opaque. The difficulty in understanding the doctrine stems in part from the Court suggesting different approaches to a case but refusing to specify which approach

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71 N.Y.U. L. REV. 1113, 1122 (1996) ("[T]he PruneYard was not being required to post a particular state message.").

124 *See* Duncan, *supra* note 24, at 280 n.120 ("[W]hen the government compels a private individual to express a particular ideological message or creed, as in *Barnette* and *Wooley*, it is an egregious viewpoint-based wrong under the First Amendment.").

125 *PruneYard*, 447 U.S. at 87.

126 *See* Wooley v. Maynard, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting).

127 *See id.* at 717 ("We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.").

128 *See PruneYard*, 447 U.S. at 87; *see also* Volokh, *supra* note 78.

129 *See Wooley*, 430 U.S. at 722 (Rehnquist, J., dissenting); *see also PruneYard*, 447 U.S. at 87. Some commentators seem not to appreciate that the Maynards could have easily had a bumper sticker disavowing the State's message. *See* Nicholas Nesgos, Pacific Gas and Electric Co. v. Public Utilities Commission*: The Right to Hear in Corporate Negative and Affirmative Speech*, 73 CORNELL L. REV. 1080, 1088 (1988) ("The Court has recognized that the principles of *Wooley* and *Barnette* do not apply where an individual may easily disassociate himself from compelled speech.").

130 *PruneYard*, 447 U.S. at 87.

131 *Id.*

drove the decision.[132] For example, in *Wooley*, the constitutional difficulty might have been that the state requirement that the license not be obscured resulted in the message wrongly being attributed to the Maynards or might have been that the Maynards were being forced to help disseminate the State's message.[133] If the difficulty involved the incorrect attribution, then the Maynards might have engaged in self-help by posting a disavowal of the State's message, although self-help would not be a solution if the difficulty were that the Maynards were being forced to host someone else's message.

The *PruneYard* Court then made the doctrine even more difficult to understand by undercutting the force of *both* of the *Wooley* rationales. When rejecting the mall owner's challenge, the *PruneYard* Court reasoned that people would be unlikely to attribute the unapproved message to him, whether because of his own ability to post a disavowal message or because of the public knowledge that state law was forcing him to host the message.[134] Those same points were true in *Wooley*, which undercuts the plausibility that the Court was adopting a mistaken attribution rationale in *Wooley*.[135] The *PruneYard* Court also rejected the mall owner's objection that he should not be forced to host other people's messages, which undercuts that the *Wooley* Court was adopting the rationale that individuals cannot be forced to host others' messages. To make matters worse, the Court in *Pacific Gas & Electric Co. v. Public Utilities Commission of California* ("*PG & E*")[136] undercut the force of the other factors emphasized in *PruneYard*.

C. On Being Pressured to Speak

At issue in *PG & E* was whether the California Public Utilities Commission could require a privately owned utility company to include opposing viewpoints within its mailings.[137] While the Court vacating such a requirement[138] under the compelled

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[132] *See supra* text accompanying notes 78–79 (discussing differing positions that the *Wooley* Court might have adopted).

[133] *Cf.* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219 (2015) ("We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs." (citing *Wooley*, 430 U.S. at 717, 717 n.15)).

[134] *See PruneYard*, 447 U.S. at 87 ("Finally, as far as appears here appellants 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.").

[135] *See supra* note 121 and accompanying text.

[136] Pac. Gas & Elec. Co. v. Pub. Util. Comm'n (PG & E), 475 U.S. 1, 12 (1986).

[137] *Id.* at 4.

[138] *Id.* at 21 ("[T]he decision of the California Public Utilities Commission must be vacated.").

speech doctrine seems unsurprising on its face,[139] the legal analysis was anything but straightforward. To appreciate the difficulties in the analysis, a little background is required.

When PG & E mailed its monthly bill, it enclosed within that envelope a newsletter that included among other matters political editorials, energy conservation tips, and information about the services the utility provided.[140] An organization that frequently opposed PG & E, Toward Utility Rate Normalization ("TURN"), urged California's Public Utility Commission ("PUC" or "Commission") to prohibit the utility from using its billing envelopes to offer political commentary. TURN argued that customers should not be forced to bear the cost of PG & E's political speech.[141]

When suggesting that customers should not be forced to pay for political speech, TURN was not challenging the appropriateness of PG & E making *any* communications with its customers. For example, TURN was not challenging the appropriateness of PG & E sending monthly bills to customers, which meant that the costs associated with sending the bills were not at issue.[142] But if the costs associated with sending the bills were not at issue, then TURN would have to explain more clearly which costs were being passed on to the public for PG &E's political speech.

Consider the Commission's point that because of how postage rates were calculated, there might be no increased postage cost for inserts that did not appreciably increase the weight of the envelope.[143] That point might cut in either of two very different ways. Because the public would not be bearing any increased costs for PG & E's speech, the PG & E enclosures might be thought to impose only a de minimis burden on the public and thus PG & E should be permitted to include those disclosures.[144] Or, because the costs of doing business (including the costs associated with sending out bills)[145] would themselves be passed on to the public, the extra space in the envelope might also be thought to belong to the public rather than to the utility.

The Commission took the latter approach, finding that the space for an insert (the inclusion of which would *not* increase the postage cost) was "the property of the

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139 *Cf.* B. Ashby Hardesty, Jr., *Joe Camel Versus Uncle Sam: The Constitutionality of Graphic Cigarette Warning Labels*, 81 FORDHAM L. REV. 2811, 2848–49 (2013) ("[T]he Court's compelled speech doctrine . . . exemplified by *Barnette*, *Wooley*, and *Pacific Gas & Electric Co.*, declares that the state cannot force private individuals and corporations to express views that are repugnant to them unless the government can satisfy strict scrutiny review.").

140 *See PG & E*, 475 U.S. at 5.

141 *Id.*

142 *See id.* at 5 n.3 (discussing how envelopes, postage, and other costs associated with billing were a necessary part of providing utility service).

143 *See id.* at 5–6 (discussing "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost").

144 *Cf. supra* text accompanying note 142.

145 *Cf. supra* text accompanying note 142.

ratepayers."[146] Because TURN represented the interests of a significant number of customers,[147] and because TURN had helped the Commission perform its role,[148] the Commission decided that taxpayers would benefit[149] if TURN were permitted to include its own inserts four times a year for two years.[150] The Commission placed no restrictions on what either PG & E or TURN included in the inserts,[151] although TURN was required to identify its own message and make clear that its message might not represent the views of PG & E.[152] PG & E challenged the order, arguing that it had a First Amendment right not to promote messages with which it disagreed.[153]

When examining the constitutionality of the Commission's order, the U.S. Supreme Court likened the requirement at issue to the right-of-reply statute that had been at issue in *Tornillo*.[154] The Court reasoned that the *Tornillo* statute "directly interfered with the newspaper's right to speak."[155] First, because "the newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message,"[156] the statute's "effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents' views, the statute penalized the newspaper's own expression."[157] In addition, the *Tornillo* statute "interfered with . . . 'editorial control and judgment' by forcing the newspaper to tailor its speech to an opponent's agenda, and to respond to candidates' arguments where the newspaper might prefer to be silent."[158] Of course, *Tornillo* involved a newspaper and PG & E was a utility company, so it was not clear that *Tornillo* was relevant.

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146 *PG & E*, 475 U.S. at 6.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* ("[T]he Commission permitted TURN to use the 'extra space' four times a year for the next two years.").

151 *Id.* at 6–7 ("The Commission placed no limitations on what TURN or appellant could say in the envelope.").

152 *Id.* at 7 ("TURN is required to state that its messages are not those of appellant.").

153 *Id.* ("Appellant . . . argu[ed] that it has a First Amendment right not to help spread a message with which it disagrees." (citing Wooley v. Maynard, 430 U.S. 705 (1977))).

154 *See id.* at 10.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

The *PG & E* Court held that the rule that was understood to apply to the press in *Tornillo* should be applied to the utility as well.[159] Just as the State cannot dictate what a newspaper can and cannot print,[160] "the State is not free either to restrict [PG & E's] speech to certain topics or views or to force appellant to respond to views that others may hold."[161] The Court reasoned that "[u]nder *Tornillo* a forced access rule that would accomplish these purposes indirectly is similarly forbidden."[162]

There is one additional point that should be mentioned about the PUC order. When allocating the reserved space in the envelope to someone other than PG & E, the PUC refused to include speakers whose positions coincided with PG & E's[163] and instead "limited [access] to persons or groups—such as TURN—who disagree[d] with appellant's views as expressed in *Progress* and who oppose[d] appellant in Commission proceedings."[164] This limitation could not stand. The *PG & E* Court reasoned that "because access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced—at TURN's discretion—to help disseminate hostile views."[165] Such a rule might induce PG & E to avoid controversy by limiting its own speech.[166] The Court concluded that the PUC rule was unconstitutional because it did not "simply award access to the public at large; rather, it discriminate[d] on the basis of the viewpoints of the selected speakers."[167]

The *PG & E* opinion misrepresented both the law and the facts. First, the Court ignored the conditions that the PUC had imposed.[168] Unlike what was involved in *Tornillo*, TURN had not been given the right of reply so it was not as if TURN could

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159 *Id.* at 11 ("The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press.").

160 *Id.* (citing Pittsburgh Press Co. v. Hum. Rel. Comm'n, 413 U.S. 376, 400 (Stewart, J., dissenting)).

161 *Id.* at 11–12 (citing Consolidated Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 533–35 (1980)).

162 *Id.* at 12.

163 *Id.* at 13.

164 *See id.*; *see also* Nesgos, *supra* note 129, at 1091–92 ("In *Pacific Gas*, as in *Tornillo*, there was a content based access rule. Only parties who disagreed with PG&E had access to the envelopes.").

165 *PG & E*, 475 U.S. at 14.

166 *Id.* (citing Miami Herald Pub. Co., Div. of Knight Newspapers v. Tornillo, 418 U.S. 241, 257 (1974)).

167 *Id.* at 12.

168 *Id.* at 6–7.

only address an issue that PG & E had brought up.[169] Instead, TURN could say what it wanted, regardless of what PG & E had said or even whether PG & E had spoken.[170] But if that is so, then PG & E would not limit what it said for fear that addressing some topic would open up the door to a TURN reply.

PG & E would have an incentive to refrain from speaking only if PG & E believed that TURN might not think of an issue unless PG & E discussed it first or, perhaps, that TURN would focus on less important issues (in PG & E's eyes) if PG & E did not address particular issues.[171] But that kind of tactical decision-making should hardly have been characterized as PG & E having been "required to alter its own message as a consequence of the government's coercive action."[172]

A more important misunderstanding pervades the opinion. The Court's analysis suggests that the PUC erred by reserving four spaces for TURN rather than permitting speakers whose views coincided with PG & E's to make use of that space.[173] But the publicly owned space was the extra space in *each* monthly envelope, not just the envelopes where TURN was allowed to speak. Basically, the PUC allocated two-thirds (8/12) of the publicly owned space to PG & E so it could say what it wanted.[174] Rather than suggest that PG & E was being unfairly burdened by the PUC allocation, the Court should have suggested that the PUC had "stacked the deck"[175] in favor of PG & E.

The *PG & E* Court offered another reason that the PUC order did not pass constitutional muster, noting that while the public owned the extra space it did not own the envelopes or the bills or the newsletter.[176] But this meant that the private property was being commandeered to spread a message with which PG & E disagreed.[177] But that had been true in *PruneYard* because the mall had to be open to

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169 The Court understood this point. *See id.* at 13–14 ("TURN's access to appellant's envelopes is not conditioned on any particular expression by appellant."); *see also* Nesgos, *supra* note 129, at 1095 ("The utility could not stop TURN from writing on particular subjects by not mentioning them in Progress."). However, the *PG & E* Court analyzed the case as if it involved a right-of-reply statute anyway. *See PG & E*, 475 U.S. at 12.

170 *PG & E*, 475 U.S. at 6–7.

171 *See* Nesgos, *supra* note 129, at 1095 ("[B]y refraining from a particular topic the utility might avoid suggesting a subject to its competing speaker.").

172 *PG & E*, 475 U.S. at 16.

173 *Id.* at 13.

174 *Id.* at 5–7.

175 Witherspoon v. Illinois, 391 U.S. 510, 523 (1968).

176 *PG & E*, 475 U.S. at 17 ("The envelopes themselves, the bills, and Progress all remain appellant's property.").

177 *Id.* ("The Commission's access order thus clearly requires appellant to use *its* property as a vehicle for spreading a message with which it disagrees."); Nesgos, *supra* note 129, at 1092 ("The envelopes themselves, the bills and *Progress* all remained the utility's property. Thus, the

speech with which the mall owner *might* disagree.[178] The *PG & E* Court distinguished *PruneYard* by noting that "the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based."[179] However, by noting that the mall owner did not object to the particular message at issue, the Court seemed not to appreciate the position in which the mall owner found himself. He might have preferred *no* pamphlets because he did not wish to alienate would-be shoppers—he might have feared that those opposing whatever messages were offered might simply decide to patronize a different mall.[180] Or, perhaps the speech was popular,[181] but the mall owner nonetheless did not wish that particular speech to be offered on his property, either because he disagreed with it (but did not want to publicize his disagreement with the message for fear that doing so would dissuade people from coming to the mall) or because he feared that the next speech offered at the mall would be less popular and result in a decrease in the number of people patronizing the mall.

The reason the PUC had made the restriction context-based was to assure diversity of viewpoint,[182] because two-thirds of the envelopes with extra space had been reserved for PG & E.[183] It is simply unclear whether the *PG & E* Court was suggesting that the PUC would not have run afoul of constitutional guarantees if it had mandated that the extra space in *every* envelope be allocated to would-be speakers on some content-neutral basis, even though this might have put PG & E in a *less* advantageous position than it had been under the PUC rule guaranteeing that PG & E would have its view represented more often than any other view.

The *PG & E* Court suggested that "*PruneYard* . . . does not undercut the proposition that forced associations that burden protected speech are

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order required PG & E to use its property as a vehicle for spreading a message with which it disagreed.").

178 Alan Hirsch & Ralph Nader, *"The Corporate Conscience" and Other First Amendment Follies in* Pacific Gas & Electric, 41 SAN DIEGO L. REV. 483, 493 (2004) (discussing "the obvious fact that California's right of access would result in the dissemination of some messages with which the owner disagreed").

179 *PG & E*, 475 U.S. at 12.

180 *See* Eule & Varat, *supra* note 121, at 1566–67 ("PruneYard's patrons might attribute the presence of the students' card table in the mall's courtyard to the owner's sympathy with their cause."); *cf.* Robert H. Thomas, *Common Sense and Common Law: Defining "Property" in* Cedar Point v. Hassid, 38 PRAC. REAL EST. L. 3, 8 (2022) (discussing those "who might just want to shop or work in peace").

181 *See* David E. Somers III, *State Constitutional Law—Free Expression*—PruneYard *Reloaded: Private Shopping Malls Cannot Restrict Protesters' Free Expression Rights.* Fashion Valley Mall v. N.L.R.B., 172 P.3d 742 (Cal. 2007), 40 RUTGERS L.J. 1015, 1025 n.80 (2009) (suggesting that the speech was well-received by customers).

182 Hirsch & Nader, *supra* note 178, at 498 ("Before the Commission order, ratepayers heard only the voice of PG&E; by virtue of the Commission order, they also heard the contrary voice of TURN. Whether or not one approves of this means of promoting diverse viewpoints, surely the Commission order did exactly that.").

183 *PG & E*, 475 U.S. at 5–6.

impermissible."[184] But every time speakers offered positions opposed to the mall owner's, he would have been forced to associate with speech that undercut his own views. The *PruneYard* mall owner had objected to being forced to use his own property as a forum for others' speech,[185] and he likely would have been surprised by the Court's confident assertion that "forced associations that burden protected speech are impermissible."[186]

There is some difficulty in understanding how *PG & E* should be applied in other cases when one considers both that the Court's rationales were difficult to understand in light of the prevailing jurisprudence and that the Court seemed to misunderstand what the Commission had actually done. Nonetheless, the Court offered a rule—forced associations that burden protected speech are impermissible[187]—and that rule requires explication. For example, one issue involves the degree to which the allegedly protected speech must itself be identified and understood for First Amendment guarantees to be triggered.

D. Protection and Message Clarity

The Court made quite clear that speech need not be readily identifiable and understood to trigger constitutional protections. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston Inc.* ("GLIB"), a group of gay, lesbian and bisexual Irish descendants and their supporters sued the South Boston Allied War Veterans Council because they were prevented from marching in the St. Patrick's Day Parade ("Parade").[188] As a general matter, the organizers allowed many different individuals and groups to march,[189] although members of the Ku Klux Klan and members of an anti-busing group had been precluded from marching.[190] The Supreme Judicial Court of Massachusetts held that the Parade was a public accommodation and that GLIB had been excluded because of the orientation of its members.[191] The United States Supreme Court reversed. The Court rejected that the public accommodation law

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184 *Id.* at 12.

185 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85 (1980) ("Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.").

186 *PG & E*, 475 U.S. at 12.

187 *Id.*

188 Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos. Inc., 515 U.S. 557, 561 (1995).

189 *Id.* at 562 ("[T]he Council had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did 'not generally inquire into the specific messages or views of each applicant.'").

190 *Id.* ("[T]he Council had indeed excluded the Ku Klux Klan and ROAR (an antibusing group).").

191 *Id.* at 563–64.

could be used to force the organization to permit GLIB to march, reasoning that this forced association would burden protected speech.[192]

A forced inclusion could *burden* protected speech only if the parade was in fact expressing a message.[193] The *Hurley* Court noted that if "there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself."[194] Although some "people might call such a procession a parade, . . . it would not be much of one."[195] The Court announced that "we use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[196]

Yet, one of the difficulties presented was identifying that collective point, given the sheer number of participants and range of messages.[197] The Court was aware of the numbers,[198] and admitted that "the Council is rather lenient in admitting participants."[199] However, the Court explained that "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."[200]

Here, the Court's description was misleading—the point was not merely that the Parade failed to have a carefully honed message,[201] but that the Parade contained so many possibly conflicting messages that there might have been no message at all and

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192 *Id.* at 573 ("[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.").

193 *Id.* at 563.

194 *Id.* at 568.

195 *Id.*

196 *Id.*

197 Sheryl Buske, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 6 DEPAUL-LCA J. ART & ENT. L. 125, 126–27 (1995) ("[T]he Parade . . . typically attracts more than 20,000 marchers, legions of floats and marching bands as well as more than 1,000,000 spectators.").

198 *Hurley*, 515 U.S. at 560 (noting that "the parade . . . at times has included as many as 20,000 marchers").

199 *Id.* at 569.

200 *Id.* at 569–70.

201 Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. REV. 1243, 1267 (1997) ("Traditionally, the Council had not been selective in admitting participants: it had no formal criteria for participation, it voted on applicants in batches; it did not screen the specific themes of applicants; and it had sometimes included groups who showed up on the day of the parade without submitting an application in advance.").

might more accurately be characterized as a moving celebration or party.[202] Or, perhaps the collective point of the Parade was to celebrate being Irish,[203] although including gay, lesbian, and bisexual *descendants of the Irish* would then support rather than undermine that point.

The *Hurley* Court was quite deferential to the organizers' understanding of what would contradict their own speech, notwithstanding the apparent message of celebrating being Irish.[204] Indeed, the Court implied that deference to the organizer's understanding of the world was required, noting that "a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual"[205] and that the "parade's organizers [might] not believe these facts about Irish sexuality to be so."[206] But the organizers' refusal to acknowledge these facts would not negate their existence, unless the Court wished to endorse a First Amendment jurisprudence that "shared the latitudinarian attitude of Alice in Wonderland toward language."[207]

The *Hurley* Court claimed that enforcement of the public accommodations law in this case would "not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade."[208] In the Court's view, the parade organizers were only objecting to "the admission of GLIB as its own parade unit carrying its own banner."[209] But the *Hurley* Court's rationale undercut its own analysis. Suppose, for example, that the openly gay, lesbian, or bisexual individuals in various parade units wore T-shirts saying, "I'm Gay and Irish." The Court made clear that the organizers could keep out those individuals as well because "in the context of an expressive parade, as with a protest march, the parade's overall message

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202 *See, e.g.*, Mark Hager, *Freedom of Solidarity: Why the Boy Scout Case Was Rightly (But Wrongly) Decided*, 35 CONN. L. REV. 129, 189 (2002) ("A St. Patrick's Day parade is more like a mobile party than like a peace march. It may have banners and orations, to be sure, but then so may a party. What it 'expresses'—basically, 'Kiss me, I'm Irish'—is of no great public import, and if that is the 'message,' it is hard to see how having gays say the very same thing undermines it.").

203 Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 816 (1993) ("Politicians sometimes spelled their surnames with an extra 'O' on parade day, and generally promoted the message of Irish inclusion implied in the common refrain that '[o]n St. Patrick's Day, every New Yorker is Irish.'").

204 *See* Vincent J. Samar, *The First Amendment and the Mind/Body Problem*, 41 SUFFOLK U. L. REV. 521, 542 (2008) ("March 17th is the day Bostonians celebrate the 1776 evacuation of British troops and Loyalists and the city's Irish heritage in the annual St. Patrick's Day Parade.").

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

206 *Id.*

207 Nat'l Mut. Ins. Co. of Dist. of Col. v. Tidewater Transfer Co., 337 U.S. 582, 654 (1949) (Frankfurter, J., dissenting).

208 *Hurley*, 515 U.S. at 572.

209 *Id.*

is distilled from the individual presentations along the way."[210] After all, the parade's organizers might not want such T-shirts in the parade because the organizers might object "to unqualified social acceptance of gays and lesbians."[211] Basically, the *Hurley* Court was implicitly suggesting that because the organizers were allowing lesbian, gay and bisexual individuals to march in the parade in other units as long as those marchers did *not* self-identify as gay or lesbian,[212] i.e., were *not* open,[213] that was good enough. The public accommodations law could not be used to require openly gay, lesbian, or bisexual individuals to march and, on some interpretations of *Hurley*, that law could not be used to require that closeted gay, lesbian, or bisexual individuals be permitted to march.[214]

Presumably, the *Hurley* Court would also suggest that the organizers might demand of any participant that he or she not be open about a particular feature of his or her identity—the person would be free to march as long as he or she did not proclaim his or her religion or race[215] if such a proclamation did not fit in with the organizers' message. Perhaps the organizers did not believe that those individuals were really Irish.[216] Or, perhaps the organizers would attribute a different message to the would-be marchers[217] about equality or respect that the organizers did not wish to endorse.

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[210] *Id.* at 577.

[211] *Id.* at 574–75.

[212] 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, 2461 (1997) ("[T]he message would not have been undermined had lesbians, gay men, and bisexuals been dispersed throughout John Hurley's crowd because their sexual orientation would have been invisible to the audience.").

[213] *Cf.* Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 103 (1998) ("Most significant, however, is the Court's distinction between carrying a banner and simply being gay in the parade. This distinction reinforced the silencing of gays and lesbians.").

[214] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000) (suggesting that *Hurley* held that certain *individuals* could be precluded from marching).

[215] *Cf.* Eskridge, Jr., *supra* note 212 (noting that messages are not undermined when the contested characteristics are not visible to the audience).

[216] *But cf. id.* at 2460 ("An implication of *Roberts* is that if a parade is a public accommodation, parade organizers cannot exclude women or people of color or, to make the analogy to *Hurley* closer, cannot require women marching in the parade to pass as men or people of color to put on whiteface."). Here, Professor Eskridge does not focus on the degree to which the message was altered, a key consideration in *Roberts*. *See infra* notes 247–61 and accompanying text. The organizer might argue that the Parade's message would be significantly altered by allowing women or people of color to be marching openly, e.g., because permitting that would convey a message of dignity or respect that the organizer did not wish to endorse.

[217] *Cf.* Yackle, *supra* note 203, at 820 (discussing those who "think the point of the demand by gays and lesbians to take part amounts to religious intolerance ('Catholic-bashing')").

It might be thought that the exclusion, itself, was the message, although there might have been some confusion about the content of that message—onlookers would not know whether the group had been excluded because it was promoting a political issue or social cause[218] or the wrong political issue or social cause[219] or for other reasons, for example, safety concerns.[220] Further, for the exclusion to be the message, people would have to know that individuals had been *excluded*[221]—otherwise a group's failure to participate might simply have been because the group did not wish to be part of the parade.[222] The Court has been unwilling to treat the exclusion, itself, as the message in other contexts,[223] and the *PruneYard* Court was quite unwilling to be deferential to the mall owner with respect to his wish to keep out unwanted messages.[224]

Hurley was confusing, at least in part, because it said both too much and too little. If public accommodations laws do not apply to parades even where there is no particular message or where mixed messages are being offered, then the Court can say that—the Court had no need to pretend that open gays, lesbians and bisexuals were free to march. If the worry was mistaken attribution,[225] then the Court should have

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[218] *Id.* at 816 ("[S]igns are barred—particularly placards promoting political candidates, social causes, or commercial products.").

[219] Charles Morris, *Association Speaks Louder Than Words: Reaffirming Students' Right to Expressive Association*, 19 GEO. MASON U. CIV. RTS. L.J. 193, 197 (2008) ("The parade's organizers sought to prevent a gay pride group from marching in a public St. Patrick's Day parade and argued that including them would fundamentally contradict the organizers' message of traditional family values.").

[220] *Cf.* Brainerd Daily Dispatch v. Dehen, 693 N.W.2d 435, 437–38 (Minn. Ct. App. 2005) ("The City of Brainerd holds an annual Fourth of July celebration that includes a parade. Brainerd Community Action (BCA), a private community-development organization that receives substantial sums from the city through a tax levy, administers the parade. In 2003, the BCA received a permit to organize the parade. The Brainerd Area Coalition for Peace (peace coalition) applied for permission to march in the parade, but BCA denied the request based on safety concerns.").

[221] *But see infra* note 232 and accompanying text (suggesting that it may not be necessary for the public to understand the message as long as an individual's private understanding of his/her own message was altered).

[222] *Cf.* Fabrizio v. City of Providence, 104 A.3d 1289, 1290 (R.I. 2014) ("[T]wo Providence firefighters objected to orders from their superiors that they serve as part of the crew of a fire engine in the 2001 Pride Parade.").

[223] *See infra* note 291 and accompanying text (discussing the FAIR Court's reluctance to treat law schools' unwillingness to have military recruiters on campus as communicating a message).

[224] *See supra* notes 109–32 and accompanying text (discussing *PruneYard*).

[225] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 459 (2008) (Roberts, C.J., concurring) ("Similarly, in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), we allowed the organizers of Boston's St. Patrick's Day

considered whether there was a message at all and, if so, whether other participants in the parade would have prevented the mistaken attribution, just as a sign might prevent mistaken attribution.[226] If the fear was that the message was being diluted because the Parade organizers did not want anyone to attribute toleration of the "gay lifestyle,"[227] then that message could have been precluded, although separate issues involved whether the Parade could plausibly have been thought to have been communicating that message and whether all openly gay, lesbian, or bisexual individuals could be excluded because the organizers disapproved of how some gay, lesbian, or bisexual individuals allegedly acted.[228]

Hurley suggests that an individual can claim that possible mistaken attribution or message dilution is enough to trigger First Amendment protections, *PruneYard* notwithstanding, and that the message need not be clear or, perhaps, even discernible to trigger such guarantees.[229] The Court continued this same approach in another case involving the exclusion of gender-nonconforming individuals.

In *Boy Scouts of America v. Dale*, the Court addressed whether New Jersey's public accommodations law could prevent the Boy Scouts from refusing to allow James Dale to continue to be an assistant scoutmaster because "he [was] an avowed homosexual and gay rights activist."[230] The Court held that "applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association."[231]

Parade to exclude a pro-gay rights float because the float's presence in the parade might create the impression that the organizers agreed with the float sponsors' message.").

226 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (discussing the *Pruneyard* Court's explanation that a sign would prevent mistaken attribution).

227 *Cf.* Yackle, *supra* note 203, at 821 ("The [New York] parade committee chair, Francis P. Beirne, denied ILGO's application and later gave two reasons for his action. In the main, he simply considered ILGO ineligible to participate in the parade as a unit, because the homosexual 'lifestyle' the group promoted conflicted with the teachings of the Catholic Church, the promotion of which he understood to be a principal purpose of the parade.").

228 *Cf. id.* at 820 ("By still other reports, the leaders of the gay group seeking access to the parade found it objectionable that they should be held responsible for actions taken by others, who happened also to be homosexual.").

229 *Cf.* James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 49 (2008) ("The association would be expressive even if it had published no message at all, provided it was undertaking steps to be communicative. In *Hurley*, the parade and all that it entailed, was intended to be communicative, whatever its message.").

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

231 *Id.*

James Dale was an assistant scoutmaster.[232] While attending Rutgers University, he became co-President of the Lesbian/Gay Alliance[233] and did an interview with a newspaper about teenagers' needs for gay role models.[234] Later that month, Dale's adult membership in the Boy Scouts was revoked,[235] and the Boy Scouts' explanation for that action was that "the Boy Scouts 'specifically forbid membership to homosexuals.'"[236]

The *Dale* Court explained 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."[237] The Court then examined whether inclusion of Dale would impair the Boy Scouts' ability to express its chosen message.[238]

First, it was necessary to determine whether the group engaged in expressive association. The Court explained that to come within the First Amendment's "ambit, a group must engage in some form of expression, whether it be public or private."[239] The Boy Scouts sought to instill certain values within the Scouts,[240] including being "'morally straight' and 'clean.'"[241] The Court understood that different people had different understandings of those terms—"some people may believe that engaging in homosexual conduct is not at odds with being 'morally straight' and 'clean' [a]nd others may believe that engaging in homosexual conduct is contrary to being 'morally straight' and 'clean.'"[242] The Boy Scouts claimed to be among the latter[243] and their view was entitled to deference.[244] That was true even if the Boy Scouts had declined

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232 *Id.* ("Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73.").

233 *Id.* at 645 ("He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance.").

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.* at 648 (citing N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 13 (1988)) (emphasis added).

238 *Id.* at 650.

239 *Id.* at 648.

240 *Id.* at 649–50.

241 *Id.* at 650.

242 *Id.*

243 *Id.*

244 *Id.* at 653 ("[W]e give deference to an association's assertions regarding the nature of its expression . . . .").

to "trumpet its views from the housetops."[245] The Court failed to mention that this sort of deference with respect to who counts as morally straight and clean would countenance all kinds of discrimination—individuals of various races, ethnicities, religions, etcetera, might not be viewed as worthy of inclusion.[246]

The *Dale* Court made clear that deference was due even if the articulated views were internally inconsistent.[247] Deference was also owed with respect to whether the inclusion of someone would impair an organization's ability to communicate its preferred message.[248] To illustrate its view, the *Dale* Court noted that "the 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."[249] This brief comment is rather suggestive because it implies that the St. Patrick's Parade organizers could exclude gay, lesbian, and bisexual participants, even if GLIB was neither diluting a message about orientation nor creating an impression of endorsement by the organizers.

Although the *Dale* Court described Dale as an "activist,"[250] that was not the reason for his removal—the Boy Scouts made clear that it did not permit "homosexuals" to be members.[251] The Court agreed that the organization could not be forced to include an "unwanted person"[252] if in the organization's view that person might undermine the organization's message, whatever that message might be.

Hurley and *Dale* offer a particular understanding of First Amendment guarantees, namely, that organizations can exclude particular people if the organization believes that inclusion of such people would undermine the organization's message. However, that understanding was not reflected in the previous caselaw. Consider, for example, *Roberts v. United States Jaycees*, which addressed "a conflict between a State's efforts

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[245] *Id.* at 656.

[246] *Cf.* Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 39 (1996) (discussing "the 'evil' Fu Manchu-ish 'yellow peril'").

[247] *Dale*, 530 U.S. at 651 ("[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent.").

[248] *Id.* at 653 ("[W]e must also give deference to an association's view of what would impair its expression.").

[249] *Id.* at 655 (emphasis added).

[250] *Id.* at 655–56.

[251] *See id.* at 645; *see also* Christopher C. Fowler, *The Supreme Court Endorses "Invidious Discrimination":* Boy Scouts of America v. Dale *Creates a Constitutional Right to Exclude Gay Men*, 9 J.L. & POL'Y 929, 973 (2001) ("In failing to deny BSA its right to hide its invidious discrimination behind the First Amendment, the *Dale* majority created the constitutional right to exclude gay men.").

[252] *Dale*, 530 U.S. at 648 (citing N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 13 (1988)).

to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization."[253]

The Junior Chamber of Commerce ("Jaycees") did not permit women to "vote, hold local or national office, or participate in certain leadership training and awards programs,"[254] instead reserving those privileges for males eighteen to thirty-five years of age.[255] The Minneapolis and St. Paul chapters of the Jaycees began admitting women as regular members, which meant that those chapters were in violation of the national organization's bylaws, which made those chapters subject to sanctions.[256] When both chapters were informed by the president of the national organization that there was going to be a vote to revoke their charters, the Minneapolis and Saint Paul chapters filed allegations of discrimination with the Minnesota Department of Human Rights,[257] arguing that the national organization's threatened action would be a violation of the Minnesota public accommodations law.[258] The national organization sued, arguing that application of the public accommodations law against it violated the organization's freedom of association rights, an argument accepted by the Eighth Circuit.[259] That decision was appealed and the United States Supreme Court reversed.[260]

The *Roberts* Court admitted that requiring women to be full voting members implicated freedom of association guarantees, explaining:

> By requiring the Jaycees to admit women as full voting members, the Minnesota Act [is] . . . an intrusion into the internal structure or affairs of an association [because it] . . . forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association . . . plainly presupposes a freedom not to associate.[261]

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

254 *Id.* at 613.

255 *Id.*

256 *Id.* at 614.

257 *Id.*

258 *Id.* at 614–15.

259 U.S. Jaycees v. McClure, 709 F.2d 1560, 1576 (8th Cir. 1983), *rev'd sub nom.*, Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) ("[W]e therefore hold that the application of the state public-accommodations law to the Jaycees' membership policies is, in the circumstances of this case, invalid under the First and Fourteenth Amendments.").

260 *Roberts*, 468 U.S. at 612 ("We noted probable jurisdiction . . . and now reverse.").

261 *Id.* at 623.

Yet, "[t]he right to associate for expressive purposes is not . . . absolute"[262] and "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[263] Further, the Court explained that States have "broad authority to create rights of public access on behalf of its citizens," citing *PruneYard* for support.[264] That authority can be used in light of "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women."[265]

After discussing the importance of removing economic, political, and social barriers, the Court explained that the State was employing "the least restrictive means"[266] because "the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association."[267] Ironically, the *Dale* Court cited with approval this passage about the Jaycees failing to demonstrate the harm,[268] conveniently failing to mention that if the Jaycees had been afforded the same deference that the Boy Scouts had received both with respect to the content of their message and with respect to when that message was being undermined, the result would presumably have been quite different. By the same token, in *Board of Directors of Rotary International v. Rotary Club of Duarte*,[269] the Court held that the California Public Accommodations Act (the Unruh Act)[270] "does not require [the Rotarians] to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace."[271] But if the organization is owed deference with respect to the content of their message and the degree to which their message is being undermined by being forced to include unwanted members,[272] then First Amendment guarantees would presumably have prevented California from requiring forced association.

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262 *Id.*

263 *Id.*

264 *Id.* at 625.

265 *Id.* at 626.

266 *Id.*

267 *Id.*

268 Boy Scouts of Am. v. Dale, 530 U.S. 640, 657–58 (2000).

269 Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

270 *See* William F. Grady, *The Boy Scouts of America as a "Place of Public Accommodation": Developments in State Law*, 83 MARQ. L. REV. 517, 539 (1999) (describing the Unruh Act as California's public accommodations statute).

271 *Duarte*, 481 U.S. at 548.

272 The *Duarte* Court was unwilling to defer with respect to the degree to which the message was undermined. *See id.* at 549 ("Even if the Unruh Act does work some *slight* infringement on Rotary members' right of expressive association . . . .") (emphasis added).

Suppose that the Court in *Roberts* and *Duarte* upheld the forced inclusion, alleged undermining of organizational message notwithstanding, precisely because of the importance of removing existing political and social barriers. In that event, it would have been difficult to understand why the importance of removing existing political and social barriers would not have won the day in *Dale* as well.[273]

A possible way to reconcile *Roberts*, *Duarte*, *Hurley*, and *Dale* is to suggest that the Court formerly believed itself capable of deciding whether organizational messages had been undermined by forced inclusion, but then subsequently came to understand in *Hurley* and *Dale* that deference was owed to the organization both with respect to the content of the message and with respect to whether that message had been undermined.

Such an interpretation is possible, although not particularly plausible.[274] In any event, the Court *again* changed its position on deference, later manifesting a *lack* of deference with respect to an organization's assertion that its own message was being undermined in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("*FAIR*").[275]

At issue in *FAIR* was the constitutionality of the Solomon Amendment, which denied federal funds to any university preventing military recruiters from having access to students on campus.[276] Some law schools with a nondiscrimination policy prohibiting orientation discrimination sought to prevent the military from interviewing on campus because of the military's policy with respect to members of the LGBT community,[277] just as the law schools would refuse to permit other employers on campus who violated the schools' nondiscrimination policies.[278]

The *FAIR* Court reasoned that the Solomon Amendment "neither limits what law schools may say nor requires them to say anything."[279] Instead, the Solomon

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[273] *Cf.* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1227 (N.J. 1999), *rev'd and remanded*, 530 U.S. 640 (2000) ("It is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society.").

[274] *See supra* notes 268–73 and accompanying text (noting that the *Dale* Court did not appreciate that its position on deference had changed and discussing the doctrinal implications of that positional change).

[275] Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR), 547 U.S. 47 (2006).

[276] *See id.* at 55.

[277] *Id.* at 51 (discussing "law schools . . . restricting the access of military recruiters to their students because of disagreement with the Government's policy on homosexuals in the military"); Philip Lee, *A Contract Theory of Academic Freedom*, 59 ST. LOUIS U. L.J. 461, 472 (2015) (discussing law schools' "expression of their opposition to military policies that discriminate against openly LGBT soldiers").

[278] *See FAIR*, 547 U.S. at 58 (discussing whether "a law school [can] treat the military as it treats all other employers who violate its nondiscrimination policy").

[279] *Id.* at 60.

Amendment "affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."[280]

Yet, this emphasis on what individuals may be required to *do* rather than *say* does not account for much of the jurisprudence. In *Wooley*, the Maynards were not asked to say anything; they were merely asked to refrain from doing something, namely, obscuring part of their license plate.[281] So, too, PG & E was merely asked to do something.[282]

The *FAIR* Court recognized that the "compelled-speech cases are not limited to the situation in which an individual must personally speak the government's message."[283] But, the Court cautioned, the "compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[284] For example, the *FAIR* Court noted that in *PG & E*, "when the state agency ordered the utility to send a third-party newsletter four times a year, it interfered with the utility's ability to communicate its own message in its newsletter."[285] Of course, no particular PG & E message was impaired because whether PG & E's message would be undermined would depend upon what TURN said.

Suppose, for example, that TURN, who "represented the interests of 'a significant group' of appellant's residential customers,"[286] devoted one of their inserts to guidance about how individuals might reduce energy consumption,[287] which would mean that PG & E's interests might be bolstered rather than undermined by TURN's message.

Ironically, the *PG & E* Court feared that PG & E might have its message impaired even though TURN expressly stated that its views did not reflect those of PG & E,[288] whereas the law schools allegedly were not having their message impaired because they *could* engage in self-help and put up signs indicating that the exclusionary policy

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280 *Id.*

281 *See supra* notes 62–111 and accompanying text (discussing *Wooley*).

282 *See supra* notes 137–87 and accompanying text (discussing *PG & E*).

283 *FAIR*, 547 U.S. at 63.

284 *Id.*

285 *Id.* at 64.

286 Pac. Gas & Elec. Co. v. Pub. Util. Comm'n (PG & E), 475 U.S. 1, 6 (1986).

287 *Cf.* Noah M. Sachs, *Greening Demand: Energy Consumption and U.S. Climate Policy*, 19 DUKE ENV'T L. & POL'Y F. 295, 316 (2009) ("In a 2007 expansion of the program, the California Public Utilities Commission adopted a 'shared savings' model, in which the state adopts energy savings targets, and utilities are then entitled to between nine and twelve percent of the verified net savings (depending on whether they come close to, or exceed, the targets), potentially up to $450 million over a two year period.").

288 *PG & E*, 475 U.S. at 7.

was the military's rather than their own.[289] But if an express disavowal was not enough to protect PG & E, it is at the very least surprising that the law schools' ability to disavow was enough to protect their message. Although the Court had suggested in *PruneYard* that the mall owner could avoid imputation of a particular individual's message by putting up signs, that same rationale did not save the New Hampshire requirement in *Wooley*.[290] In short, the Court seems to use the possibility (or actuality) of message disavowal inconsistently, in some cases suggesting that the possibility of self-help undermines the assertion of a First Amendment claim but in other relevant similar cases suggesting that the possibility of self-help does not undermine the assertion of a First Amendment claim.

The *FAIR* Court argued that "accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."[291] But PG & E was hosting[292] rather than speaking when TURN included its self-identified message[293] as an insert, and forcing PG & E to host unwanted speech violated PG & E's First Amendment rights.

That PG & E was not speaking did not end the inquiry because PG & E might have felt pressured to respond to TURN's message.[294] But it would be unsurprising for law schools to have felt compelled to hold student town halls[295] to explain why their nondiscrimination policies had to be ignored or amended so that the military could be afforded the same privileges as would be accorded to the most favored would-be

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289 *See FAIR*, 547 U.S. at 60 ("Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds.").

290 *See supra* note 80 and accompanying text (discussing Justice Rehnquist's point that the Maynards could have expressly disavowed agreement with the State's message).

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

292 *See PG & E*, 475 U.S. at 6.

293 *Id.* at 7.

294 *See id.* at 11–12.

295 *See, e.g.*, Stephanie Francis Ward, *What's in A Name? For Some Law Schools and Universities, Namesakes Stir Up Controversial Pasts*, 104 A.B.A. J. 16, 17 (Feb. 2018) ("Berkeley Law dean Erwin Chemerinsky, who is also a columnist for the *ABA Journal*, formed a committee to discuss the naming controversy, and the school planned a town hall-style meeting to address it."); Alice K. Ma, *Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights*, 83 CAL. L. REV. 693, 694 (1995) ("In mid-December 1994, at the University of California at Berkeley's Boalt Hall School of Law, anonymous flyers making derogatory racial references were distributed to the mailboxes of some first-year students immediately before their first law school examination. Dean Herma Hill Kay promptly condemned the hate mail and called a 'town hall meeting' to discuss the incident."); Mark F. Walsh, *Immigrant Class Student Interest in Immigration Law Rises with Recent Political Developments*, 103 A.B.A. J. 18, 18 (Nov. 2017) ("Law school students nationwide packed town hall-style meetings and forums to grapple with the implications of the new [immigration] restrictions.").

employer.[296] Further, one of the points distinguishing *PruneYard* from *Wooley* and *Barnette* was that the State was requiring a particular message in the latter cases[297] but in *PruneYard* the State was not requiring a particular message but instead was requiring that the mall owner permit a whole range of possibly conflicting messages.[298] In *FAIR*, the law schools were required to treat the military as among the most-favored,[299] a message endorsed by the government but not by those law schools challenging the requirement.[300]

The *FAIR* Court explained that laws schools were not being asked to speak[301] and then also examined whether the law schools were being asked to engage in expressive conduct.[302] The Court "rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea,'"[303] and noted that "the conduct regulated by the Solomon Amendment is not inherently expressive."[304]

The Court illustrated its point by noting, "[p]rior to the adoption of the Solomon Amendment's equal access requirement, law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters."[305] But an individual seeing that the military was interviewing off-campus "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."[306] The Court then noted that the "expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it [and the] fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently

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296 *FAIR*, 547 U.S. at 55 ("[T]he law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.").

297 *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 629 (1943).

298 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77 (1980).

299 *See FAIR*, 547 U.S. at 55.

300 *Id.* at 52.

301 *Id.* at 64.

302 *Id.* at 65 ("Having rejected the view that the Solomon Amendment impermissibly regulates *speech*, we must still consider whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection.").

303 *Id.* at 65–66 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

304 *Id.* at 66.

305 *Id.*

306 *Id.*

expressive that it warrants protection [as expressive conduct]."[307] Needless to say, the Court did not adopt a similar approach in *Hurley*, where inclusion of GLIB would presumably have been inferred to promote the St. Patrick's Parade's celebration of being Irish.[308]

To help differentiate expressive activity from activity which needs speech to transform it into expressive activity, the *FAIR* Court offered flag-burning as an example, focusing on *Texas v. Johnson* where the activity counted as expressive conduct.[309] At issue in *Johnson* was the activity of some individuals who were protesting in Dallas where the Republican National Convention was taking place.[310] The *Johnson* Court explained that "Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: 'America, the red, white, and blue, we spit on you.'"[311]

How did onlookers know that the flag-burning was expressive activity? They might have considered that "the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations,"[312] which would have been understood because that had been "explained in literature distributed by the demonstrators and in speeches made by them."[313] In addition, the onlookers might have considered the protesters' speech accompanying the flag-burning.[314] Yet, the *FAIR* Court had claimed that one's considering the speech explaining the action cut against the action as being sufficiently expressive itself to count as expressive activity.[315] After all, the *Johnson* Court itself noted that flag-burning occurs outside of the protest context, for example, as a preferred disposal method if a flag is torn or spoiled,[316] so the *FAIR* Court's paradigmatic example of expressive activity might not even count as expressive under the *FAIR* Court's own analysis.

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307 *Id.*

308 *See supra* note 203 and accompanying text (discussing how the inclusion of GLIB would support the Parade's celebration of those of Irish descent).

309 *FAIR*, 547 U.S. at 66 ("In Texas v. Johnson, 491 U.S. 397, 406 (1989), for example, we applied *O'Brien* and held that burning the American flag was sufficiently expressive to warrant First Amendment protection.").

310 Texas v. Johnson, 491 U.S. 397, 399 (1989) ("While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the 'Republican War Chest Tour.'").

311 *Id.*

312 *Id.*

313 *Id.*

314 *See id.*

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

316 *Johnson*, 491 U.S. at 411 ("[I]f he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag 'when

The difficulty here is that even flag-burning activity is expressive within a particular context, possibly informed or written statements. Someone aware of the context and expressed statements would understand that certain activity was expressive. Perhaps the Court had in mind what the reasonable observer would know.[317] But that might mean that the reasonable observer knew that the law schools had antidiscrimination policies that precluded *inter alia* discrimination on the basis of orientation[318] and that the law schools would prevent other would-be employers from interviewing on campus if those would-be employers did not honor those nondiscrimination policies.[319] By hosting violators of the nondiscrimination policy, the school sent a message about how seriously it took its avowed refusal to host those who violate its nondiscrimination policy.[320]

The *FAIR* Court suggested that the law schools were wrong to believe that their own message would be undercut by military recruiting on campus—students and others would understand that the law schools are merely following federal law.[321] But such an analysis does not defer to the organization's understanding of its own message

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it is in such condition that it is no longer a fitting emblem for display.'" (citing 36 U.S.C. § 176(k))).

317 *Cf.* Salazar v. Buono, 559 U.S. 700, 728 (2010) (Alito, J., concurring in part and concurring in the result) ("The endorsement test views a challenged display through the eyes of a hypothetical reasonable observer who is deemed to be aware of the history and all other pertinent facts relating to a challenged display.").

318 The law schools had a message. *See* Erwin Chemerinsky, *The First Amendment and Military Recruiting*, 42 TRIAL 78, 79 (May 2006) ("In this case, law schools have a message—they are against discrimination based on sexual orientation."). Where that message has been articulated but the law school does not enforce its own policy, some might question whether the law school is serious about its stated policy. A separate question is whether law schools should use their campus hosting policies to reflect their nondiscrimination policies. *See* Braxton Williams, Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*: By Allowing Military Recruiters on Campus, Are Law Schools Advocating "Don't Ask, Don't Tell"?*, 11 RICH. J.L. & PUB. INT. 107, 119 (2008) ("Repugnant as the military's treatment of openly gay Americans may be to some, it is not the duty of law schools to filter on-campus recruiters based on how those recruiters' policies or employment practices square with those of the law schools that host them.").

319 *Cf. FAIR*, 547 U.S. at 56 (discussing a brief claiming that "the Solomon Amendment's equal access requirement is satisfied when an institution applies to military recruiters the same policy it applies to all other recruiters. On this reading, a school excluding military recruiters would comply with the Solomon Amendment so long as it also excluded any other employer that violates its nondiscrimination policy").

320 Mark Strasser, *Leaving the Dale to Be More Fair: On* CLS v. Martinez *and First Amendment Jurisprudence*, 11 FIRST AMEND. L. REV. 235, 269 (2012) ("But a school selectively enforcing a nondiscrimination policy may send the undesired message that the school is not serious about that policy.").

321 *See FAIR*, 547 U.S. at 65 ("[H]igh school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so . . . . [S]urely students have not lost that ability by the time they get to law school.").

and what would undermine that message.[322] Indeed, the Court's argument that individuals who follow the law would not be misunderstood by others to be espousing a particular message undercut the Maynards' claim that they would be assumed by others to endorse the license plate's message. So, too, *Barnette* should not have been understood to involve a forced affirmation—the children were merely doing what the law required and so should not have been thought to be affirming anything.

In *Barnette*, the forced salute was viewed as speech because of the context in which it took place.[323] So, too, individuals would understand why the law schools required the military to interview off-campus in light of their articulated nondiscrimination policies, which is one of the reasons that the law schools were required to host the military on campus so that the military would be viewed as having pride of place.[324]

The Court's jurisprudence is difficult to understand and apply, at least in part, because the Court does not use a consistent standard when discussing what qualifies as speech versus expressive conduct versus just conduct. Nor does the Court use a consistent standard when deciding when deference is due to the content of an organization's message or to when that message is being undermined. Instead, the Court announces rules and then honors them in the breach.

III. EXPRESSION AND PUBLIC ACCOMMODATION LAWS

In two high-profile cases—*Masterpiece Cakeshop* and *303 Creative*, the Court considered the application of public accommodations laws to businesses refusing to cater to individuals wishing to celebrate their relationships.[325] The Court continued to follow the positions it offered in *Hurley* and *Dale*, even though there was no parade involved and there was no organization allegedly dedicated to First Amendment activity. Instead, the Court seems to have adopted the view that individuals are entitled to deference about what their engaging in commercial activity means and, further, that those individuals are constitutionally protected insofar as they wish to avoid communicating such unwanted messages, recognize the existence or content of those messages.

A. Masterpiece Cakeshop

Masterpiece Cakeshop, Limited v. Colorado Civil Rights Commission involved a baker who refused to provide a cake to a same-sex couple who wished to celebrate

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322 *See id.* at 53 ("FAIR argued that this forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association.").

323 *See supra* notes 37–38 and accompanying text (discussing how, in connection with the pledge, the flag salute was speech).

324 *Cf.* Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1631 (2007) ("[T]he Court refused to accord any deference to law schools' own sense of the messages their policies are intended to convey either to their students or to outside observers.").

325 *See generally* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617 (2018); 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (refusing to provide services for same-sex couples' weddings).

their union.[326] The baker explained that his refusal was based on his opposition to same-sex marriage.[327]

The couple filed a complaint with the Colorado Civil Rights Commission, and the Commission found that the baker had violated the Colorado Anti-Discrimination Act.[328] Colorado state courts affirmed the ruling[329] and the United States Supreme Court granted certiorari to decide whether constitutional guarantees had been violated.[330]

When Charlie Craig and Dave Mullins approached baker Jack Phillips because they wished to order a cake to celebrate their union, he told them that he would not create a cake for their wedding.[331] This was not in response to the kind of cake they had requested in particular—the Court noted that they "did not mention the design of the cake they envisioned."[332]

Phillips had claimed that he was being asked "to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation.[333] But his refusal had been announced before he knew what expressive statement he was being asked to make. Indeed, there was evidence that Phillips was not objecting to same-sex marriage in particular because it had also refused to sell cupcakes for a same-sex commitment ceremony.[334]

The *Masterpiece Cakeshop* Court understood that:

> [A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons.[335]

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326 *Masterpiece Cakeshop*, 584 U.S. 617.

327 *Id.* at 621 ("The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages.").

328 *Id.* ("The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act. The Commission determined that the shop's actions violated the Act and ruled in the couple's favor.").

329 *Id.* ("The Colorado state courts affirmed the ruling and its enforcement order.").

330 *Masterpiece Cakeshop*, 584 U.S. 617.

331 *Id.* at 626.

332 *Id.*

333 *Id.* at 617.

334 *Id.* at 629 ("[A]ccording to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration.").

335 *Id.* at 634.

This was something that the Constitution does not require because while "religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[336] The *Masterpiece Cakeshop* Court cited *Hurley* as support for the contention that persons could not be denied equal access to such goods and services.[337]

Yet, *Hurley* had been read in the past as recognizing that the First Amendment requires permitting the exclusion of persons where the forced inclusion might undermine the would-be excluder's message, where appropriate deference was given to the would-be excluder both with respect to the content of the message and what would undermine it.[338] Of course, the Court is not always deferential to an organization's assertion about the content of its message and what will undermine that message.[339]

The *Masterpiece Cakeshop* Court accepted that the "reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions."[340] It is unsurprising that the Court deferred to the baker with respect to what he believed was inconsistent with those convictions, although a separate question was whether that sincere belief overrode the dictates of the state's public accommodations law. The Court did not ultimately reach that issue. Instead, the Court vacated the Civil Rights Commission's decision because one of the Commissioners had noted that "religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, [or] whether it be the holocaust . . . ,"[341] and the Court believed this comment indicative of bias.[342]

The *Masterpiece Cakeshop* Court did not make clear whether it believed that religion had never been used in support of slavery and the Holocaust[343] or whether these uses had occurred but the Commissioner should not have mentioned those past

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336 *Id.* at 631.

337 *Id.* ("[S]ee also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1995) ('Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments').").

338 *See supra* note 249 and accompanying text (discussing the *Dale* Court's interpretation of *Hurley*).

339 *See supra* notes 275–322 and accompanying text (discussing *FAIR*).

340 *Masterpiece Cakeshop*, 584 U.S. at 625.

341 *Id.* at 635.

342 *Id.* at 636 ("[T]he Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.").

343 *But cf.* Stephen M. Feldman, *Having Your Cake and Eating It Too? Religious Freedom and LGBTQ Rights*, 9 WAKE FOREST J.L. & POL'Y 35, 52 (2018) ("But the commissioner accurately depicted history.").

uses of religion.[344] Or, the Court might instead have been suggesting that the Commissioner's noting that there were "hundreds of situations where freedom of religion has been used to justify discrimination"[345] indicated bias because the Commissioner had included within that list was a situation where religion was used to justify discrimination on the basis of orientation.[346] Ironically, the Court chastised the Commissioner for comparing "Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust,"[347] implying that grouping Phillip's sincerely held views with defenses of slavery and the Holocaust demeaned Phillip's views, while in the same opinion explaining that a "principled rationale for the difference in treatment . . . cannot be based on the government's own assessment of offensiveness."[348] Apparently, the Court's assessments of offensiveness are subject to a different rule.

The *Masterpiece Cakeshop* Court took special exception to the Commissioner's comment that "it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others,"[349] arguing that the comment disparaged religion "in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere."[350] Yet, here, the Court was mischaracterizing the comments of the Commissioner, who had nowhere questioned the sincerity of the view[351] and had nowhere suggested that the comments were *merely* rhetorical. Indeed, the

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344 Mark Strasser, *Masterpiece of Misdirection?*, 76 WASH. & LEE L. REV. 963, 980–81 (2019) ("It is not clear whether the Court rejected that religious views had been used throughout history to justify discrimination or whether, instead, the Court believed that religious views had been used to justify discrimination but that those uses of religion were not appropriately compared to the use of religion before the commission.").

345 *Masterpiece Cakeshop*, 584 U.S. at 635.

346 *Cf. id.* at 638 (noting with disapproval that the comment "sends a signal of official disapproval of Phillips' religious beliefs").

347 *Id.* at 635.

348 *Id.* at 638.

349 *Id.* at 635.

350 *Id.*

351 *See* Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 275 (2018) (noting that the Commissioner had referred to a concurring view in a different case in which the judge had suggested that the views at issue were sincere even if in violation of the local public accommodations law); *see also* Elane Photography, LLC v. Willock, 309 P.3d 53, 78 (N.M. 2013) (Bosson, J., specially concurring) ("One is free to believe, think, and speak as one's conscience, or God, dictates. But when actions, even religiously inspired, conflict with other constitutionally protected rights—in *Loving* the right to be free from invidious racial discrimination—then there must be some accommodation.").

Commissioner seemed to be elevating the importance of religious speech, which was why he criticized the use of such important and impactful speech to hurt others.[352]

The Court also noted that there were other cases where bakers had refused as a matter of conscience to provide requested cakes and that the Commission had not found discrimination in any of those cases.[353] But those cases involved objections to particular words and symbols that had been requested and did not involve a refusal to sell any cake to the would-be purchaser.[354] Indeed, the bakeries who refused to provide cakes in these latter cases had provided other customers with cakes with religious symbols.[355] The Court's failure to attend to the differences in the cases did not bode well for principled decision-making in the future.[356]

To reach its decision, the *Masterpiece Cakeshop* Court imputed bias by ignoring what was actually said.[357] Perhaps this was a tactical decision[358] so that the Court would not have to decide the individual case but could nonetheless provide some helpful guidance for future decisions. But the Court instead continued its confusing jurisprudence regarding the contents of messages and who gets to determine whether those messages will be altered by performing certain actions.

If individuals get to determine the contents of their messages regardless of what others understand, and what will undermine the contents of those messages regardless of what others might think, then individuals will be afforded great discretion with respect to what they are permitted to do or not do, existing laws notwithstanding. The Court may have been aware of that difficulty and offered the reassurance that "there are no doubt innumerable goods and services that no one could argue implicate the

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352 *Cf.* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 140 (2018) ("Jairam [the Commissioner] reached for one of the most eloquent statements made in recent years concerning the respect owed to religious believers who must nevertheless make sacrifices and compromises as they interact with others of different beliefs in the public sphere.").

353 *Masterpiece Cakeshop*, 584 U.S. at 636 ("Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.").

354 *See id.* at 669 (Ginsburg, J., dissenting) (noting that each of the bakers would have sold the would-be-purchaser a cake; they simply refused to sell a cake with the writing in particular requested by the purchaser).

355 *Id.* at 670 ("[T]he bakeries regularly produced cakes and other baked goods with Christian symbols.").

356 *Cf.* Strasser, *supra* note 344, at 999 ("But the Court's suggestion may be taken to suggest that a commission's treating *different cases differently* may nonetheless reasonably be viewed as reflecting bias.").

357 Kendrick & Schwartzman, *supra* note 352, at 135 ("[T]he Court misread the facts to find intentional hostility in the application of civil rights law where none existed.").

358 *See* Strasser, *supra* note 344, at 963 ("The decision might seem to have been a masterful resolution of an extremely difficult case because the Court issued a narrow opinion that seemed to affirm . . . .").

First Amendment."[359] Yet, the Court's own decision casts that statement into doubt. Phillips had said that he would sell the couple various baked goods but that he would not sell goods for a same-sex union.[360] Implicitly, he was arguing that what made this a First Amendment case was that he did not wish to do anything connected with such an event. But that presumably means that many of the goods and services that as a general matter do not implicate the First Amendment do implicate the First Amendment if the individual's subjective beliefs provide that linking.[361]

B. 303 Creative

The Court had another opportunity to clarify how to reconcile public accommodations laws with First Amendment guarantees in *303 Creative LLC v. Elenis*.[362] Regrettably, by holding that the public accommodations law had to create an exception for Ms. Smith,[363] the Court made the jurisprudence more rather than less confusing, ignoring distinctions thought important in the past and making a murky doctrine even more obscure.

303 Creative involved a website designer, Lorie Smith, who wished to expand her business to include websites for weddings.[364] But she feared that the public accommodations laws would force her to provide services for same-sex couples who wished to marry,[365] and she sought an injunction to prevent the State from forcing her to provide services in conflict with her beliefs.[366]

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359 *Masterpiece Cakeshop*, 584 U.S. at 632.

360 *Id.* at 665 (Thomas, J., concurring in part and concurring in the judgment) ("I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.").

361 Strasser, *supra* note 344, at 1000 ("If the sincere belief that performance of a particular action would send a message suffices to make the action trigger First Amendment guarantees, then the state may well have a very difficult time requiring individuals to perform or, perhaps, refrain from performing a whole host of actions.").

362 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

363 *See id.* at 2322.

364 *Id.* at 2308 ("[S]he decided to expand her offerings to include services for couples seeking websites for their weddings.").

365 *Id.* ("[S]he worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman.").

366 *Id.* ("[S]he sought an injunction to prevent the State from forcing her to create wedding websites celebrating marriages that defy her beliefs.").

Ms. Smith claimed that she would serve all customers regardless of orientation,[367] although she reserved the right not to provide certain services for certain clients.[368] She offered the consolation that others would be able to provide the services that she could not,[369] uniqueness of her services notwithstanding.[370]

Although it is not exactly clear what Ms. Smith had in mind when suggesting that she would serve all customers, she might have been suggesting that she would be willing to create wedding websites for a gay or lesbian customer as long as she or he were marrying someone of a different sex.[371] Or, perhaps Smith was suggesting that she would allow LGBTQ+ customers to purchase her services as long as the website services provided would be for a different-sex couple celebrating a marriage.[372] The Court offered no plausible explanation[373] for the meaning of Ms. Smith's claim that she did not discriminate on the basis of orientation,[374] given her intent to refuse to provide wedding services for same-sex couples and her wanting to post a sign to that effect.[375]

While the focus here was on same-sex weddings, the basis for the requested exemption would apply to various kinds of weddings.[376] Suppose that an interfaith or interracial couple wanted Ms. Smith to set up their wedding website. If she did not

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367 *Id.* at 2309 ("[S]he 'will gladly create custom graphics and websites' for clients of any sexual orientation . . . .").

368 *Id.* at 2310 ("Ms. Smith may not be able to provide certain services to a potential customer.").

369 *Id.*

370 *Id.* at 2312 ("[E]very website will be her 'original, customized' creation.").

371 *Cf.* Hecox v. Little, 479 F. Supp. 3d 930, 984 (D. Idaho 2020), *aff'd,* No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023) (discussing the argument that "homosexual individuals are not prevented from marrying under statutes preventing same-sex marriage because lesbians and gays could marry someone of a different sex").

372 *See 303 Creative,* 143 S. Ct. at 2339 (Sotomayor, J., dissenting) ("Apparently, a gay or lesbian couple might buy a wedding website for their straight friends.").

373 *See id.* ("This logic would be amusing if it were not so embarrassing.").

374 *Id.* at 2309 ("Ms. Smith is 'willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender,' and she 'will gladly create custom graphics and websites' for clients of any sexual orientation."); *see also id.* at 2341 (Sotomayor, J., dissenting) ("By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status.").

375 *Id.* at 2334 (Sotomayor, J., dissenting) ("Smith would like her company to sell wedding websites 'to the public,'. . . but not to same-sex couples. She also wants to post a notice on the company's website announcing this intent to discriminate.").

376 *Cf. id.* at 2317 ("Ms. Smith stresses, too, that she has not and will not create expressions that defy any of her beliefs for any customer, whether that involves encouraging violence, demeaning another person, or promoting views inconsistent with her religious commitments.").

wish to endorse those unions, then she presumably could refuse to work with those couples, too.[377] If she did not wish to endorse the weddings of anyone not in her faith tradition, then she could presumably refuse to do so.[378]

Perhaps it would be thought that a narrow exception was at issue—the right not to create a website for wedding services that an individual does not endorse.[379] But the principle articulated in *303 Creative* goes far beyond that.[380] Suppose, for example, that a same-sex couple, Robin and Kim, wish to create a website for Kim's retirement celebration. If Robin and Kim are listed as the hosts, the website might be taken to endorse or at least recognize their relationship. But that is something that Ms. Smith might view as contradicting Biblical truth so she could refuse to create this retirement website.[381] Or, suppose that Kim and Robin want a website celebrating a major birthday of their daughter's. The suggestion that they are a family might contradict Ms. Smith's sincere beliefs, which also provide a basis for her refusal.

Nothing in the *303 Creative* opinion limits the exemption to LGBTQ+ families.[382] Suppose that a family wants to set up a website to celebrate a religious milestone. If this family's religious tradition differs from Ms. Smith's, Ms. Smith might believe that her having any role in the creation of such a site was an endorsement of religious views that she considers sacrilegious.

The *303 Creative* Court explained that "[a]ll of the graphic and website design services Ms. Smith provides are 'expressive.'"[383] The websites and graphics are "original"[384] and "customized"[385] and contribute to the overall message conveyed by the business.[386] Further, that message would express *Ms. Smith's* view of marriage.[387]

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377 *Id.* at 2342 (Sotomayor, J., dissenting) ("A website designer could equally refuse to create a wedding website for an interracial couple, for example.").

378 *See id.* at 2309 (suggesting that the focus of her concern was not to be forced "to create websites celebrating marriages she does not endorse").

379 *See id.*

380 *See supra* notes 376–78 and accompanying text (discussing other potentially objectionable websites); *see also infra* notes 381–82 and accompanying text (discussing additional potentially objectionable websites).

381 *303 Creative*, 143 S. Ct. at 2309 ("She will not produce content that 'contradicts biblical truth' regardless of who orders it.").

382 *Cf. id.* at 2339 (Sotomayor, J., dissenting) ("To allow a business open to the public to define the expressive quality of its goods or services to exclude a protected group would nullify public accommodations laws. It would mean that a large retail store could sell 'passport photos for white people.'").

383 *Id.* at 2309.

384 *Id.*

385 *Id.*

386 *Id.*

387 *Id.*

The claim that each of Ms. Smith's websites would express her view of marriage needs to be unpacked. The State of Colorado had suggested that Smith could "repurpose websites she will create to celebrate marriages she *does* endorse for marriages she does *not*."[388] The Court rejected this proposal because all of Smith's creations were allegedly unique.[389] Yet, Smith could custom tailor each website with respect to numerous matters—colors, spacing, information about names and locations[390]—without being forced to articulate positions that she did not believe. Thus, if Robin and Kim saw the wedding website created for different-sex friends and wanted the exact same website with only the names, date, and location of the ceremony altered, the website itself would presumably not contain anything Ms. Smith found offensive. Nonetheless, Ms. Smith asserted that she had a First Amendment right not to provide to a same-sex couple the very same product that she supplied to a different-sex couple.[391]

Suppose that two, three, or four different-sex couples loved one of Smith's websites and wanted that very website for their own wedding announcement. Smith would not be barred from allowing each of those couples to have a website identical except for the colors, but could refuse to provide such a website for a same-sex couple. Indeed, given the number of unisex names,[392] the website of the same-sex couple might not have differed at all in what it said.

Another difficulty posed by the Court's analysis is that the Court is also opening the door to preventing mass-produced expressive goods from being sold to disapproved groups. The creator of wedding announcements saying "God Bless This Union" might refuse to permit such announcements to be sold to a disapproved couple ,and even a stationer might refuse to sell such an announcement to a couple of whom the stationer disapproved.[393]

One might have expected that the Court would have offered a nuanced First Amendment analysis when holding that Smith had the right to refuse to create a wedding website for a same-sex couple even if that website would have mirrored what she had created for a different-sex couple.[394] But the Court's approach was anything

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388 *Id.* at 2316.

389 *Id.* ("[T]he State has stipulated that Ms. Smith does *not* seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple.").

390 *See id.*

391 *Id.* at 2338 (Sotomayor, J., dissenting) ("Indeed, petitioners here concede that if a same-sex couple came across an opposite-sex wedding website created by the company and requested an identical website, with only the names and date of the wedding changed, petitioners would refuse.").

392 *See* Sarah Zhang, *The Rise of Gender-Neutral Names Isn't What It Seems*, ATL. (Mar. 21, 2023), https://www.theatlantic.com/science/archive/2023/03/gender-neutral-baby-names-popularity/673464/ ("In 2021, 6 percent of American babies were bestowed androgynous names.").

393 *303 Creative*, 143 S. Ct. at 2342 (Sotomayor, J., dissenting) ("A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child.").

394 *See id.* at 2334.

but nuanced. Instead, the Court suggested that because a same-sex couple might want something on their website that conflicted with Smith's beliefs[395] Smith therefore did not have to provide service to same-sex couples.[396] The Court did not see fit to clarify (or even follow) the existing jurisprudence. Instead, the Court quickly disposed of the State's contention that the First Amendment did not protect Ms. Smith by citing *Barnette*,[397] *Hurley*,[398] and *Dale*[399] among others.[400] Those cases allegedly establish that "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided.'"[401] A different holding "would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty."[402] Lest anyone worry that the Court's ruling would undermine public accommodations laws, the Court offered the reassurance that "there are no doubt innumerable goods and services that no one could argue implicate the First Amendment."[403]

Yet, there were two distinct reasons that the Court's analysis was surprising. First, Smith was claiming that she could not be forced to articulate *her own speech* if the would-be website purchasers were a same-sex couple who wanted to purchase website services for their wedding.[404] The information on the site would not be something Smith disbelieved—presumably, the names, date, and location would be correct. The photograph would be of the individuals who planned to marry. The only way that this would be forcing Smith to say something that she did not believe would be if her creating the website would be construed as support for the marriage at issue. But Smith could have a disclaimer of support on her own website or even on the couple's website,

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395 *Cf. id.* at 2318 ("Colorado . . . seeks to force an individual to 'utter what is not in [her] mind' about a question of political and religious significance."). But Smith sought a blanket exemption, so it was not as if there was particular content that Colorado was forcing her to say. *See id.* at 2336 (Sotomayor, J., dissenting) ("Colorado does not require the company to 'speak [the State's] preferred message.' Nor does it prohibit the company from speaking the company's preferred message.") (citation omitted).

396 *Cf. id.* at 2318 ("Colorado . . . seeks to force an individual to 'utter what is not in [her] mind' about a question of political and religious significance.").

397 *Id.* at 2311.

398 *Id.*

399 *Id.*

400 *See, e.g.*, *id.* at 2312 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)); *see also id.* (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257–58 (1974)).

401 *Id.*

402 *Id.* at 2313–14.

403 *Id.* at 2315 (citing Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 584 U.S. 617, 632 (2018)).

404 *Id.* at 2308–09.

and the possibility of a disclaimer was enough to defeat the First Amendment challenge in both *FAIR*[405] and *PruneYard*.[406] Further, as the *FAIR* Court noted, individuals who merely follow the law will likely not have a particular view attributed to them,[407] so individuals seeing that Smith had created a website would not assume that she had a particular view about same-sex marriage.

In *Barnette*, the State was requiring that particular words be articulated,[408] so that did not seem applicable because Colorado was not requiring Smith to say particular words.[409] *Hurley* emphasized how the Parade's message would be changed were GLIB allowed to march,[410] and *Dale* emphasized how the Boy Scouts were an expressive association.[411] Yet, 303 Creative was a commercial business open to the public,[412] and being open to the public was an important reason that the *PruneYard* Court held that the mall owner's First Amendment rights had not been violated.[413]

Part of the difficulty in understanding *303 Creative* is that the Court does not specify what Ms. Smith was being forced to say. The website would not contain the words "303 Creative approves of same-sex marriage" and might instead have had a disclaimer. The public might not even know that the website had been created by 303 Creative (unless that information were supplied), which is yet another reason that 303 Creative would be unlikely to be mistakenly thought to be supporting same-sex marriage.

The *303 Creative* Court emphasized that the requested services were expressive.[414] That, combined with her view that same-sex marriage was contrary to

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405 *See supra* note 288 and accompanying text.

406 *See supra* note 125 and accompanying text.

407 *See supra* note 320 and accompanying text.

408 *See supra* note 26 and accompanying text.

409 *303 Creative*, 143 S. Ct. at 2336 (Sotomayor, J., dissenting) ("Colorado does not require the company to 'speak [the State's] preferred message.'").

410 *See supra* notes 204–05 and accompanying text.

411 *See supra* notes 230–31 and accompanying text.

412 *303 Creative*, 143 S. Ct. at 2334 (Sotomayor, J., dissenting) ("Smith would like her company to sell wedding websites 'to the public.'").

413 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) ("[T]he shopping center by choice of its owner is . . . a business establishment that is open to the public."). The *PruneYard* Court also emphasized that the State was not requiring that particular words be stated. *See id.* ("[N]o specific message is dictated by the State to be displayed on appellants' property.").

414 *See supra* notes 383–86 and accompanying text.

God's will,[415] allegedly sufficed to require an exemption from the law.[416] But there are many whose work is expressive—florists, cake designers, wedding panners, bakers, hair stylists, photographers, etc.—and they all could presumably refuse citing their opposition to same-sex marriage.[417]

One of the most disconcerting aspects of the *303 Creative* opinion is the Court's failure to explain how "Colorado seeks to force an individual to speak in ways that align with [the State's] views but defy her conscience."[418] Ms. Smith seemed to believe that her creating a wedding website for a same-sex couple would force her to speak contrary to her own belief, regardless of the content of the website or what people would attribute to her by creating the website.[419] But if providing the service was itself expressive of support contrary to her sincere beliefs, then the Court has very much broadened what might count as expressive and what might be the basis for refusing to provide services to those whom one does not support. Although there was discussion of how Ms. Smith's websites were expressive,[420] there was no discussion of either how her message would be altered or what people would assume she was endorsing.

The *303 Creative* Court emphasized that the services were custom-designed.[421] Yet, the individual tailoring might merely be that the individuals' names, wedding date, and wedding location were unique to them. Indeed, the website might not even mention the word "wedding." The very breadth of the permission sought and granted

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415 *303 Creative*, 143 S. Ct. at 2334 (Sotomayor, J., dissenting) ("In Smith's view, 'it would violate [her] sincerely held religious beliefs to create a wedding website for a same-sex wedding because, by doing so, [she] would be expressing a message celebrating and promoting a conception of marriage that [she] believe[s] is contrary to God's design.'").

416 *Id.* at 2333.

417 *But see id.* at 2337 ("If a photographer opens a photo booth outside of city hall and offers to sell newlywed photos captioned with the words 'Just Married,' she may not refuse to sell that service to a newlywed gay or lesbian couple, even if she believes the couple is not, in fact, just married because in her view their marriage is 'false.'"). The Court simply suggested that it was not discussing photographers. *See id.* at 2319 ("But those cases are not *this* case."). The Court did not make clear why photographers did not engage in expressive activity that would be covered under the analysis provided in this case, instead suggesting that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions." *Id.* But the Court did not explain why the photographer case would be difficult to analyze after *303 Creative*.

418 *Id.* at 2321.

419 *Id.* at 2308.

420 *Id.* at 2316 ("The State has stipulated too, that Ms. Smith's wedding website 'will be expressive in nature.' . . .").

421 *Id.* ("The State has stipulated the Ms. Smith does not seek to sell an ordinary commercial good but intends to create 'customized and tailored' speech for each couple.").

undercut that this case was about what Smith would be forced to say or would be believed by others to be saying.[422]

Suppose that a Justice of the Peace claims that she should not be forced to conduct same-sex weddings.[423] Her work is expressive and tailored to each individual because she uses the parties' names when conducting the ceremony.[424] What does *303 Creative* say about this case? It is difficult to determine because the decision offers so little reasoning.

303 Creative was focused on someone who did not want to be seen to support same-sex weddings. But suppose that the person did not want to support equal rights for LGBTQ+ individuals.[425] *303 Creative* provides the basis for many more people to refuse to provide expressive services in many contexts if doing so contravenes a sincerely held belief.

The Court offered the consolation that many products and services will not be construed as having First Amendment significance.[426] But that may be because many individuals and businesses do not construe their sales to individuals as somehow supporting something of which they disapprove. *303 Creative* opens the door to many refusals to deal with certain members of the public because doing so would express a message with which the individual or business does not agree, e.g., that women or racial/religious/ethnic minorities deserve equal treatment. The *303 Creative* Court has made the jurisprudence even more confusing, which is likely to yield inconsistent opinions in the lower courts and further undermine First Amendment guarantees.

IV. CONCLUSION

The Court has long had difficulty offering a coherent account of the conditions under which individuals can be forced to speak or host others' speech when those individuals do not agree with the expression's content. The Court has offered numerous factors to consider but is inconsistent about when those factors should be considered and what weights those factors should be assigned. Sometimes, a challenger's ability to disavow an unwanted message defeats her First Amendment challenge to a required hosting or posting of speech, whereas other times the First Amendment challenge is upheld, notwithstanding the ability to disavow. Sometimes, the Court defers to challengers' claims about what their message is and what will dilute

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422 *See id.* at 2334 (Sotomayor, J., dissenting) ("The breadth of petitioners' pre-enforcement challenge is astounding.").

423 Rebecca Schneid, *Texas Judge Fights to Deny Wedding Ceremonies to Gay Couples*, TEX. TRIB. (July 13, 2023), https://www.keranews.org/news/2023-07-13/texas-judge-who-doesnt-want-to-perform-gay-marriage-ceremonies-hopes-web-designers-supreme-court-case-helps-her-fight (discussing the case of a Justice of the Peace who refused to conduct same-sex weddings).

424 *See 303 Creative*, 143 S. Ct. at 2338 (Sotomayor, J., dissenting) (stating that using the names of the parties to be married can be expression).

425 *Cf.* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos., Inc., 515 U.S. 557, 574–75 (1995) ("The parade's organizers . . . may object to unqualified social acceptance of gays and lesbians.").

426 *See supra* note 384 and accompanying text.

it, whereas at other times no deference is given to challengers' claims about the content of their speech or what will change that content.

The Court's analyses of how First Amendment claims should be analyzed in the context of public accommodations laws has been even more inconsistent and confusing. Factors important in some cases are ignored in others, and the Court seems unable to offer a coherent and consistent doctrine that is capable of application.

Recently, the Court's attempts to explain the jurisprudence have been even more disappointing. In *Masterpiece Cakeshop*, the Court unfairly imputed animus by offering a contrived reading of statements that were arguably accurate. *303 Creative* offers a jurisprudence that is unrecognizable in light of past caselaw, ignoring factors that are sometimes dispositive and always considered.

Our society is becoming increasingly polarized,[427] and First Amendment claims invoking a right not to associate with or offer support for disfavored groups are likely to increase. Reconciling the competing interests will require nuance, understanding, and wisdom. Regrettably, the current Court seems committed to showing that it is simply not up to the task of interpreting the Constitution or even understanding past caselaw.

The Court's current approach to the right to refrain from speaking is "impenetrable and incapable of consistent application,"[428] especially when analyzed with reference to public accommodations laws. One can only hope that the Court will shift gears and actually consider the caselaw and synthesize a position in accord with the Constitution and good public policy rather than cause incalculable harm to individuals and society as a whole.

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427 *See* Levi Boxell et al., *Cross-Country Trends in Affective Polarization*, NAT'L BUREAU ECON. RSCH. 11, https://www.nber.org/system/files/working_papers/w26669/w26669.pdf (last visited Apr. 18, 2024) (describing the rapid growth in U.S. polarization due to racial and income-driven societal differences); *see also USC Polarization Index Reveals America's Political Divide Remains Wide*, USC ANNENBERG SCH. FOR COMMC'N & JOURNALISM, https://annenberg.usc.edu/news/research-and-impact/usc-polarization-index-reveals-americas-political-divide-remains-wide (Nov. 9, 2021, 11:03 AM) (stating polarization is a permanent part of American society due to partisan politics and media personalities).

428 Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).