Stanford Law Review

Volume 76 Symposium

ESSAY

Expressive Association Claims for Private Universities

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Abstract. The Constitution protects private rights from state interference. Certain statutes purport to protect individuals' rights from interference by private actors as well. Two examples are the Leonard Law, a California law that prohibits private universities from disciplining students for speech protected against state interference by the First Amendment, and Title VI, which conditions universities' federal funding on their refraining from racial discrimination. But by extending individuals' rights to include protection from interference by private universities, do these laws unconstitutionally interfere with private universities' own expressive rights?

This Essay assesses whether expressive association claims could protect private universities from statutory restrictions on their freedom to admit and retain students. First, it examines the Leonard Law and concludes that the law limits private universities' ability to restrict student speech on the basis of viewpoint discrimination. Next, this Essay argues that universities' constitutional right of expressive association trumps their students' right of free speech under the Leonard Law. This insight relies both on strengthened protection in recent years for association claims and on unique features of the Leonard Law. Finally, the Essay explores how the principles that make the Leonard Law unconstitutional do not extend to the prohibitions against race discrimination under Title VI, thus providing a limit for universities' right of expressive association.

* J.D., Stanford Law School, 2024. I am incredibly grateful to Professor Michael McConnell for his guidance, insight, and feedback, as well as Morgan Weiland, Elliot Setzer, John Acton, and Sophia Caldera for their helpful review. Thank you to the Bradley Foundation for supporting this project, as well as Collin Frederick and Saj Sri-Kumar for inspiring it. And thank you to the meticulous editors of the *Stanford Law Review*, Andrew Park, Charlie Power, Andrew Nahom, Ling Ritter, Alex Kilroy, Tianyi Huang, and Kevin Wang. All errors are my own.

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Introduction

The Constitution protects speech from state interference. Because *public* universities are the state, they are subject to constitutional limits. But *private* universities are just that: private. They are not subject to constitutional limits on state power; rather, they are protected by constitutional limits on state power. These constitutional protections are well recognized: freedom of speech, freedom of expression, freedom of association. These First Amendment freedoms give private universities the right to choose and control their membership, even when such restrictions would be unconstitutional if imposed by the state.

This Essay considers whether two laws extending constitutional limits on state power to private universities may violate the First Amendment rights of those universities: California's Leonard Law and Title VI of the 1964 Civil Rights Act. The Leonard Law requires private universities in California to adhere to the First Amendment, thus limiting their ability to discipline and expel students for speech that the state would itself be unable to restrict.[1] Title VI conditions federal aid on universities' refraining from racial discrimination, which *SFFA v. Harvard* held forbids race-conscious admissions.[2] *SFFA* curtailed the peculiar freedom enjoyed by private and public universities to choose students on the basis of race. This Essay argues that the general freedom of expressive association extends to private universities, shielding them from some, but not all, restrictions on their ability to choose and discipline their students.

Part I discusses the text and history of the Leonard Law. This history begins with the statute's enactment, a response to politically correct campus speech codes. It continues with the first claim under the Leonard Law, one brought against Stanford University; that claim produced the singular, failed challenge to the law's constitutionality. That history culminates in the present application of the Leonard Law by California state courts, which construe the law to limit private universities' ability to restrict student speech on the basis of viewpoint discrimination.

Part II argues that the development of First Amendment jurisprudence over the last twenty-five years has clarified the right of expressive association and revealed the Leonard Law to be unconstitutional. When Stanford University challenged the Leonard Law, its asserted First Amendment interests were dismissed by the court as internally inconsistent. Though this dismissal reflected contemporary doctrine, its logic has not withstood the test of time. As this Essay shows, successful challenges to public accommodation laws

1. Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 3-4 (Cal. Super. Ct. Feb. 27, 1995).
2. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (*SFFA*), 143 S. Ct. 2141, 2166 (2023).

demonstrate that the Leonard Law infringes universities' right of expressive association—an infringement that cannot withstand constitutional scrutiny.

Part III shows that the principles that make the Leonard Law unconstitutional do not extend to Title VI. While the Leonard Law is a pure restriction on university's ability to (dis)associate, Title VI is a conditional funding scheme—providing the government correspondingly vastly more discretion in how it regulates. Furthermore, the government's narrow and compelling interest in preventing race discrimination in higher education fares far better under the relevant doctrinal frameworks than the vague interests motivating the Leonard Law. These differences serve to provide limiting principles for an expressive association claim.

I. The Leonard Law

Part I.A reviews the text and historical context of the Leonard Law. Part I.B describes the sole constitutional challenge to the Leonard Law and its subsequent applications in California state court.

A. Text and Context

The Leonard Law is named for its sponsor, California State Senator Bill Leonard, who wished to combat university student speech codes.[3] Notwithstanding its conservative sponsor, the law enjoyed widespread and bipartisan support. Passing 24-0 in the State Senate and 64-1 in the Assembly, the law had something for everyone.[4] On the one hand, conservatives had worried that university speech codes "encourage[d] students to conform to a 'politically correct' view" and "add[ed] to an atmosphere of intolerance on campus."[5] These concerns were substantiated by reports of conservatives resigning from student groups for fear of administrative reprisal and strong support for the bill from the California College Republicans.[6] On the other hand, liberals had long supported imposing public free-speech norms on private universities.[7] As Erwin Chemerinsky argued, "[s]peech can be chilled

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3. Karen M. Clemes, Note, Lovell v. Poway Unified School District*: An Elementary Lesson Against Judicial Intervention in School Administrator Disciplinary Discretion*, 33 CAL. W. L. REV. 219, 235 (1997).

4. 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, 1591-92 (1998).

5. Clemes, *supra* note 3, at 235 nn.109-10.

6. *See* Henry J. Hyde & George M. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469, 1472, 1484 (1991); Eule & Varat, *supra* note 4, at 1592.

7. Eule & Varat, *supra* note 4, at 1590.

and lost as much by private sanctions as public ones"; because "[a]ll schools—public and private—perform an essential public function," "[a]ll should be obligated to follow the United States Constitution."[8]

To be precise, the "Leonard Law" is the colloquial name for three statutes that collectively prohibit California secondary and postsecondary schools, public and private, from disciplining students for speech that, "when engaged in outside of the campus," would be protected by the First Amendment of the Constitution.[9] This Essay focuses on the component of the Leonard Law, California Education Code section 94367, applying to private universities.[10]

B. Historical Applications

1. The failed constitutional challenge

Doubts about the Leonard Law's constitutionality were put to bed by the successful challenge under the Leonard Law to Stanford University's speech code in 1995.

The Stanford speech code had prohibited insulting or "fighting" words intended to stigmatize on the basis of "sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."[11] The code reflected Stanford's institutional judgment twice over: first, that speech targeting these characteristics was particularly harmful;[12] second, that prohibiting such speech was a constitutionally permissible regulation of "fighting words" and an "expressive means . . . of bolstering the credibility of [Stanford's] anti-racist statement[s]."[13]

The California Superior Court of Santa Clara County rejected Stanford's defense of its speech code in *Corry v. Stanford.* The threshold question of whether the code would survive First Amendment scrutiny if enacted by a government was resolved by the Court's then-recent decision in *R.A.V v. City of St. Paul*, which held a nearly identical municipal hate speech ordinance to be

8. Erwin Chemerinsky, *The Constitution and Private Schools, in* PUBLIC VALUES, PRIVATE SCHOOLS 274, 275-76 (Neil E. Devins ed., 1989).

9. Eule & Varat, *supra* note 4, at 1592 & n.238; CAL. EDUC. CODE §§ 48950, 66301, 94367 (West 2024).

10. CAL. EDUC. CODE § 94367 (West 2024).

11. Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 2 (Cal. Super. Ct. Feb. 27, 1995).

12. Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience,* 29 U.C. DAVIS L. REV. 891, 906 (1996).

13. Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights,* NEW REPUBLIC, Sept. 20 & 27, 1993, at 37.

unconstitutional.[14] Mirroring the reasoning in *R.A.V.*, *Corry* held that the code improperly constrained speech that merely "conveys a message of hatred and contempt" and "prohibit[ed] speech based on the content of the underlying expression."[15] *Corry* also rejected Stanford's arguments for the facial invalidity of the Leonard Law. Part II.A will address the court's reasoning in greater depth, but the core finding was straightforward: The "Leonard Law simply does not restrict speech or ideas in any way" and, in fact, "*expands* the realm of speech without favoring one side over the other."[16]

2. Subsequent applications in state court

Subsequent case law has modestly clarified the ambit of the Leonard Law. Relevant here are a pair of challenges, *Omicron I* and *Omicron II*, alleging that the University of Southern California (USC) violated the Leonard Law by delaying students from joining a fraternity or sorority until the spring semester of their freshman year.[17]

The *Omicron* challenges provide a de facto "as applied" challenge to the Leonard Law. As the court explained, there were "First Amendment considerations on both sides": on plaintiffs' side, "statutory protections for student free speech rights"; on USC's side, "the constitutional First Amendment deference owed to a university's academic decisions."[18] Relying on *Grutter v. Bollinger*, *Omicron I* held that USC's policy merited First Amendment protection so long as it was a "genuine academic judgment."[19] The court warned this protection would be forfeited if the "policy arises not from a genuine academic judgment but from viewpoint discrimination" against the "viewpoint plaintiffs espouse."[20] The court also analyzed the policy under a "limited public forum framework," which allows the government—and, by application of the Leonard Law, the university—to thereby restrict speech activity within dedicated spaces so long as the restriction is not on the basis of viewpoint.[21] Because this framework likewise turned on the existence of

14. *Corry*, slip op. at 10-12 (citing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)).
15. *Id.* at 9, 20.
16. *Id.* at 35.
17. Omicron Chapter of Kappa Alpha Theta Sorority v. Univ. of S. Cal. (*Omicron I*), Nos. B292907, B294574, 2019 WL 1930153 (Cal. Ct. App. May 1, 2019); Omicron Chapter of Kappa Alpha Theta Sorority v. Univ. of S. Cal. (*Omicron II*), No. B309916, 2022 WL 212339 (Cal. Ct. App. Jan. 25, 2022).
18. *Omicron I*, 2019 WL 1930153, at *3.
19. *Id.* at *6-7 (citing Grutter v. Bollinger, 539 U.S. 306, 324, 328-29 (2003)).
20. *Id.* at *3, 7.
21. *Id.* at *7.

viewpoint discrimination, the court ultimately granted summary judgment to USC because there was no viewpoint discrimination.[22]

II. Challenging the Leonard Law

This Essay revives the strongest of Stanford's constitutional challenges under *Corry* to the Leonard Law: that it violates universities' First Amendment right of expressive association and cannot survive strict scrutiny. Part II.A details *Corry*'s rationale for rejecting Stanford's expressive association defense and shows how *Corry*'s rationale has been significantly superseded by the Court's subsequent decisions in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*[23] and *Boy Scouts of America v. Dale*.[24] Part II.B explains how an expressive association challenge against the Leonard Law would operate, how the law would not survive strict scrutiny, and, in the alternative, how the law would not survive even intermediate scrutiny.

A. The Right of Expressive Association

Implicit in the First Amendment freedoms of speech and association is the freedom to gather to express ideas: the "right of expressive association."[25] Thus, there "can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[26]

A freedom of association claim entails three elements: first, forced inclusion;[27] second, a group viewpoint;[28] third, a showing that the forced inclusion "significantly burden[s]" the expression of that viewpoint.[29] *Corry* rejected Stanford's claim as deficient on that final element, finding that Stanford's reach and resources prevented any burden.[30] Though a plausible conclusion under contemporary doctrine, subsequent case law makes plain this finding was wrong.

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22. *Omicron II*, 2022 WL 212339, at *6, 10.
23. 515 U.S. 557 (1995).
24. 530 U.S. 640 (2000).
25. Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (*FAIR*), 547 U.S. 47, 68 (2006) (quoting *Dale*, 530 U.S. at 644).
26. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).
27. *Dale*, 530 U.S. at 648.
28. *Id.*
29. *Id.* at 653.
30. Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 39-40 (Cal. Super. Ct. Feb. 27, 1995).

1. Contemporary doctrine and application in *Corry v. Stanford*

Corry came at what later proved to be the low-water mark of expressive association claims. True, the Court had previously recognized a right to associate, but primarily in a political context so that an organization could "protect [itself] 'from intrusion by those with adverse political principles.'"[31] And, in the context of businesses trying to exclude women and minorities, the Court had warned that even if "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections."[32]

Yet such propositions remained surplusage because the Court had consistently rejected contentions brought by allegedly discriminatory organizations that they enjoyed associational rights in the first instance. The difficulty of establishing such a claim was illustrated by *Roberts v. United States Jaycees*, where the Court upheld a state antidiscrimination law forcing certain clubs to accept female members.[33] The clubs faced two hurdles. First, they struggled to establish that they were expressive rather than mere business clubs; as Justice O'Connor explained, commercial organizations did not enjoy the full associational rights belonging to groups "engaged in protected expression."[34] Second, the clubs could not show any connection between their professed philosophy and their membership criterion. Any connection was "attenuated at best" as the majority of the clubs' activities had "nothing to do with sex," and nothing in the record beyond mere pleadings indicated the group's views or ability to express those views would change.[35]

Relying on contemporary doctrine, the *Corry* plaintiffs argued that Stanford's mission to provide a "comprehensive liberal arts education in which controversial ideas and presuppositions are subject to academic scrutiny" constituted a "specific expressive purpose."[36] And, as in *Roberts*, the *Corry* plaintiffs contended there was no "logical nexus" between that mission and the

31. Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122 (1981) (quoting Ray v. Blair, 343 U.S. 214, 221-22 (1952)).
32. Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)).
33. 468 U.S. 609, 623 (1984).
34. *Id.* at 636 (O'Connor, J., concurring in part and concurring in the judgment).
35. *Id.* at 627 (quoting Roberts v. U.S. Jaycees, 709 F.2d at 1560, 1571 (1983), *rev'd*, 468 U.S. 609 (1984)).
36. Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 38-39 (Cal. Super. Ct. Feb. 27, 1995) (quoting N.Y. State Club Ass'n v. City of New York 487 U.S. 1, 13 (1988)).

speech code.[37] Accordingly, the code was inconsistent with the university's "principals [sic] of free inquiry and free expression."[38]

The *Corry* court agreed, finding both that there was not a "sufficient nexus" between Stanford's mission and the speech code[39] and also that Stanford's financial resources ensured it retained "numerous alternative means of conveying its views," even if denied the ability to discipline and expel students.[40] To substantiate this final point, *Corry* cited *Pruneyard Shopping Center v. Robins*, wherein the Supreme Court upheld a state law forcing a mall to allow political protestors.[41] The two cases, as *Corry* explained, were "[i]dentical."[42] Like the shopping mall, Stanford was "open to the public," forced to host private persons rather than a "specific message [that] was directed by the State," and blessed with the capacity to "easily disclaim any . . . wrongful attribution of a student's expressions for those of the University."[43] Finding Stanford's ability to express its message was not "impaired," the Court rejected the university's expressive association defense (and so concluded the Leonard Law was constitutional).[44]

2. Post-*Corry* case law

The Court has made expressive association claims easier to establish and sustain in the twenty-five years since *Corry*. This doctrinal shift began with two post-*Corry* cases: *Hurley*[45] and *Dale*.[46] In both, gay plaintiffs asserted that their exclusion from expressive associations violated state public accommodations law.[47] And in each case, defendant organizations successfully argued that forced inclusion would violate their right of expressive association.[48] Together, the two cases transformed the doctrine of expressive association: *Hurley* recognized how membership could alter groups' message and that associational rights could trump public accommodations laws;[49] *Dale*

37. *Id.* at 39.
38. *Id.* at 38-39.
39. *Id.* at 42.
40. *Id.* at 40.
41. *Id.* at 41-42 (citing 447 U.S. 74 (1980)).
42. *Id.* at 41.
43. *Id.*
44. *Id.* at 40.
45. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995).
46. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
47. *Hurley*, 515 U.S. at 561; *Dale*, 530 U.S. at 644.
48. *Hurley*, 515 U.S. at 559; *Dale*, 530 U.S. at 644.
49. *Hurley*, 515 U.S. at 573-81.

modified the purpose and nexus scrutiny of *Roberts* (and *Corry*) into a highly deferential review that could be satisfied by organizations' own pleadings.[50]

In *Hurley*, the Court held that forced inclusion of a gay pride group in a parade would alter the parade's message and thus constitute unconstitutionally compelled speech.[51] It did not matter that the "purpose" of the parade had nothing to do with sexual orientation.[52] The group retained the right to decide "what not to say."[53] The Court rejected the group's contention that *Pruneyard* provided comparable facts.[54] As the Court explained, *Pruneyard* was the exception, not the rule, for expressive association claims: The "owner did not even allege that he objected" to the content of the protestor's speech.[55] This exceptional fact ensured that expressive "autonomy was simply not threatened."[56] By contrast, the parade in *Hurley* was expressive (rather than a "business establishment") and lacked a practical way of disclaiming its participants' speech (compared to "simply posting signs").[57] Tellingly, the Court declined to apply a scrutiny analysis and thus determine whether this forced alteration could be justified by some government interest.[58] Because the government's stated goal was to compel the inclusion of the gay pride message, its express objective was the "alteration of [the parade's] speech."[59] As such, the government had failed to "address[] the threshold requirement of any review under the Speech Clause, whatever the ultimate level of scrutiny, that a challenged restriction on speech serve a compelling, or at least important, governmental object."[60]

In *Dale*, the Court found both that the forced inclusion of a gay scoutmaster compromised the Boy Scout's pledge to be "morally straight" and that this inclusion "significantly burden[ed]" the Boy Scout's expressive purpose.[61] In sharp contrast to the nexus scrutiny of *Corry*, the Court gave double deference to the Boy Scout's self-definition of its expressive purpose. First, the Court accepted the Boy Scout's judgment that "morally straight" was inconsistent with

50. *Dale*, 530 U.S. at 651-53.
51. *Hurley*, 515 U.S. at 566, 581.
52. *Dale*, 530 U.S. at 655.
53. *Hurley*, 515 U.S. at 573 (quoting Pac. Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986)).
54. *Id.* at 579-80 (citing Pruneyard Shopping Center v. Robins, 447 U.S. 74, 87 (1980)).
55. *Id.* at 580 (quoting *Pacific Gas*, 475 U.S. at 12).
56. *Id.*
57. *Id.* at 577, 580. (quoting *Pruneyard*, 447 U.S. at 87).
58. *See id.*
59. *Id.*
60. *Id.*
61. Boy Scouts of Am. v. Dale, 530 U.S. 640, 649, 653 (2000).

homosexuality, rebuking the state court's inquiry and conclusion that such judgment was "antithetical to the [Boy Scout's] goals and philosophy."[62] Rather, the Court did not need to inquire further than the Scout's own pleadings, which professed "homosexual conduct is not morally straight."[63] Second, the Court held that just as "we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."[64] That deference led the Court to conclude that the Dale's very presence would "significantly burden" the Boy Scouts by "forc[ing] [them] to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[65]

B. Establishing a Violation

This post-*Corry* case law gives universities all the tools needed to challenge the Leonard Law as a facial claim. Part II.B.1 explains why the same facts required for a student's Leonard Law claim would also establish a university's expressive association defense. This symmetry would allow a challenge against the Leonard Law to establish a facial infringement of the First Amendment right of association. Part II.B.2 shows that the Leonard Law cannot survive strict scrutiny. Part II.B.3 considers the possibility that a reviewing court might reject the logic of Part II.B.1 and determine that the Leonard Law does not place a "heavy burden on associational rights";[66] stipulating there was not a heavy burden, the Leonard Law would trigger only intermediate scrutiny. Though the standard of scrutiny often predetermines the case, here it would make no difference: The nature of the Leonard Law ensures it cannot survive either strict or intermediate scrutiny.

1. Facial challenge

A facial challenge succeeds if "no set of circumstances exists under which the [law] would be valid."[67] A facial challenge against the Leonard Law would require establishing that restrictions on a private university's ability to discipline its students always "significantly burdens" that university's expression.[68]

62. *Id.* at 651 (quoting Dale v. Boy Scouts of Am., 734 A.2d 1196, 1226 (N.J. 1996)).

63. *Id.* (quoting Brief for Petitioners at 39, *Dale*, 530 U.S. 640 (No. 99-699), 2000 WL 228616).

64. *Id.* at 653.

65. *Id.*

66. *Clingman*, 544 U.S. at 593.

67. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387 (2021) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

68. *See supra* Part II.A.

To explore how a successful facial challenge would proceed, consider a hypothetical claim brought by a student who had been expelled by a private, nonprofit university for speech violating the university's speech code. The student's Leonard Law claim would require a showing that the student was "punish[ed] . . . solely for engaging in speech."[69] Because "genuine academic judgment is of First Amendment dimension,"[70] the student would need to show the policy was not "genuinely rooted in academic considerations"[71] but rather "disfavored treatment of those espousing unpopular views—because of those views."[72] That is, the student would need to show that the university committed "viewpoint discrimination."[73]

But once the student-plaintiff had proven that their expulsion stemmed from some hostile "viewpoint [or] motivating ideology,"[74] the university's expressive association defense would be halfway established. After all, the Court has recognized that the university is an "expressive association" consisting of both "[s]tudents and faculty."[75] And, as required for a freedom of association claim, the Leonard Law directly "affects the composition" of the university by "forcing the [university] to accept members it does not desire."[76]

To be sure, under *Roberts*, the university might struggle to establish an expressive purpose sufficiently burdened by a lack of speech codes.[77] Yet *Dale* rejected the need for further inquiry into the nature of a group's expression beyond its own pleadings;[78] here, the university would merely need to stipulate in its own pleadings that the university disapproved of the student's speech. Even if the university elsewhere proclaimed a commitment to free

69. *See* Yu v. Univ. of La Verne, 126 Cal. Rptr. 3d 763, 772 (Cal. Ct. App. 2011).

70. *Omicron I*, Nos. B292907, B294574, 2019 WL 1930153, at *6 (Cal. Ct. App. May 1, 2019).

71. *Omicron II*, No. B309916, 2022 WL 212339, at *6 (Cal. Ct. App. Jan. 25, 2022).

72. *Id.*

73. *Omicron I*, 2019 WL 1930153, at *3.

74. *Omicron II*, 2022 WL 212339, at *6.

75. *FAIR*, 547 U.S. 47, 69-70 (2006).

76. *Id.*

77. *See supra* Part II.A.1.

78. Boy Scouts of Am. v. Dale, 530 U.S. 640, 651 (2000) ("The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight.' . . . We accept the Boy Scouts' assertion. *We need not inquire further* to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs." (emphasis added) (quoting Brief for Petitioners at 39, *Dale*, 530 U.S. 640 (No. 99-699), 2000 WL 228616)).

speech, *Dale* forestalls the *Corry*-counterargument that the ideology was "internally inconsistent."[79]

Once the university established that it disapproved of the student's speech, the university would only need to show that inability to expel the student would "significantly burden" the university's own speech. The university could rely on *Hurley* and *Dale* for the proposition that legal restrictions on their ability to discipline a student based on that student's speech meet the "significant burden" element of an expressive association claim. Recall the student suing under the Leonard Law, publicly accusing the university of expelling him because it disapproved of that student's speech. As in *Hurley*, expulsion of the student because of that student's speech meant the university had "clearly decided to exclude a message it did not like from the communication it chose to make."[80] That decision would be "enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[81] Indeed, the fact of expulsion would only increase the impact on the school's expression were the student's Leonard Law claim successful.[82] By the time a court considered whether to reinstate the student, the disagreement would be well publicized—thus increasing the burden of compelled membership. To wit, the student's very litigation against the university would have created proof of well-publicized disagreement and disapproval.

Indeed, *Hurley* provides a further reason for rejecting the finding in *Corry* that the university's own expression was not "significantly burdened" by the Leonard Law. Recall that *Corry* determined the university retained sufficient avenues to express its opposition to the disfavored message.[83] As *Corry* recognized, a university can respond to unwanted speech with either quiet

79. *Id.* ("[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."). *But see* Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 39 (Cal. Super. Ct. Feb. 27, 1995) ("[E]nforcement of the Speech Code [is] inconsistent with the specific express purposes of the University . . . ."). Relatedly, *Roberts* could foreclose the expressive association claim. *Roberts* rejected an expressive association defense because the organization was not prevented from "exclud[ing] individuals" with unwanted "ideologies." 468 U.S. at 627. But successfully pleading a Leonard Law violation would establish that the university wanted to exclude the student precisely because that student's ideology was unwanted.

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

81. *Id.*

82. *See Dale*, 530 U.S. at 645, 653 (relying on Dale's post-expulsion statements made in his own Complaint to demonstrate the ideological disagreement between him and the Boy Scouts). A question left open by *Dale* is whether, and to what extent, the availability of injunctive relief such as reinstatement may depend on post-expulsion statements of the terminated member, which presumably increase the burden of prospective membership.

83. *See* Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 41-42 (Cal. Super. Ct. Feb. 27, 1995).

discipline (e.g., expulsion) or loud renunciation of the student's speech; each choice prevents attribution and thus protects the university's own expression.[84] For public universities, that choice is simple: As creatures of the state, they must choose whatever is "least restrictive" of student speech. Both discipline and loud renunciation prevent attribution, but only discipline burdens student speech. As such, the First Amendment demands that the public university must choose loud renunciation and "tak[e] pains to disassociate itself"[85] from the student.

Yet the "least restrictive" means analysis does not carry over to private speech. To be sure, a private university might be able to successfully prevent attribution by voicing disapproval of the disfavored message.[86] Yet that voiced disapproval must be by choice, as the First Amendment forbids the state from compelling private speech.[87] Preventing the private university from choosing quiet discipline does just that, however, by "forc[ing] [the university] to respond to views that others may hold."[88] Requiring a private university to publicly disclaim speech—when that university might prefer to quietly discipline the student—accordingly "violates the fundamental rule of protection . . . that a speaker has the autonomy to choose the content of his own message."[89]

Under this logic, there is no set of circumstances under which the Leonard Law is constitutional. The expulsion would either be the product of "genuine academic judgment," which is protected by the special First Amendment rights of a university, or be the product of "viewpoint discrimination," which is the necessary right of any expressive association.

The paradoxical conclusion that a law *extending* the First Amendment invariably *violates* the First Amendment turns on the nature of viewpoint discrimination. Government restrictions of speech on the basis of viewpoint "skew public debate on an issue"[90] and thereby violate the "bedrock principle underlying the First Amendment."[91] Private restrictions on speech, however, do not merely lack the police power to "drive certain ideas or viewpoints from

84. *Id.*
85. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841 (1995).
86. *See, e.g., FAIR*, 547 U.S. 47, 65 (2006) (noting that "attribution concern" is "not a plausible fear" in certain circumstances (quoting *Rosenberger*, 515 U.S. at 841)); *id.* at 69-70.
87. Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that a state could not require drivers to display the state motto on their license plates).
88. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 11 (1986).
89. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995).
90. R.A.V. v. City of St. Paul, 505 U.S. 377, 430 (1992) (Stevens, J., concurring).
91. Texas v. Johnson, 491 U.S. 397, 414 (1989).

the marketplace"[92]—those restrictions are a core mechanism in the marketplace of ideas. Thus, when the government "force[s] a group to accept certain members," the government "impair[s] the ability of the group to express those views, and only those views, that it intends to express."[93] While the government cannot discriminate on the basis of viewpoint, private associations must be allowed to: "Freedom of association . . . plainly presupposes a freedom not to associate" on the basis of viewpoint.[94]

2. Strict scrutiny

If a private university can establish a "significant burden" to its associational freedoms, the Leonard Law faces strict scrutiny and can survive only if it is "narrowly tailored to serve a compelling state interest."[95] Critically, this state interest can overcome strict scrutiny only if it is "unrelated to the suppression of ideas."[96]

Corry made three findings regarding the state interests underlying the Leonard Law. First, the law satisfied California's "compelling interest in assuring that students are educated fully";[97] this full education, presumably, was impossible if students were subject to speech codes and unable to experience speech restricted by said codes. Second, the law was narrowly tailored to achieve that interest through the least restrictive means available to the state.[98] Third, California's interest was unrelated to the suppression of free speech because the Leonard Law "expand[ed] the realm of speech without favoring one side over the other."[99]

Corry's findings regarding state interest do not withstand the test of time. First, "students [being] educated fully" was previously unrecognized among the

92. *St. Paul*, 505 U.S. at 387 (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

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

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

95. Clingman v. Beaver, 544 U.S. 581, 585-86 (2005). Following *303 Creative LLC* v. *Elenis*, a university could contend that no state interest could trump a constitutional right such as expressive association: When state "law and the Constitution collide, there can be no question which must prevail." 143 S. Ct. 2298, 2306 (2023) (citing the Supremacy Clause). While the case only addressed state public accommodation law, the logic naturally extends to all state law. *Id.* This Essay, however, presents an interest-balancing analysis in case *303 Creative*'s bypass of interest balancing is limited by future rulings.

96. *Dale*, 530 U.S. at 648 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

97. Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 36 (Cal. Super. Ct. Feb. 27, 1995).

98. *Id.*

99. *Id.* at 35.

list of compelling state interests.[100] Though a novel state interest is no impossibility, *Corry* ignored the tension with another compelling interest: deference to universities' "educational judgment."[101] The presupposition that the state can determine what merits a full education runs headlong into private universities' right "to determine for [themselves] . . . what may be taught [and] how it shall be taught."[102]

Second, the Leonard Law is not narrowly tailored. Plainly, an outright ban on speech codes is not the "least restrictive alternative." For example, a less restrictive method would be withholding state funding from universities that create speech codes. More foundationally, "[f]or a law to be narrowly tailored, the government must prove . . . the law actually advances that interest."[103] The government can satisfy this burden with evidence of "[a] long history, a substantial consensus, [or] simple common sense."[104] The Leonard Law can rely on neither history nor consensus; after all, it is the only such statute among the fifty states that restricts private university speech codes.[105] Similarly, the Leonard Law cannot rely on irrefutable common sense. For example, it is evident that certain types of student speech can chill the speech of students with unpopular viewpoints.[106]

Third, the Leonard Law's purpose is directly related to the suppression of free speech. *Corry* erred in finding that the Leonard Law only "expands" rights.[107] This conclusion ignored the legal reality that one party's right can only be secured if the law imposes a corresponding restriction on another

100. *See* Eugene Volokh, Essay, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420-21 (1996). This holds true regardless of whether one considers state interests broadly (e.g., "ensuring . . . crime victims are compensated" by their wrongdoers), or limits state interests to those pre-*Hurley* interests that overcame associational rights (e.g., "race and sex discrimination," "preserving the integrity of the tax system," and "procuring the manpower necessary for military purposes"). *See id.* at 2420-21 (quoting Gillette v. United States, 401 U.S. 437, 462 (1971)).

101. *SFFA*, 143 S. Ct. 2141, 2164 (2023) (citing Grutter v. Bollinger, 539 U.S. 306, 328 (2003)).

102. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *cf.* Grutter, 539 U.S. at 362 (Thomas, J., concurring) ("The constitutionalization of 'academic freedom' began with the concurring opinion of Justice Frankfurter in *Sweezy* . . . .").

103. Volokh, *supra* note 106, at 2422 & n.31 (citing Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality)).

104. Burson, 504 U.S. at 211.

105. Steven P. Aggergaard, *The Question of Speech on Private Campuses and the Answer Nobody Wants to Hear*, 44 MITCHELL HAMLINE L. REV., 629, 669 (2018).

106. *See, e.g.*, Nick Morrison, *It's Not Just Conservative Students Who Are Scared To Speak Out on Campus*, FORBES (Sept. 15, 2021, 9:15 AM EDT), https://perma.cc/E2YK-8V6C.

107. Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 35 (Cal. Super. Ct. Feb. 27, 1995).

party.[108] The Leonard Law also redistributes rights: It enhances the speech rights of students by restricting universities' right to control speech on their campuses. And speech control, per *Hurley*, is speech.[109] Increasing the speech of one party at the expense of another is equivalent to "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others," an objective "wholly foreign to the First Amendment."[110] To the extent the court has permitted speech equalization, it is where the regulated entity is a "monopoly" which threatens the "survival" of disfavored speakers.[111] But, like the plaintiffs in *Hurley*, students have other avenues for their speech: not only other private universities refusing to adopt a code but also every public university incapable of adopting one.[112]

3. Intermediate scrutiny

This same line of reasoning would doom the Leonard Law even if the court did not find a "heavy burden on associational rights"[113] and so reviewed the law only under intermediate scrutiny. Though intermediate scrutiny does not require a "compelling" state interest (only an "important" interest,) or a "least restrictive means" (only a "narrowly tailored" means), the state interest served by that law must turn on the "noncommunicative impact" of the regulated expression.[114]

But whether intended to promote free speech on campus or to enhance student education, the purpose of the Leonard Law plainly turns on the communicative impact of the speech codes and other restrictions on speech. Even if preventing speech codes actually enhanced student access to a "diverse and antagonistic" set of viewpoints from other students, that objective is "directly tied to the content of what the [students] will likely say."[115] The Leonard Law could not be saved by its broader objective such as producing students free of illiberal biases.[116] Tolerance towards all ideas might be a

108. *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1467 (2023) (Thomas, J., dissenting).

109. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574-75 (1995).

110. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 741 (2011) (quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).

111. *Hurley*, 515 U.S. at 577-78.

112. *Cf. id.* (finding that the plaintiffs' ability to participate in a different parade ensured their own speech had not been silenced).

113. *Clingman*, 544 U.S. at 593.

114. *See* United States v. O'Brien, 391 U.S. 367, 382 (1968).

115. Turner Broad. Sys. v. FCC, 512 U.S. 622, 678 (1994) (O'Connor, J., concurring in part and dissenting in part).

116. *Clemes*, *supra* note 3, at 235 n.110.

commendable doctrine, but "it is a decidedly fatal objective."[117] Compelled tolerance is no less inimical to the First Amendment than any "proposal to limit speech in the service of orthodox expression."[118]

III. Implications for Title VI

Headlining *Corry*'s analysis of the constitutional challenge was the "interesting proposition" that—because every law has the "intent and effect of impacting private actors and associations"—voiding the Leonard Law would "sweep into its ambit countless other laws" that protected Californians from harassment and discrimination.[119] Indeed, the question of whether expressive association claims provide immunity to racial discrimination laws is reasonable and recurring.[120]

This Part seriously engages that question and explores how an expressive association defense could be used to justify a particular form of discrimination: affirmative action.[121] Such a defense could free universities from *SFFA v. Harvard*, which held that race-based admissions violate the Fourteenth Amendment (binding public universities) and therefore Title VI (binding private universities).[122] Part III.A describes the legal regime beginning in *Bakke* and ending with *SFFA*. Then, Part III.B reviews contours of the expressive association claim as applied to affirmative action—both the findings necessary for the claim to succeed, and why those findings run contrary to current doctrine.

A. The Rise and Fall of First Amendment Deference to University Admissions

In *Bakke*, the Court held that race-conscious admissions are a form of racial classification and therefore unconstitutional unless justified by a compelling state interest.[123] Under the controlling Powell concurrence, the Court also held that the educational benefits of a racially diverse student body provided a

117. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 579 (1995).

118. *Id.*

119. Corry v. Leland Stanford Junior Univ., No. 740309, slip op. at 22-23 (Cal. Super. Ct. Feb. 27, 1995).

120. *See, e.g.*, Response to Petition for Writ of Certiorari, NetChoice, LLC v. Paxton (No. 22-555), at 18-19 (contending that a First Amendment exemption to a social media statute "would rip a 'gaping hole in the fabric' of public accommodations laws" (quoting FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 431 (1990))).

121. Neither the universities nor the amici briefs supporting them cited *Hurley*, *Dale*, or otherwise made an expressive association claim.

122. *SFFA*, 143 S. Ct. 2141, 2166 (2023); *id.* at 2188 n.4 (Thomas, J., concurring).

123. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287-305 (1978) (plurality opinion).

compelling state interest.[124] This state interest derives from universities' First Amendment right to maximize a "robust exchange of ideas."[125]

Affirmative action stood on uneasy legal footing for the thirty-five years between *Bakke* and *SFFA*. First, the Court never explained why a state actor could evade the Fourteenth Amendment's prohibition against racial discrimination because of deference that they were purportedly entitled to under the First Amendment.[126] Second, "benign" racial discrimination was never distinguished by the Court from the invidious and "malign."[127] Student applicants of a non-advantaged race were denied the "enforcement of their right not to be disadvantaged on the basis of race."[128] Socially, it "undermin[ed] trust in meritocracy and stigmatiz[ed] those intended to be helped."[129]

Race-conscious admissions survived challenges in *Grutter* and *Fisher v. University of Texas at Austin*,[130] but not without clarification that "deference" extended only to the academic ends while strict scrutiny applied to the universities' use of race to achieve those ends.[131] *SFFA* held that the use of race in college admissions did not meet strict scrutiny.[132] As the Court explained, the universities' justifications for their admissions programs were "not sufficiently coherent" and without a "meaningful connection between the means they employ and the goals they pursue."[133]

124. *Id.* at 315 (opinion of Powell, J.).

125. *Id.* at 312-13 (opinion of Powell, J.) (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U. S. 589, 603 (1967)).

126. *Id.* at 287 (plurality opinion); *id.* at 311-14 (opinion of Powell, J.); *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 363 (2003) (Thomas, J., concurring in part and dissenting in part) ("'[I]t is the business' of this Court to explain itself when it cites provisions of the Constitution to invent new doctrines—including the idea that the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause. The majority fails in its summary effort to prove this point." (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957))).

127. *SFFA*, 143 S. Ct. at 2199 (Thomas, J., concurring) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 n.* (1995) (Thomas, J., concurring in part and concurring in the judgment)).

128. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring in the judgment).

129. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 298 (1992).

130. 136 S. Ct. 2198 (2016).

131. *Id.* at 376-77.

132. *See SFFA*, 143 S. Ct. at 2166-68.

133. *Id.* at 2166-67.

B. Contours of a Freedom of Association Challenge to Title VI

As a threshold matter, whereas the Leonard Law is pure police power, Title VI operates through conditional funding. Enforcement through selective funding rather than criminal sanction, however, does not divest universities of First Amendment protection. Under the unconstitutional conditions doctrine, the state may not make funding contingent on the cessation of an activity otherwise protected by the First Amendment—unless there is a "reasonably appropriate requirement" connecting the cessation of the activity to that funding's purpose.[134] A funding condition cannot be unconstitutional if contingent on activity that was not protected by the First Amendment in the first instance.[135] Accordingly, an expressive association challenge against Title VI by a private university would require showing: (1) private universities have an associational right to conduct race-conscious admissions; (2) this right is not trumped by a state interest in preventing racial discrimination; and (3) preventing this policy was not a valid condition of funding.

1. Hard: showing that Title VI significantly burdens associational freedom

Applying the reasoning of *Dale*, a university seeking to uphold racial preferences could allege that the purposeful admission of racial minorities would (1) communicate its commitment to enhancing diversity and minority opportunity and (2) avoid the impression of hypocrisy attaching to such a university that remained overtly monochrome.[136] Such a university could plausibly claim this admission policy was necessary to promote its message or to prevent that message's dilution. As with *Dale*, pleading this purpose would merit judicial deference for the conclusion that the admission policy (and the inevitable exclusions) constituted the university's expression.[137] Whereas academic deference required "an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review,"[138] expressive association claims are immune to this sort of inquiry, given that "it 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."[139]

The university's difficulties would begin with the required step of establishing that "expression" would be "significantly burdened" by its inability

134. *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 716-17 (1996).

135. *See FAIR*, 547 U.S. 47, 60 (2006).

136. *See supra* Part II.A.2.

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

138. *SFFA*, 143 S. Ct. at 2168.

139. *Dale*, 530 U.S. at 651.

to maintain racial preferences post-*SFFA*.[140] While giving "deference to an association's view of what would impair its expression," *Dale* cautioned against the conclusion "that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[141] Accordingly, the university's only chance of success would come from welding the language of *Dale* and *303 Creative v. Elenis*.[142] First, *Dale* recognized that the very presence of "an avowed homosexual and gay rights activist" sent a "distinctly different message from the presence of a heterosexual" who avowedly "disagree[d] with Boy Scouts policy"; that is, the activist's "presence" would force the Boy Scouts to send a "message" beyond the views the activist vocally expressed.[143] Second, *303 Creative* plausibly eliminates the burden inquiry by holding that any interference with a group's preferred message is more than a mere "incidental burden on speech."[144] To the contrary, *303 Creative* states in absolute terms that "no government may 'alter' the 'expressive content' of [an individual's] message; and no government may 'interfer[e] with' [an individual's] 'desired message.'"[145]

But there is danger in reading Supreme Court holdings like statutes, and both cases are distinguishable. *Dale* has the aforementioned disclaimer about "mere acceptance,"[146] and *303 Creative* relied in large part on Colorado's stipulation that the speech to be compelled was expressive.[147]

2. Harder: the state interest in ending racial discrimination in education

Even assuming that the university was able to establish that race-conscious admissions are expressive and that Title VI significantly burdens that protected expression, it would struggle mightily to overcome the well-

140. *See supra* Part II.A.2.

141. 530 U.S. at 653.

142. 143 S. Ct. 2298 (2023).

143. 530 U.S. at 655-56.

144. *303 Creative*, 143 S. Ct. at 2318.

145. *Id.* (citations omitted) (quoting *FAIR*, 547 U.S. 47, 63-64 (2006)). The Court in *303 Creative* indicated that compelled expression, which is one step removed from compelled membership, merits the same analysis: "[T]he First Amendment protects acts of expressive association. Generally, too, the government may not compel a person to speak its own preferred messages. Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include. All that offends the First Amendment just the same." *Id.* at 2312 (citations omitted).

146. 530 U.S. at 653.

147. 143 S. Ct. at 2316.

established government interest in ending racial discrimination in education. Claiming a First Amendment right to discriminate in education has a losing pedigree: *Norwood v. Harrison* (preventing indirect aid to racist schools),[148] *Runyon v. McCrary* (outlawing racially discriminatory admissions),[149] and *Bob Jones University v. United States* (ending tax benefits where the university admitted only married black students to prevent interracial dating).[150] These cases assert the absolute proposition that while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections."[151] As such, the challenging university would at a minimum need to distinguish and narrow these landmark holdings. That would certainly be possible, as none of the cases found any direct burden on the freedom of association or other First Amendment right. For instance, *Runyon* found "no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma";[152] what's more, the university's speech interests were minimal because the university was a commercial, for-profit institution.[153] Likewise, *Bob Jones* concluded that its disposition "will not prevent [the] schools from observing their religious tenets"; only against this incidental impact did the governmental interest "substantially outweigh[] whatever burden" came from the denial of tax benefits.[154]

But even if *Bob Jones* and its predecessors could be distinguished from the challenge against affirmative action, the university would still need to forestall the independent finding of a compelling government interest. Universities may argue the invidious nature of racial discrimination is lessened when the discrimination is benign and meant to help minorities. *Bob Jones* somewhat supports this conclusion. There, the government interest was inferred from a "national policy to prohibit racial segregation" wrought by a quarter century of "pronouncement[s] of this Court and myriad Acts of Congress and Executive Orders."[155] No such judicial weight prohibits affirmative action, which was

148. 413 U.S. 455, 471 (1973).

149. 427 U.S. 160, 172 (1976).

150. 461 U.S. 574, 584-85 (1983).

151. *Norwood*, 413 U.S. at 470; *see also Runyon*, 427 U.S. 160, 176 (1976); *Bob Jones*, 461 U.S. at 603-04.

152. *Runyon*, 427 U.S. at 176 (quoting McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)).

153. Roberts v. U.S. Jaycees, 468 U.S. 609, 633-36 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

154. *Bob Jones*, 461 U.S. at 603-04.

155. *Bob Jones*, 461 U.S. at 593.

permitted for the near half-century between *Bakke* and *SFFA*. Further, the Court has permitted affirmative action in other contexts like private employment.[156] Similarly, Congress and the President have exempted and even encouraged affirmative action while continuing to prohibit racial discrimination.[157] Even if wrongly decided, decisions such as *Bakke*,[158] *Grutter*,[159] and *Fisher*[160] limit the inference of any "national policy" against affirmative action as part of a generalized prohibition on racial discrimination.[161]

Yet this attempt to distinguish "benign" from "invidious" discrimination is almost certainly doomed. What makes discrimination benign: Is it differential treatment, but to remedy past wrongs? Or is it treating minorities differently, but for their own good? The first rationale was rejected by *Bakke* and never since revived.[162] And the second relies on judges to permit advantaging one race and, in the zero-sum scheme of admissions, disadvantaging another. Such a scheme seems unlikely following *SFFA*'s skepticism of "a judiciary that picks winners and losers based on the color of their skin."[163]

3. Hardest: the reasonableness of not funding discriminatory schools

The final and most difficult hurdle in an unconstitutional conditions challenge to Title VI will be arguing that nondiscrimination is not a reasonable condition on selective school funding.

On the face of the unconstitutional conditions doctrine, universities have a plausible argument. As a matter of blackletter law, the state "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."[164] Broadly, the denial is unconstitutional under any of three circumstances: (1) if the benefit is an "offer that cannot be refused" and so becomes coercive; (2) if the condition is "not relevant to the objectives of the program"; or (3) if the condition does not merely define the limits of the funded program but seeks to regulate the speech of the recipient itself.[165] A university with federal funding similar to Harvard's

156. *See* United Steelworkers of Am., v. Weber, 443 U.S. 193, 209 (1979).

157. *See, e.g.*, Exec. Order No. 13,160, 65 Fed. Reg. 39775, 39776 (June 27, 2000).

158. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

159. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

160. *See generally* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).

161. Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

162. Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 294-95.

163. *SFFA*, 143 S. Ct. 2141, 2175 (2023).

164. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013) (quoting *FAIR*, 547 U.S. 47, 59 (2006)).

165. *Id.* at 214-15 (explaining that the dissent's list of markers of unconstitutionality, "when the condition is not relevant" and "when the condition is actually coercive," failed to

footnote continued on next page

would have a good argument that at least two of the circumstances are present with Title VI. Turning first to coercion, *NFIB v. Sebelius* found that "[t]he threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce."[166] Harvard could plausibly claim that loss of its $676.1 million in direct federal funding in 2023 (which goes to research and comprises roughly 11% of overall revenues)[167] posed a similar "gun to the head."[168] Second, with respect to relevance: While ending racial discrimination may be a compelling national interest, it bears no clear relationship to research.

But the true difficulty for universities would be school-specific case law that is at best, unsettled—and, at worst, unfriendly and nearly on point. To date, the Court has not "determine[d] when a condition placed on university funding goes beyond . . . 'reasonable' choice . . . and becomes an unconstitutional condition."[169] Furthermore, the arguable lack of connection between direct government funding for research and a university's antidiscrimination policies likely means little given that universities such as Harvard benefit from not only direct funding but also indirect funding through student scholarships like Pell Grants, guaranteed loans, and the GI Bill.[170] When the Court considered a university recipient of such indirect funds, it found that Title IX (prohibiting sex discrimination by funded schools) attached "reasonable and unambiguous conditions to federal financial assistance" and "infringe[d] no First Amendment rights."[171] Worse still, even if the doctrine behind *Norwood* has changed,[172] the

account for a final marker: "conditions that seek to leverage funding to regulate speech outside the contours of the program itself").

166. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 582 (2012).

167. *See* HARVARD UNIV., FINANCIAL REPORT: FISCAL YEAR 2023, at 6, 18 (2023), https://perma.cc/AYM5-LZ9L.

168. *NFIB*, 567 U.S. at 581.

169. *See, e.g.*, *FAIR*, 547 U.S. at 59.

170. *See, e.g.*, *Payment and Financial Aid*, HARV. BUS. SCH. ONLINE, https://perma.cc/YWT9-66VA (detailing forms of financial aid, to include from the government).

171. Grove City Coll. v. Bell, 465 U.S. 555, 575-76 (1984).

172. *Norwood* prevented students who attended discriminatory schools from receiving free textbooks but relied on an outdated theory that providing indirect aid to schools would render those schools state actors. *Compare* Norwood v. Harrison, 413 U.S. 455, 465 (1973) ("[A] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." (quoting Lee v. Macon Cnty. Bd. of Ed., 267 F. Supp. 458, 475-76 (M.D. Ala. 1967), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967))), *with* Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1997 (2022) ("[A] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."), *and* Blum v. Yaretsky, 457 U.S. 991, 1011 (1982) (finding that "regulation" and "substantial funding of the activities of a private entity" do not render an entity a state actor).

motivating policy has not: The state should not "facilitate, reinforce, [or] support private discrimination."[173]

Conclusion

Private universities have historically refrained from asserting their rights as expressive associations to control student admission and retention, perhaps hesitating to legitimize a doctrine that hitherto protected conservative-coded entities. That continued hesitation alone might suffice to prevent a challenge to the Leonard Law, even though the challenge to the Leonard Law relies on *Hurley* and *Dale*'s recognition that speech control is itself speech and requires no doctrinal development. The same cannot be said for an expressive association challenge brought against Title VI. This challenge would face three doctrinal hurdles: first, an infringement of expressive association rights would need to be established by a burden lower than any previously recognized; second, the right of expressive association would need to trump the state interest against private racial discrimination; and third, general unconstitutional conditions doctrine would need to overcome on-point precedent—as well as longstanding judicial aversion to state-funded racial discrimination.

173. *Norwood*, 413 U.S. at 466.