

A Gricean Theory of Expressive Conduct

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In Spence v. Washington, the Supreme Court devised a two-part test for determining whether a nonverbal action is expressive conduct protected by the First Amendment. According to the Spence test, a nonverbal action is expressive if and only if: (1) it is intended to communicate a particularized message; and (2) in the circumstances in which the action is performed, the likelihood is great that the message will be understood by observers.

In subsequent cases, however, the Court has made clear that the category of “expressive conduct” embraces a much wider variety of nonverbal behaviors than a literal reading of the Spence test would suggest. It includes, for example, such behaviors as composing instrumental music, creating nonrepresentational visual artworks, penning nonsense verse, and dancing in the nude for the entertainment of others.

Drawing on the work of Paul Grice, one of the twentieth century’s most influential philosophers of language, this Comment develops a two-part expressive conduct test that captures the expressive character of this wider variety of behaviors. It shows that the Gricean test displays striking consistency with the Supreme Court’s particularized judgments about which sorts of nonverbal conduct are expressive and which sorts are not.

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INTRODUCTION

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”¹ The word “speech” is sometimes interpreted narrowly, as applying only to actions involving the oral or written use of language. The Supreme Court, however, has construed the meaning of “speech” far more broadly, holding that the First Amendment’s “protection does not end at the spoken or written word.”²

The Court has held a wide variety of nonverbal behaviors to constitute “speech” for the purposes of First Amendment analysis, including: (1) flying a red flag in opposition to organized government;³ (2) saluting the U.S. flag;⁴ (3) staging a sit-in in protest of racial segregation;⁵ (4) wearing a black armband in protest of a war;⁶ (5) hanging an inverted U.S. flag with peace signs superimposed on it to convey that America “st[ands] for peace”;⁷ (6) playing music;⁸ (7) burning a flag in protest;⁹ (8) dancing in the nude to provide “so-called adult entertainment”;¹⁰ (9) selecting the contingents that may participate in a parade;¹¹ (10) marching in a parade;¹² (11) burning a cross to communicate a message of racial animus;¹³ and (12) displaying a monument in a public park.¹⁴ The Court has referred to such expressive behaviors by a variety of names—most commonly, as “expressive conduct”¹⁵ or “symbolic speech.”¹⁶

Despite having held that a wide variety of nonverbal behaviors constitute speech, the Court has only once offered a test for

¹ U.S. CONST. amend. I.

² *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

³ *Stromberg v. California*, 283 U.S. 359, 369 (1931).

⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

⁵ *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

⁷ *Spence v. Washington*, 418 U.S. 405, 408–10 (1974).

⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”).

⁹ *Johnson*, 491 U.S. at 406 (quoting *Spence*, 418 U.S. at 409).

¹⁰ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 563–66 (1991).

¹¹ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995).

¹² *Id.* at 570.

¹³ *Virginia v. Black*, 538 U.S. 343, 360–61 (2003).

¹⁴ *Pleasant Grove City v. Summum*, 555 U.S. 460, 476 (2009).

¹⁵ *See, e.g., Barnes*, 501 U.S. at 567 (1991).

¹⁶ *Id.*

determining whether conduct is expressive. In *Spence v. Washington*,¹⁷ the Court devised a two-factor test that has subsequently become known as the “*Spence* test.”¹⁸ According to the test, in determining whether an action was expressive, a court must ascertain: (1) whether “[a]n intent to convey a particularized message was present”; and (2) whether “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”¹⁹

The *Spence* test serves a vitally important function in First Amendment litigation. When a litigant brings a First Amendment challenge against a law that applies to their nonverbal conduct, a court must first determine whether the conduct at issue is “speech.”²⁰ If it is, then the First Amendment is implicated,²¹ and heightened scrutiny may be warranted.²² The *Spence* test excludes from the category of “speech” any action that is not both intended and likely to communicate a particularized message.²³ It therefore entails that the government can regulate much of what we do without triggering heightened scrutiny—e.g., any action performed without communicative intent.²⁴ If all human behavior counted as “speech,” then the judiciary could subject any enactment of the legislature to heightened scrutiny and potential invalidation.²⁵ It could, in principle, operate as a “superlegislat[ure],” “constitutionalizing [] policy question[s] of purely legislative dimensions” and striking down laws that advanced disfavored policies.²⁶ The *Spence* test, by limiting what counts as “speech” in the first place, mitigates the risk of superlegislative

¹⁷ 418 U.S. 405 (1974).

¹⁸ See, e.g., Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 340 (2018).

¹⁹ *Spence*, 418 U.S. at 410–11.

²⁰ See *Johnson*, 491 U.S. at 404 (explaining that *Spence* factors determine whether “conduct possesses sufficient communicative elements to bring the First Amendment into play”).

²¹ *Id.*

²² Heightened scrutiny may take a variety of forms. See, e.g., *id.* at 412–13 (applying strict scrutiny); *Barnes*, 501 U.S. at 567 (applying intermediate scrutiny); *Spence*, 418 U.S. at 414 n.8 (declining to apply intermediate scrutiny).

²³ *Spence*, 418 U.S. at 410–11.

²⁴ See Genevieve Lakier, *Sport as Speech*, 16 U. PA. J. CONST. L. 1109, 1125 (2014) (noting that, under the *Spence* test, an action receives no First Amendment protection if it is performed without expressive intent).

²⁵ Invalidation is particularly likely when courts apply strict scrutiny. See *Witt v. Dep’t of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) (observing that “[f]ew laws survive” it).

²⁶ Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 771 (2001).

review, and therefore plays an important role in preserving the separation of powers.

Many courts have treated the *Spence* test as a test of general applicability, to be applied whenever the question arises whether conduct is expressive. The Second Circuit, for example, has held that nonverbal conduct must satisfy the *Spence* factors to count as speech: when “conduct [] does not manifest an ‘intent to convey a particularized message,’ the First Amendment does not come ‘into play.’”²⁷ In a similar vein, the Ninth Circuit has held that the *Spence* factors are necessary and sufficient conditions for expressiveness.²⁸ They are “requirement[s]” that, when satisfied, “qualify [conduct] as ‘speech.’”²⁹

Over the past two decades, however, the circuits have become increasingly divided over the extent to which the specific requirements laid out in *Spence* remain good law.³⁰ The question is a difficult one partly because of how rarely the Supreme Court has applied the test since 1974, when *Spence* was decided. Despite having had numerous opportunities to apply *Spence*’s two factors in determining whether conduct is expressive, the Court has done so in only one other majority opinion: *Texas v. Johnson*.³¹ In *Johnson*, decided in 1989, the Court characterized the test as a broadly applicable one, whose basic logic permeated a number of

²⁷ *United States v. Thompson*, 896 F.3d 155, 164 (2d Cir. 2018) (quoting *Johnson*, 491 U.S. at 404).

²⁸ *Edge v. City of Everett*, 929 F.3d 657, 668–69 (9th Cir. 2019) (identifying the *Spence* factors as “requirements” and rejecting the claim that conduct was expressive on grounds that second factor was unsatisfied).

²⁹ *Hilton v. Hallmark Cards*, 599 F.3d 894, 904 (9th Cir. 2010) (citing *Spence*, 418 U.S. at 405, 410–11).

³⁰ *See, e.g.*, *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) (concluding that, in *Hurley*, the Supreme Court “eliminated the ‘particularized message’ aspect” of the *Spence* test); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (holding that *Hurley* “liberalized” the *Spence* test, replacing the second factor with the question of whether a “reasonable person would interpret” the relevant conduct as expressing “some sort of message” (emphasis in original)); *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) (reiterating a “some sort of message” standard (emphasis in original)); *see also* *Cressman v. Thompson*, 719 F.3d 1139, 1150 (10th Cir. 2013) (observing that the *Spence* test is sometimes “too high a bar for First Amendment protection”).

³¹ 491 U.S. 397 (1989).

cases decided years before *Spence* itself.³² But despite this characterization, the Court has not applied the test even once since *Johnson* was decided.³³

The numerous cases³⁴ in which the Court has declined to apply the test are worthy of study, since in many such cases, it is doubtful that the Court would have reached the same conclusions had it applied the *Spence* factors. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*³⁵ is a particularly clear example. In *Hurley*, the Court held that a parade organizer's selection of participating groups may constitute expressive conduct, even if no "particularized message" is likely to be conveyed by their inclusion.³⁶ The Court explained that if First Amendment protection were "confined to expressions conveying a 'particularized message,' cf. *Spence v. Washington* . . . , [it] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."³⁷ *Hurley* is unusual in how explicitly it declined to apply a *Spence* factor. In other expressive conduct cases, the Court has frequently declined even to mention the *Spence* test.³⁸

There are at least two ways that the Court's repeated snubbing of the *Spence* test could be interpreted. According to the first interpretation, the *Spence* test remains good law, but it has a more limited scope than the Court has ever explicitly stated. According to this interpretation, the cases where the Court declined to apply the *Spence* test were generally ones falling outside the test's intended sphere of applicability. If correct, this interpretation leaves lower courts the task of: (1) identifying the range of

³² See *id.* at 404 (explaining that the Court applies the *Spence* factors in determining whether conduct is expressive, and "[h]ence . . . recognized the expressive nature" of such activities as wearing armbands in protest of war and conducting sit-ins in protest of segregation).

³³ This long period of disuse does not, of course, entail that the *Spence* test is no longer good law. It does, however, raise the question of whether the test (or certain parts of it) have been quietly abandoned by the Court. This Comment will take no position on this question.

³⁴ See, e.g., *Barnes*, 501 U.S. at 565–66 (determining whether at-issue conduct was expressive without applying the *Spence* factors); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006) (same); *Summum*, 555 U.S. at 476 (2009) (same); *Ward*, 491 U.S. at 790 (same); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (same); *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (same).

³⁵ 515 U.S. 557 (1995).

³⁶ *Id.* at 569–70.

³⁷ *Id.* at 569 (quoting *Spence*, 418 U.S. at 411).

³⁸ See *supra* note 34.

legal contexts in which the *Spence* test is applicable; and (2) fashioning alternative rules for determining whether conduct is expressive in those contexts where *Spence* does not apply.³⁹ According to a second interpretation, the *Spence* test, as originally stated, is no longer good law. The test was originally intended as an “expressive conduct” test of general applicability. But subsequent cases made it increasingly clear that the *Spence* factors failed to encompass much conduct that was rightfully entitled to First Amendment protection. The Court therefore abandoned the test.

Both of these interpretations leave lower courts confronting a difficult question: If there are a significant number of cases in which the *Spence* test should *not* be applied—either because it is a test with a limited scope, or because it is no longer good law—then how *should* courts determine whether conduct is expressive in these cases?⁴⁰ It is this difficult question that is the primary focus of this Comment.

The difficulty would be eliminated if the Supreme Court were to replace (or supplement) the *Spence* test with a rule that is more generally applicable. But it might be doubted that any single rule could capture all of the Court’s past judgments about what sorts of conduct are expressive and what sorts are not. A rule that comported perfectly with existing precedent would have at least three properties. First, it would be *comprehensive*: it would entail that all of the behaviors that the Court has held to be expressive are, in fact, expressive. Second, the rule would be *predictive*: it would entail that the nonverbal behaviors that the Court has described, in dicta, as “unquestionably shielded” (e.g., executing a drip painting in the style of Jackson Pollock) are also expressive. Finally, the rule would be *restrained*: it would cohere with the Court’s holdings to the effect that certain behaviors are *not* expressive. In particular, it would respect the Court’s admonition that while “almost every activity a person undertakes” contains “some kernel of expression,” not all actions are “speech” within

³⁹ Part I.B identifies and analyzes two categories of cases that might reasonably be held to fall outside the *Spence* test’s proper domain. The first category involves conduct whose intended message is ambiguous. The second involves conduct that is expressive not because it conveys thoughts or ideas, but rather because it communicates emotions.

⁴⁰ This question has produced considerable uncertainty and disagreement among the lower courts. Among the circuits that have held that the *Spence* test is no longer good law, there is nothing approaching a consensus about what test should be applied in its place. See *Tenafly*, 309 F.3d at 160; *Cressman*, 798 F.3d at 956; *Food Not Bombs*, 901 F.3d at 1244–45.

the meaning of the First Amendment.⁴¹ A test that entailed that all human actions were expressive would subject all government regulation to heightened scrutiny.

This Comment attempts to articulate an expressive conduct test that satisfies all three of these desiderata. The test is derived from the work of Paul Grice, one of the most influential language theorists of the twentieth century. Grice is perhaps best known as one of the founders of pragmatics, a branch of modern linguistics.⁴² But Grice was also deeply interested in nonlinguistic forms of expression. In a 1957 paper entitled “*Meaning*,” Grice articulated a highly influential account of what it is for an action—whether it involves language or not—to “mean something.”⁴³ According to the account, “meaning” is a variety of self-revelation: to “mean something” is to openly and deliberately reveal, to some audience, your intent to produce a psychological response in that audience.⁴⁴

Grice was not a First Amendment scholar and did not proffer his theory of meaning in the hope of providing courts with a comprehensive, predictive, and restrained expressive conduct test. Nevertheless, this Comment will argue that, in effect, he did just that. Grice’s theory draws the distinction between expressive and nonexpressive conduct in a way that is highly faithful to the Supreme Court’s particularized judgments about what sorts of conduct are speech. The theory might therefore serve as useful inspiration to any court seeking to fashion a replacement for, or supplement to, the *Spence* test. And since the theory makes no assumptions about whether the *Spence* test remains good law, it might be usefully employed both by courts that embrace the *Spence* test and by those that do not.⁴⁵

The plan for the Comment is as follows. Part I introduces the *Spence* test and provides a general overview of the cases in which it has been applied and withheld. The upshot of this overview is

⁴¹ *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

⁴² See generally Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 LINGUISTICS & PHIL. 509 (1992).

⁴³ See H.P. Grice, *Meaning*, 66 PHIL. REV. 377, 385 (1957).

⁴⁴ See *id.*

⁴⁵ It bears emphasizing that my argument in favor of Grice’s theory is not a normative one. I shall not be arguing that Grice’s theory distinguishes between expressive and nonexpressive conduct in a manner that is normatively ideal (e.g., by arguing that the theory is speech protective to an optimal degree). My argument in favor of Grice’s theory is a purely precedential one: the theory demonstrates a high degree of fidelity to the Court’s individualized judgments about what sorts of conduct are expressive and what sorts are not.

that there are two identifiable categories of cases in which the Court has declined to apply the *Spence* test in determining whether conduct is speech. Part II articulates and defends a Gricean test to be applied in such cases and, further, demonstrates that the test is fully consistent with the expressive conduct determinations that the Court actually reached in each case. Part III considers and responds to the concern that the Gricean test is not sufficiently restrained and confers First Amendment protection upon too much conduct. The Comment concludes by describing two possible ways in which the Gricean test might be implemented by lower courts.

I. THE *SPENCE* TEST AND ITS LIMITATIONS

In *Spence v. Washington*, Harold Spence, a college student, was convicted under the State of Washington's flag misuse statute for superimposing a peace sign on both sides of a United States flag, and then hanging the flag, inverted, from an apartment window, where it would be "plainly visible to passersby."⁴⁶ The Washington statute forbade any person from "[p]lac[ing] . . . any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag . . . of the United States" for the purposes of "exhibition or display," and from "expos[ing] to public view" any U.S. flag so modified.⁴⁷

Spence testified at trial that he had displayed the modified flag in protest of the invasion of Cambodia and the Kent State massacre, "events which occurred a few days prior to his arrest."⁴⁸ He explained that he "felt that the flag stood for America and [] wanted people to know that [he] thought America stood for peace."⁴⁹ Despite these explanations, the trial court instructed the jury that "the mere act of displaying the flag with the peace symbol attached, if proved beyond a reasonable doubt, was sufficient to convict."⁵⁰ The jury returned a verdict of guilty.⁵¹

On appeal, Spence argued that Washington's flag misuse statute was unconstitutional as applied to his actions, which were

⁴⁶ *Spence*, 418 U.S. at 406.

⁴⁷ *Id.* at 407 (quoting Wash. Rev. Code § 9.86.020).

⁴⁸ *Id.* at 408.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Spence*, 418 U.S. at 408.

“speech” within the meaning of the First Amendment.⁵² The Supreme Court agreed.⁵³ In assessing whether Spence’s display of the flag was expressive, the Court considered two questions: (1) whether “[a]n intent to convey a particularized message was present”; and (2) whether “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed” Spence’s display.⁵⁴ The Court found that Spence’s testimony, the context of his actions, and the connotations of the symbols he employed supported an affirmative answer to both questions, and thus concluded that Spence’s conduct was expressive.⁵⁵

Having determined that Spence’s actions were “speech” within the meaning of the First Amendment, the Court then proceeded to consider whether his speech was *protected*—i.e., whether Washington’s application of the flag misuse statute had violated his First Amendment rights.⁵⁶ The Court examined “the range of various state interests that might be thought to support the challenged conviction,” including interests in: (1) “prevent[ing] [] breach[es] of the peace”; (2) “protect[ing] the sensibilities of passersby”; and (3) “preserving the national flag as an unalloyed symbol of our country.”⁵⁷ The Court held that the first interest was not implicated by Spence’s conduct,⁵⁸ and that the second and third were impermissibly related to the suppression of free expression.⁵⁹ It therefore concluded that Spence’s “conviction must be invalidated.”⁶⁰

A. Later Application of the *Spence* Test

In the decades after *Spence* was decided, the Court was afforded numerous opportunities to apply *Spence*’s two-factor inquiry in determining whether conduct was expressive.⁶¹ But as noted already, it declined to do so in all but one case: *Texas v. Johnson*. In *Johnson*, appellant Gregory Johnson was convicted under Texas’s flag desecration statute for burning a U.S. flag at

⁵² See *id.* at 406.

⁵³ *Id.* at 414–15.

⁵⁴ *Id.* at 410–11.

⁵⁵ *Id.* at 409–11.

⁵⁶ *Spence*, 418 U.S. at 411.

⁵⁷ See *id.* at 412.

⁵⁸ *Id.* at 412–15.

⁵⁹ *Id.* at 412.

⁶⁰ *Id.* at 415.

⁶¹ See *supra* note 34.

a demonstration outside Dallas City Hall.⁶² The stated purpose of the demonstration “was to protest the policies of the Reagan administration and of certain Dallas-based corporations.”⁶³ Applying the *Spence* factors to Johnson’s actions, the Court asked “whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”⁶⁴ It again answered both questions in the affirmative, basing this conclusion on the meaning of the American flag (as “a symbol of our country”), the context of the flag-burning (“as Ronald Reagan was being renominated as President”), and Johnson’s testimony at trial about the significance of his actions.⁶⁵

In every other case where the Court has confronted the question of whether conduct is expressive, it has either expressly declined to apply the *Spence* factors,⁶⁶ or else declined even to mention the *Spence* test.⁶⁷ The next Section will discuss four such cases. What is noteworthy about these cases is that, had the Court applied the *Spence* test in any one of them, it is doubtful that it would have reached the same conclusion about whether the conduct at issue was expressive. These cases therefore raise, in acute form, the question of what rules courts should be applying in determining whether nonverbal actions constitute speech.

B. Limitations of the *Spence* Test

I will divide the cases to be discussed in this Section into two diagnostically useful categories. Each category centers on a type of conduct that (1) the Court has held is expressive, but (2) whose expressive character is not captured by the *Spence* test.

The first category involves what I term “ambiguous conduct.”⁶⁸ In these cases, the actor’s conduct is highly likely to convey some message or other to observers, but there is no particular message that observers are especially likely to retrieve.⁶⁹ The actor may have a general sense of the *kind* of message that they

⁶² *Id.* at 399–400.

⁶³ *Id.* at 399.

⁶⁴ *Id.* at 404 (alterations in original) (quoting *Spence*, 418 U.S. at 410–11).

⁶⁵ *See id.* at 404–06.

⁶⁶ *Hurley*, 515 U.S. at 569, 574.

⁶⁷ *See supra* note 34.

⁶⁸ *See infra* Part I.B.1.

⁶⁹ *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 474–76 (2009) (discussing the expressive character of public monuments that might reasonably be interpreted as expressing a variety of different messages).

wish to convey, and yet be more or less indifferent as to *which* message of this kind observers actually recover. A variety of messages may suit the actor's communicative purposes equally well.

The second category of cases I categorize under the heading "expression without a message."⁷⁰ In these cases, there is neither a particular message that the actor intends to communicate, nor even a general kind of message that they are concerned to convey. Here, the actor intends not to communicate thoughts or ideas, but rather to express and impart emotions—i.e., affective states such as excitement, joy, anxiety, or amusement.⁷¹

The following two sections will address each of these categories in turn. It should be noted, at the outset, that these categories are not mutually exclusive. A given episode of expressive conduct might involve both ambiguity and the expression of emotion. My purpose in distinguishing between these categories is only to illustrate two conceptually distinct challenges that courts must overcome in fashioning a satisfactory expressive conduct test. Having brought these challenges into view, I proceed, in Part II, to articulate a test.

1. Ambiguous conduct.

Verbal utterances are frequently susceptible of being interpreted in a variety of ways by a reasonable, attentive hearer. Consider, for example, a metaphorical utterance like "Tom is a real bulldozer." Such an utterance could be interpreted as commenting on (1) Tom's indelicate approach to problem solving, (2) his aggressive demeanor, or (3) his poor listening skills—or indeed, any combination of these. A definition of "speech" that purported to exclude all such multiply interpretable utterances would threaten to deprive much ordinary communication of First Amendment protection.

What holds true of verbal communication holds no less true of nonverbal communication. Just as reasonable minds will often differ about the meaning of an utterance, so too will they often differ about the meaning of conduct. A shrug, for example, can variously be interpreted as communicating a message of uncer-

⁷⁰ See *infra* Part I.B.2.

⁷¹ See, e.g., *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1093 (7th Cir. 1990) (discussing the expressive character of dance and instrumental music).

tainty, indifference, or even resignation. And which sort of message is intended in a given context may not always be readily ascertainable by a reasonable, attentive observer.

The *Spence* test—insofar as it insists upon clearly defined messages that are likely to be understood by observers⁷²—threatens to exclude much ambiguous conduct from First Amendment protection. As will be seen in what follows, when a person performs a communicative act that is ambiguous, there may be no “particularized message” that they intend to convey. They may, rather, be equally content to convey any one of a range of related messages to their hearer. And even where a “particularized message” is intended, the likelihood may not be “great that the message [will] be understood by those who view [] it,”⁷³ given the multiplicity of alternative interpretations that are possible.

The Supreme Court has confronted the issue of ambiguous conduct in two “expressive conduct” cases: *Pleasant Grove City v. Summum*⁷⁴ and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*. In both cases, a straightforward application of the *Spence* factors might have led the Court to conclude that the conduct at issue was not expressive. But the Court reached the opposite conclusion in both instances. In the former case, it omitted mention of the *Spence* factors. In the latter, it highlighted their limitations.

In *Summum*, a private religious organization (“Summum”) brought a § 1983 suit against Pleasant Grove City, Utah for violating its First Amendment rights.⁷⁵ On three separate occasions, the City had denied Summum’s request for permission to erect a religious monument in a small public park, where a Ten Commandments monument was already on display.⁷⁶ The City explained that its policy was to only accept monuments that “either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.”⁷⁷ Summum sought a preliminary injunction directing the City to permit it to erect its monument, arguing that the City had violated the Free Speech Clause by accepting the Ten

⁷² See *Spence*, 418 U.S. at 410–11.

⁷³ *Id.* at 411.

⁷⁴ 555 U.S. 460 (2009).

⁷⁵ *Id.* at 466.

⁷⁶ *Id.* at 465–66.

⁷⁷ *Id.* at 465.

Commandments monument but rejecting Summum's monument.⁷⁸ The district court denied Summum's request, but the Tenth Circuit reversed, concluding that the City's content-based denial of Summum's application was unlikely to survive strict scrutiny.⁷⁹

The Supreme Court reversed again on two grounds. First, it explained that "government speech is not restricted by the Free Speech Clause."⁸⁰ A city's decisions about what to say, and what not to say, do not trigger heightened scrutiny. Second, the Court held that, when a city chooses to display a privately donated monument in a public park, it thereby "engages in expressive conduct"—i.e., government speech.⁸¹

Summum argued that the City's display of the Ten Commandments monument did not constitute expressive conduct because the City had not formally adopted any particular message as "the message' that it associate[d] with the monument."⁸² The Court, however, rejected this argument as "fundamentally misunderstand[ing] the way monuments convey meaning".⁸³

The meaning conveyed by a monument is generally not a simple one like "Beef. It's What's for Dinner." Even when a monument features the written word, the monument *may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways*. . . . What, for example, is "the message" of the Greco-Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic and may "imagine" a world without religion, countries, possessions, greed, or hunger. Or, to take another example, what is "the message" of the "large bronze statue displaying the word 'peace' in many world languages" that is displayed in Fayetteville, Arkansas? These text-based monuments are *almost certain to evoke different thoughts and sentiments in the*

⁷⁸ *Id.* at 466.

⁷⁹ *Summum*, 555 U.S. at 466.

⁸⁰ *Id.* at 469.

⁸¹ *Id.* at 476.

⁸² *Id.* at 474.

⁸³ *Id.*

minds of different observers, and the effect of monuments that do not contain text is likely to be *even more variable*.⁸⁴

According to the *Sumnum* Court, the act of displaying a public monument can constitute expressive conduct even if there is no particular message that could correctly be identified as “the message” of the monument.⁸⁵ Even if a monument will “almost certain[ly] [] evoke different thoughts and sentiments in the minds of different observers,” and even if it is “intended to be interpreted . . . in a variety of ways,” display of the monument can nevertheless constitute expressive conduct.⁸⁶

The *Sumnum* Court did not discuss the possibility that this holding might be in tension with *Spence*—or indeed, mention *Spence* at any point. The tension, however, is apparent. According to the *Spence* test, an action is expressive only when: (1) “An intent to convey a particularized message [is] present, and [(2)] in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it.”⁸⁷ But according to *Sumnum*, the display of a monument may count as expressive even if neither prong of the *Spence* test is satisfied: (1) there is no particular message that the displayer intends to convey to viewers; and (2) the monument is sufficiently ambiguous that viewers are “almost certain” to reach different interpretations.⁸⁸

It might be argued that this tension is merely an apparent one, since the *Spence* test was never meant to serve as an “expressive conduct” test of general applicability. It could be argued, for example, that the test was never meant to apply to expressive conduct by the government.⁸⁹ But even if this is correct, the central difficulty remains: What test *should* courts be employing in determining whether conduct is expressive in those contexts where *Spence* is inapplicable?

⁸⁴ *Sumnum*, 555 U.S. at 474–75 (emphasis added) (citations omitted).

⁸⁵ *Id.* at 474.

⁸⁶ *Id.* at 474–75.

⁸⁷ *Spence*, 418 U.S. at 410–11.

⁸⁸ *See Sumnum*, 555 U.S. at 474–75.

⁸⁹ This suggestion, however, is hard to reconcile with the Court’s government speech precedents. The Court has emphasized that, in determining whether government conduct is expressive, courts should look to whether the conduct is “[(1)] meant to convey and [(2)] ha[s] the effect of conveying a [] message.” *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 216 (2015) (quoting *Sumnum*, 555 U.S. at 472). It has emphasized that the latter inquiry centers on “observers’ reasonable interpretation of the messages conveyed.” *Id.* This two-factor inquiry is not easily distinguished from the *Spence* test.

Summun was not the first time that the Court confronted the difficulties posed by expressive conduct that is ambiguous. In *Hurley*, GLIB (an organization of gay, lesbian, and bisexual descendants of Irish immigrants) sued the private organizers of Boston's St. Patrick's Day Parade for excluding GLIB from marching.⁹⁰ Explaining their rejection of GLIB's application, the organizers stated that the "decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values."⁹¹ The trial court concluded that, in excluding GLIB from marching, the organizers had violated a Massachusetts statute that prohibited discrimination on the basis of sexual orientation in places of public accommodation.⁹²

The organizers argued that their selection of parade contingents was a valid exercise of their First Amendment rights, but the Massachusetts trial court disagreed.⁹³ It found it "impossible to discern any specific expressive purpose" in the organizers' selection of contingents that would entitle the organizers to First Amendment protection.⁹⁴ It characterized the parade as "eclectic,' containing a wide variety of 'patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes,' as well as conflicting messages."⁹⁵

The organizers appealed the trial court's First Amendment determination, but the Supreme Judicial Court of Massachusetts affirmed. It found "no error in [the trial court's] finding that the parade was not used by the [defendants] for expressive purposes, and that, as a result, the defendants could not cloak their discriminatory acts in the mantle of the First Amendment."⁹⁶ Like the court below, it found it "impossible" to identify any specific expressive goal in the organizers' selection of contingents that might entitle the organizers to First Amendment protection.⁹⁷

The Supreme Court, however, reversed, rejecting the holding of the lower courts that the organizers' selection of contingents fell "within the vast realm of nonexpressive conduct."⁹⁸ The Court

⁹⁰ *Hurley*, 515 U.S. at 561.

⁹¹ *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Boston*, 418 Mass. 238, 242 (1994).

⁹² *Id.* at 245.

⁹³ *Id.*

⁹⁴ *Hurley*, 515 U.S. at 563 (quotation marks omitted).

⁹⁵ *Id.* at 562.

⁹⁶ *Irish-Am.*, 418 Mass. at 251.

⁹⁷ *Id.* at 249.

⁹⁸ *Hurley*, 515 U.S. at 567.

conceded that the organizers had not displayed much selectivity in determining which groups could participate in the parade.⁹⁹ But it rejected the notion—seemingly endorsed by the courts below—that a speaker might “forfeit [First Amendment] protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message.”¹⁰⁰ The Court observed that, if First Amendment protection extended only to actions that convey a “particularized message,” the First Amendment would afford no protection to such “unquestionably shielded” works as the drip paintings of Jackson Pollock, the expressionist compositions of Arnold Schoenberg, or the nonsense verse of Lewis Carroll.¹⁰¹

The Court acknowledged that the organizers were unlikely to communicate any unambiguous, “wholly articulate” message to observers by including a particular contingent in the parade.¹⁰² The inclusion of GLIB, for example, could be interpreted in several ways.¹⁰³ It could, on the one hand, be interpreted as an assertion that gay, lesbian, and bisexual people “have as much claim to unqualified social acceptance as heterosexuals.”¹⁰⁴ But it could also be interpreted merely as recognizing that “some Irish are gay, lesbian, or bisexual.”¹⁰⁵ GLIB’s exclusion, meanwhile, could be interpreted as a rejection of either (or both) of these messages.¹⁰⁶

But such ambiguity, the Court explained, is not atypical of expressive conduct.¹⁰⁷ A musical composition, for example, will frequently fail to communicate any clear, “particularized message” to its intended audience.¹⁰⁸ Nevertheless, musical compositions are “unquestionably shielded” by the First Amendment.¹⁰⁹

There are notable points of tension between *Hurley* and *Spence*. The *Spence* test provides that conduct is expressive only

⁹⁹ *Id.* at 569 (“To be sure, we agree with the state courts that in spite of excluding some applicants, the [organizers are] rather lenient in admitting participants.”).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (quoting *Spence*, 418 U.S. at 411).

¹⁰² *See id.* at 574.

¹⁰³ *See Hurley*, 515 U.S. at 574–75 (discussing the various messages that the organizers might have wished to avoid communicating by excluding GLIB).

¹⁰⁴ *Id.* at 574.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 574–75 (noting that the organizers might “not believe these facts about Irish sexuality to be so, or they [might] object to unqualified social acceptance of gays and lesbians”).

¹⁰⁷ *See id.* at 569.

¹⁰⁸ *See Hurley*, 515 U.S. at 574 (comparing the organizers’ selection of contingents to a composer’s choice of notes).

¹⁰⁹ *Id.* at 569.

when, in the context in which it occurs, the likelihood is great that observers will be able to discern the actor's intended, particularized message.¹¹⁰ *Hurley*, however, makes clear that nonverbal conduct may be “unquestionably shielded” even when no “particularized message” is likely to be conveyed.¹¹¹ The parade organizers' selection of contingents is one illustration of this point, but equally illustrative are the Court's examples involving nonrepresentational art.¹¹² By executing and displaying a drip painting in the style of Jackson Pollock, a painter may be unlikely to convey any “particularized message” to viewers. But as the Court noted, this fact does not render the painter's conduct unexpressive.¹¹³

Summum and *Hurley* raise a common difficulty for the *Spence* test: Conduct may count as expressive even when it is sufficiently ambiguous that different observers are unlikely to converge upon any intended, particularized message. *Summum* in particular makes clear that a speaker need not even intend to convey a specific message to engage in expressive conduct: they may be equally content to convey any one of a range of related messages. In the next Section, a different—and perhaps even more fundamental—difficulty will be explored. The problem, in short, is that not all expressive conduct is designed to impart *messages* to viewers. Some expressive conduct is designed to impart mental states of other kinds.

2. Expression without a message.

Courts have frequently observed that one of the First Amendment's most important functions is to safeguard the continued vitality of the “marketplace of ideas.”¹¹⁴ According to the marketplace metaphor, the truth is most likely to be discovered if ideas “from diverse and antagonistic sources” are all given the opportunity to compete for the public's endorsement.¹¹⁵ On this view, the chief danger posed by government censorship of expression is that it threatens our collective ability to ascertain what is true,

¹¹⁰ *Spence*, 418 U.S. at 410–11.

¹¹¹ *See Hurley*, 515 U.S. at 569.

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *See, e.g., Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018).

¹¹⁵ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

since “the best test of truth is the power of [a] thought to get itself accepted in the competition of the market.”¹¹⁶

This commonplace view about the purpose of the Free Speech Clause raises challenging questions about why the clause should afford any protection to many activities that are commonly described as “expressive.”¹¹⁷ In common parlance, the word “expression” is not restricted to behaviors that express ideas or thoughts. When a person screams in pain, howls in anger, sighs in pleasure, or wails in grief, there may not be any particular idea or thought that they mean to express. But in the colloquial sense of the word, they are undoubtedly “expressing” something. One might refer to such expressive acts as “nonpropositional” forms of expression.

Judge Richard Posner offered a useful discussion of nonpropositional expression in his concurring opinion in *Miller v. Civil City of South Bend*.¹¹⁸ At issue in *Miller* was whether nude, erotic dance for the purposes of entertainment was protected expressive conduct.¹¹⁹ Judge Posner observed that, if one adopted the premise that “the only expression protected by the First Amendment is the expression of ideas and opinions,” one might reasonably conclude that nude dancing is unprotected.¹²⁰ But this premise, Judge Posner explained, is plainly contradicted by the protected status of instrumental music, which only rarely serves as a vehicle for communicating particular “ideas” or “opinions”:

Most nonvocal music has no verbal—paraphrasable—content whatsoever. . . . [E]ven if “thought,” “concept,” “idea,” and “opinion” are broadly defined, these are not what most music conveys; and even if music is regarded as a language, it is not a language for encoding ideas and opinions. Insofar as it is more than beautiful sound patterns, music, like striptease, organizes, conveys, and arouses emotion, though not sexual emotions primarily. If the striptease dancing at the Kitty Kat lounge is not expression, Mozart’s piano concertos . . . are not expression.¹²¹

¹¹⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹¹⁷ See Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 204–07 (2012) (discussing the uneasy fit between protection for nonrepresentational art and various stated purposes of the First Amendment).

¹¹⁸ 904 F.2d 1081 (7th Cir. 1990).

¹¹⁹ *Id.* at 1082.

¹²⁰ *Id.* at 1092 (Posner, J., concurring).

¹²¹ *Id.* at 1093.

Judge Posner offered numerous examples of instrumental music that constitute speech, even though they fail to convey specific messages.¹²² “Music that imitates the twittering of birds,” he observed, “does not convey an ornithological ‘message,’” but may nevertheless constitute expression, insofar as it “organizes, conveys, and arouses emotion.”¹²³ The same, Judge Posner maintained, holds true of nude, erotic dance: “What it expresses . . . is, like most art—particularly but not only nonverbal art—*emotion*.”¹²⁴

The Supreme Court reviewed the Seventh Circuit’s *Miller* decision in *Barnes v. Glen Theatre, Inc.*¹²⁵ The Court praised the opinions below as “comprehensive and thoughtful” and agreed that nude dancing for the purpose of entertainment is “expressive conduct within the outer perimeters of the First Amendment.”¹²⁶ More notable than this conclusion, however, was the abbreviated manner in which the Court reached it: The Court declined to apply, or even to mention, the *Spence* test. It made no attempt to grapple with the question of whether a striptease for the purpose of entertainment is (1) intended or (2) likely to convey a “particularized message” within the meaning of *Spence*. The omission is a striking one, since the Court had reaffirmed the *Spence* test just two terms earlier in *Texas v. Johnson*.¹²⁷ But had the Court applied the *Spence* factors here, it might well have struggled to identify a “particularized message” that audiences were likely to recover from a nude, erotic dance.¹²⁸

The Court was similarly silent about the *Spence* test in *Ward v. Rock Against Racism*,¹²⁹ where it held that playing music is protected nonverbal expression.¹³⁰ As in *Barnes*, the Court said little about what *makes* the playing of music expressive. It noted the

¹²² See *id.* (discussing a variety of works by Richard Strauss, Ludwig van Beethoven, Gustav Holst, and Claude Debussy).

¹²³ *Miller*, 904 F.2d at 1093.

¹²⁴ *Id.* at 1091 (emphasis added).

¹²⁵ 501 U.S. 560 (1991).

¹²⁶ *Id.* at 565–66.

¹²⁷ See *Johnson*, 491 U.S. at 404–06.

¹²⁸ The Court could, of course, have interpreted *Spence*’s first factor very broadly, such that any act that communicates anything at all would count as communicating a “particularized message.” Notably, however, the Court refrained from doing this—perhaps believing that it would throw open the First Amendment floodgates far too wide. Cf. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

¹²⁹ 491 U.S. 781 (1989).

¹³⁰ *Id.* at 790 (“Music, as a form of expression and communication, is protected under the First Amendment.”).

capacity of music “to appeal to the intellect and to the emotions”¹³¹ and observed that totalitarian regimes have sometimes sought to “censor[] musical compositions to serve the needs of the state.”¹³² If the *Ward* Court had applied the *Spence* test, it might have concluded that playing music is expressive only when it is intended to convey a “particularized message” of some kind—political or otherwise. But as in *Barnes*, the Court declined to mention the *Spence* test, and instead reached the more expansive conclusion that musical performances are, in general, protected expression.¹³³ Like the Seventh Circuit in *Miller*, it drew no distinction between playing music to convey “intellectual ideas” and playing music merely to entertain.¹³⁴

The holdings of *Barnes* and *Ward* raise clear challenges for the *Spence* test. According to *Spence*, conduct is expressive only when it is intended to communicate a “particularized message,” and when the “likelihood [is] great” that the message will be understood by observers.¹³⁵ But as Judge Posner explained in *Miller*, many forms of protected music and dance do not seem likely to communicate a particularized message to observers. While the intended effect of a violin concerto *might* be to communicate a particular message, it might also simply be to arouse various emotions. And in the latter case, the *Spence* test would not seem to capture the concerto’s expressive character.

* * *

Summun and *Hurley*, on the one hand, and *Barnes* and *Ward*, on the other, pose distinct, but related difficulties for the task of fashioning an “expressive conduct” test. What the former cases make clear is that conduct may be expressive even if it is intentionally ambiguous—i.e., even if: (1) the actor would be equally content to convey any one of a range of related messages to their audience; and (2) the likelihood is not great that observers will identify any one of these messages as the one that was intended. The latter cases, on the other hand, suggest that conduct may be expressive even if observers are not intended to recover a

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *Miller*, 904 F.2d at 1086 (“[N]ot all music appeals to the intellect. The art/entertainment distinction would remove the shield of the first amendment from many forms of nonverbal art because they fail to communicate a defined intellectual thought.”).

¹³⁵ *See Spence*, 418 U.S. at 410–11.

propositional message of any kind, but are rather intended to experience certain emotions.

Devising an expressive conduct test that surmounts both of these difficulties is no simple task. The challenge, in both cases, is avoiding a rule that is wildly overinclusive. For example, to address the difficulties posed by *Sumnum* and *Hurley*, one might be tempted to maintain that conduct is expressive whenever it conveys even the vaguest of messages to observers. Such a rule, however, would threaten to bring almost all human behavior within the ambit of the First Amendment, since virtually “every activity a person undertakes” contains “some kernel of expression.”¹³⁶ Such a rule would subject all regulation to heightened scrutiny, and would seriously undermine the separation of powers. Similarly, to address the difficulties posed by *Barnes* and *Ward*, one might be tempted to maintain that conduct is expressive whenever it is likely to induce an emotional response in another person. But this definition, too, would be highly overinclusive. By setting fire to a building, one is almost certain to provoke emotional responses in other people. But this does not make every instance of arson a form of speech.¹³⁷

The goal of the next Part is to articulate an expressive conduct test that: (1) captures the expressive character of the conduct at issue in *Sumnum*, *Hurley*, *Barnes*, and *Ward*, but (2) is sufficiently restrained to avoid classifying almost all human behavior as speech. The goal, in short, is to develop a test that is faithful not only to the Court’s particularized judgments about what sorts of conduct *are* expressive, but also to its judgments about what sorts of conduct *are not*.

II. A GRICEAN TEST

Suppose that Macy and Gray are at a boring dinner party, and Macy wants to go home. Macy makes steady eye contact with Gray, checks her watch in an elaborate, exaggerated fashion, and

¹³⁶ See *Stanglin*, 490 U.S. at 25.

¹³⁷ I do not dispute that particular *instances* of arson could constitute speech (e.g., if they clearly convey a political message). Still, a universal prohibition against arson would undoubtedly satisfy the *O’Brien* test. See *infra* Part III. The *O’Brien* test provides that government regulations that incidentally burden speech are constitutionally permissible so long as they further an important government interest unrelated to the suppression of free speech, and so long as they are not “substantially broader than necessary” to further the interest. See *Doe I v. Landry*, 909 F.3d 99, 108, 111 (5th Cir. 2018) (quoting *Ward*, 491 U.S. at 799–800).

then resumes eye contact with Gray. Gray gets the message: Macy wants to leave.

In ordinary parlance, it would be very natural to describe Macy as having “meant something” by her performance, and as having “meant something” quite specific: that she wants to leave. But what, exactly, does it mean to “mean something”? In other words, under what conditions will an ordinary speaker of English describe an actor as having “meant something” by a given action?

It was this question that Paul Grice, one of the twentieth century’s most influential language theorists, set out to answer in a 1957 paper entitled *Meaning*.¹³⁸ In this paper, Grice presented a three-factor test for distinguishing between actions that “mean something” and actions that do not.¹³⁹ Grice, who was not a First Amendment scholar, did not develop this test in the hope of helping courts decide whether nonverbal conduct is “speech” within the meaning of that instrument. Nevertheless, this Part will argue that a lightly amended variant of Grice’s test might prove very useful to courts attempting to draw the difficult distinction between expressive and nonexpressive conduct. The test’s utility, it will be argued, lies in its coherence with Supreme Court precedent: it demonstrates remarkable consistency with the Court’s particularized judgments about what sorts of conduct are expressive and what sorts are not.

The next Section will introduce Grice’s test and explain why a friendly amendment to the test is needed. The following Section will apply the amended test to the varieties of ambiguous and emotive expression surveyed in Part I.B. It will be shown that, unlike the *Spence* test, the amended test captures the expressive character of the conduct at issue in *Summum*, *Hurley*, *Barnes*, and *Ward*.

A. Grice on “Meaning Something”

In *Meaning*, and in a 1969 paper in which he restated the analysis even more perspicuously, Grice offered the following analysis of what it is for a person to “mean something” by an action:

In performing an action, a person *P* has “meant something” if and only if:

¹³⁸ See generally Grice, *supra* note 43.

¹³⁹ See *id.* at 385.

- (1) *P* intended to produce, in some audience *A*, a particular psychological response (e.g., a particular belief);
- (2) *P* intended *A* to recognize *P*'s intention to produce this response; and
- (3) *P* intended the response to occur on the basis of *A*'s recognition of *P*'s intention to produce it.¹⁴⁰

For illustration of how these conditions apply in practice, consider the fictional example involving Macy and Gray with which this Part began. According to Grice, Macy's elaborate watch-checking performance "meant something" because:

- (1) Macy intended to produce in Gray a particular psychological response (i.e., the belief that she wants to leave);
- (2) Macy intended Gray to recognize her intention to produce this response; and
- (3) Macy intended Gray to form the belief that she wants to leave on the basis of his recognition of her intention to impart this belief.

Grice's account of what it is to "mean something" by an action proved to be a tremendously influential one among linguists and philosophers of language and underwent a considerable number of refinements and modifications in a host of later works by Professors Stephen Neale,¹⁴¹ Stephen Schiffer,¹⁴² and (longtime co-authors) Dan Sperber and Deirdre Wilson.¹⁴³ Two particularly compelling objections to the 1957 theory emerged in the ensuing literature.

The first objection concerns the possible vagueness of communicative intentions. The problem, in short, is that even where an actor indisputably means *something* by a given action, there may be no *particular* psychological response that they intend to produce in their audience.¹⁴⁴ Suppose, for illustration, that Jan is out with friends when she spots her partner, Kyle, on a date with someone else. After catching his eye, Jan shakes her head gravely. Jan undoubtedly means *something* by this gesture, but

¹⁴⁰ See *id.* at 385; see also H.P. Grice, *Utterer's Meaning and Intention*, 78 PHIL. REV. 147, 151 (1969).

¹⁴¹ See, e.g., Neale, *supra* note 42, at 549.

¹⁴² See, e.g., Stephen Schiffer, *Intention-Based Semantics*, 23 NOTRE DAME J. FORMAL LOGIC 119, 121 (1982).

¹⁴³ See, e.g., Dan Sperber & Deirdre Wilson, *Beyond Speaker's Meaning*, 15 CROATIAN J. PHIL. 117, 119 (2015).

¹⁴⁴ See generally Stephen Schiffer, *Gricean Semantics and Vague Speaker-Meaning*, 17 CROATIAN J. PHIL. 293 (2017); see also Sperber & Wilson, *supra* note 143, at 121–22.

there might not be any particular response she is concerned to produce in Kyle. Not knowing quite how to feel, she might be equally content to produce any one of the following responses: (1) the belief that she is enraged; (2) the belief that she is severely disappointed; or (3) the belief that their relationship is at an end. This example poses a challenge for Grice's test, since under these circumstances, the first clause of the test is not satisfied.¹⁴⁵

A second objection concerns the test's third clause. As Stephen Neale, one of the most influential defenders of Grice's work, observed in a 1992 paper, a person can "mean something" by an action even when the third clause is not satisfied.¹⁴⁶ Neale offered a memorable example. Suppose that a speaker *S* says the following to a hearer *H* in a squeaky voice: "I can speak in a squeaky voice."¹⁴⁷ In making this utterance, *S* undoubtedly means something: that *S* can speak in a squeaky voice. But while the first two clauses of Grice's test are satisfied, the third is not. *S* intends: (1) that *H* form the belief that *S* can speak in a squeaky voice; and (2) that *H* recognize *S*'s intention to produce this belief. But *S* could not reasonably intend *H* to form the belief that *S* can speak in a squeaky voice *on the basis* of *H*'s recognition of *S*'s intention to impart this belief.¹⁴⁸ After all, as *S* knows, *H* can hear *S*'s voice with his own ears.

In recognition of these two difficulties, this Comment will employ a lightly modified version of Grice's test that dispenses with the third clause, and that makes allowance for the possibility of vague communicative intentions.¹⁴⁹ I will refer to it, simply, as the "Amended Test" (AT). According to AT, a person's action "means something"—i.e., is expressive—when and only when two conditions are satisfied:

In performing action *X*, a person *P* has "meant something" if and only if:

(1) *P* intended *X* to cause, in some audience *A*, one or more of a set of psychological responses; and

¹⁴⁵ Grice himself acknowledged in later work that a person who has "meant something" by an action will not always intend to produce a specific psychological response in an audience. See H.P. GRICE, *STUDIES IN THE WAY OF WORDS* 39–40 (1991) (noting the "indeterminacy that many actual implicata do in fact seem to possess"). The challenging question is how best to modify the 1957 theory in light of this reality.

¹⁴⁶ See Neale, *supra* note 42, at 547–49.

¹⁴⁷ See *id.* at 549.

¹⁴⁸ See *id.*

¹⁴⁹ For discussion of why Grice thought the third clause was necessary to his analysis, see *id.* at 548.

(2) *P* intended *A* to recognize *P*'s intention to produce one or more such responses.

By a “psychological response,” I mean a mental state of *A* that occurs as a result of *A*'s perception of *P*'s action.

The following Section demonstrates that AT captures the expressive character of the conduct at issue in *Sumnum*, *Hurley*, *Barnes*, and *Ward*, and therefore exhibits two important virtues of an “expressive conduct” test: it is both comprehensive and predictive. Part III will show that AT is nevertheless a restrained theory, that is likewise faithful to Supreme Court precedent about what sorts of conduct are *not* expressive.¹⁵⁰

At the outset, it is natural to wonder how it could be anything but a puzzling coincidence if AT cohered with the Supreme Court's particularized judgments about what sorts of conduct are expressive. But the coincidence appears much less puzzling if one reflects on the purpose of Grice's theory: to identify, as precisely as possible, the conditions under which an ordinary speaker of English would describe a person as having “meant something” by an action. The hypothesis explored herein is that it is this ordinary conception that the Supreme Court has usually employed when determining whether conduct is “speech” within the meaning of the First Amendment. In cases where the ordinary conception departs from the *Spence* test, application of the *Spence* test has invariably been withheld.

B. Applying the Amended Test

As noted above, the purpose of this Section will be to demonstrate that AT captures the expressive character of the conduct at issue in *Sumnum*, *Hurley*, *Ward*, and *Barnes*. But before proceeding, it will be useful to say a few words about how courts have

¹⁵⁰ It is worth noting that, while this paper is the first to defend AT, it is not the first to consider the possibility of using a (broadly) Gricean theory of meaning to distinguish between expressive and nonexpressive conduct. In a 1993 paper, Professor Peter Meijes Tiersma proposed using a modified version of Grice's 1957 test for this purpose. Tiersma's modified test provided that conduct is expressive only if it is intended to “convey information” to an audience. See Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of Speech*, 1993 WIS. L. REV. 1525, 1561 (1993). As Tiersma recognized, this requirement made the test a poor fit for genres of artistic expression like dance, sculpture, and instrumental music, wherein the artist may not intend to inform their audience of anything. See *id.* at 1531 (acknowledging that “painting, sculpture, dancing [and] instrumental music raise[] issues” better left to future theorists). As demonstrated below, AT does not share this limitation. See *infra* Part II.B.

historically applied the *Spence* test in determining whether conduct is expressive.

The *Spence* test provides that a nonverbal action is expressive when: (1) “An intent to convey a particularized message [is] present, and [(2)] in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it.”¹⁵¹ To determine whether the first factor is satisfied, a court must determine whether a party who asserts that they acted with the intention to convey a particularized message *actually had* that intention. But how is a court to know?

As other authors have observed, courts frequently proceed by determining what intentions it is reasonable to impute to the claimant on the basis of their outward behavior.¹⁵² The question is thus not what message the party *actually* intended to convey, but rather what message they could reasonably have expected to convey by acting as they did. For example, would a reasonable person have thought it possible to communicate the message that “America st[ands] for peace” by superimposing peace signs on an American flag and hanging it, inverted, from their window?¹⁵³ If so, a court will likely credit the party’s assertion that they acted with the relevant intention.

Looking to imputed intent saves courts from engaging in high-flown speculation about what a party’s actual (but perhaps entirely unreasonable) intentions were. In what follows, I will assume that courts will employ the same reasonable person approach when determining whether a party has satisfied both conditions of AT. The operative question: If a reasonable party actually had the intentions that AT requires, might they have behaved as the party actually did? Or would they, rather, have known that it would likely be impossible to fulfill the relevant intentions through the party’s actual course of conduct?

In ascertaining what a party could reasonably have hoped to communicate via a given course of conduct, the Court has historically reviewed many different kinds of evidence, including facts about: (1) the context in which the allegedly expressive conduct occurred;¹⁵⁴ (2) the meanings and cultural associations of any

¹⁵¹ *Spence*, 418 U.S. at 410–11.

¹⁵² See Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1858 (1997) (“[T]o the extent that intent is relevant, it is imputed intent, rather than actual intent, that informs the symbolic-speech analysis.”).

¹⁵³ See *Spence*, 418 U.S. at 408.

¹⁵⁴ *Id.* at 410; see also *Johnson*, 491 U.S. at 405–06.

symbols employed;¹⁵⁵ (3) the expressive genre, if any, to which the conduct allegedly belonged;¹⁵⁶ and (4) the shared knowledge of observers of the conduct.¹⁵⁷ In the sections that follow, I will assume that courts would appeal to these same categories of evidence when applying AT and determining what intentions are reasonably imputable to a party who claims that their conduct was expressive.

1. *Summum* and *Hurley*.

To illustrate the reasonable person approach discussed above, it will be useful to begin with the Supreme Court's expressive conduct determination in *Summum*. In *Summum*, the Court held that, "[b]y accepting a privately donated monument and placing it on city property, a city engages in expressive conduct."¹⁵⁸ It reached this conclusion despite recognizing two important facts about "the way monuments convey meaning."¹⁵⁹ First, there is, as a general rule, no such thing as "the message" conveyed by a monument: a given monument, even if it features text, is "almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable."¹⁶⁰ Second, the ambiguity of monuments is not some little-known defect of which monument displayers are typically unaware. Monuments are frequently "*intended* to be interpreted . . . in a variety of ways."¹⁶¹

According to AT, these two facts about monuments stand in absolutely no tension with the *Summum* Court's holding. Under AT, the displayers of a monument need not intend to evoke any particularized message in viewers in order for the display to count as expressive. To engage in expressive conduct, they need only: (1) intend the displayed monument to produce, in its audience, one or more of a range of psychological responses; and (2) intend the audience to recognize their intention to produce one or more such responses.

¹⁵⁵ See *Spence*, 418 U.S. at 410; see also *Johnson*, 491 U.S. at 405.

¹⁵⁶ See *Summum*, 555 U.S. at 473–74; see also *Hurley*, 515 U.S. at 568–70.

¹⁵⁷ See, e.g., *Spence*, 418 U.S. at 410 (noting recent events that would have been common knowledge among observers of defendant's conduct).

¹⁵⁸ *Summum*, 555 U.S. at 476.

¹⁵⁹ See *id.* at 474.

¹⁶⁰ See *id.* at 475.

¹⁶¹ See *id.* at 474–75 (emphasis added) (discussing examples of public monuments that "illustrate this phenomenon").

Suppose, for illustration, that the question arises whether the New York City Department of Parks & Recreation engaged in expressive conduct by displaying, at Strawberry Fields, the “Imagine” memorial discussed by the *Summum* Court.¹⁶² Suppose the Department asserts that it: (1) displayed the monument with the intention that viewers would reflect on the career of John Lennon, or else, on the value of imagination more generally; and (2) intended viewers to recognize its intention to induce reflection on one or more of these general themes.

Applying the reasonable person approach, a court would likely credit both of these assertions, and therefore hold that both conditions of AT are satisfied.¹⁶³ In determining whether the Department could reasonably have intended to achieve its stated goals by displaying the “Imagine” monument, a court would likely attend to a variety of facts, such as: (1) the celebrity of John Lennon; (2) the proximity of the monument to the site of Lennon’s assassination; (3) the popularity of the song “Imagine”; and (4) the resultant connotations of the word “Imagine” in popular culture. Given these facts, viewers of the monument might reasonably be expected to engage in reflections of the intended variety. Moreover, given the role of monuments in our visual culture, it would be entirely reasonable to expect viewers to recognize that the monument was intended to stimulate such reflection. This is, after all, a commonplace function of monuments. There might, of course, be certain viewers who would not be influenced in the desired way—e.g., because they were simply unfamiliar with John Lennon or with the song “Imagine.” But a course of conduct need not achieve an actor’s intentions with perfect efficacy in order to count as reasonable.

AT would therefore appear to comport well with the *Summum* Court’s holding that a city’s display of a public monu-

¹⁶² *See id.*

¹⁶³ Under the reasonable person approach, a court’s task is to determine what intentions are reasonably imputable to a First Amendment claimant on the basis of the available evidence. In practice, a court need only consider whether the evidence makes it reasonable to impute an intention to the claimant that satisfies AT’s second prong. The reason for this is as follows: If a person reasonably intends for an audience to *recognize* their intention to produce a psychological response in that audience, the person must also *have* an intention to produce that psychological response. An intention that does not exist cannot be recognized. It is therefore not only unnecessary but also impossible in practice to evaluate AT’s prongs in perfect isolation from one another.

ment constitutes expressive conduct, despite the ambiguous manner in which “monuments convey meaning.”¹⁶⁴ According to AT, the display of a monument may be expressive even if the monument is intended to be interpreted in different ways by different observers, with no particular message emerging as the dominant one.

AT comports equally well with the Court’s expressive conduct determinations in *Hurley*. In *Hurley*, the Court explained that conveying a “particularized message” is not a precondition of First Amendment protection.¹⁶⁵ It applied this general principle in two ways. First, the Court explained that nonverbal behaviors such as executing a drip painting are “unquestionably shielded” by the First Amendment.¹⁶⁶ Second, the Court held that a parade organizer’s selection of a contingent to participate in the parade constitutes expressive conduct, even if no particularized message is communicated thereby.¹⁶⁷ AT appears to be straightforwardly consistent with both of these determinations.

Consider first the Court’s determination about the protected status of nonrepresentational art forms like drip painting. Suppose that an artist executes a highly ambiguous, nonrepresentational painting in the style of Jackson Pollock. Suppose she disavows any intention to convey a particular message, asserting that “[t]he notion that all art worthy of the name has a ‘message’ is philistine.”¹⁶⁸ She explains that she had the following intentions in displaying the work: (1) that viewers should reflect on some, or all, of the formal features of the work; and (2) that viewers should recognize her intention to stimulate such engagement. She further explains that she had no intention that all viewers should engage in the same reflections.

If the artist’s assertions are to be credited, then both factors of AT are satisfied because the artist: (1) intended to induce one or more of a range of contemplated psychological responses in viewers, and (2) intended viewers to recognize her intent to induce some such response. Applying the reasonable person approach, a court would have no difficulty crediting the artist’s assertions. Given commonplace understandings of what a painting

¹⁶⁴ *Sumnum*, 555 U.S. at 474.

¹⁶⁵ *Hurley*, 515 U.S. at 569 (quoting *Spence*, 418 U.S. at 411).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 574.

¹⁶⁸ *Miller*, 904 F.2d at 1094 (Posner, J., concurring).

is, and given that basically all paintings function as open invitations to viewers to reflect on their formal properties, it would be entirely reasonable for the artist to attempt to satisfy her asserted intentions by presenting the painting for her viewers' consideration. So commonplace are such intentions among painters that a court might find them present even in the absence of an explicit assertion.

Consider next the *Hurley* Court's holding concerning the expressive character of a parade organizer's selection of contingents. The Court held that if the organizers were compelled to admit GLIB to the parade, that would constitute compelled expressive conduct.¹⁶⁹ AT would seem to be perfectly consistent with this holding. According to the reasonable person approach, in determining whether a compelled action is expressive, a court must first determine what intentions the action objectively manifests—i.e., what intentions observers would likely impute to the agent who performed it, on the assumption that the agent was behaving rationally. The court must then determine whether the imputed intentions satisfy AT's two factors.

Applying this analysis, a court would almost certainly find a parade organizer's inclusion of a particular contingent to be expressive. Consider, for illustration, the inclusion of GLIB. As the *Hurley* Court observed, there is no "wholly articulate" message that the inclusion of GLIB would unambiguously communicate to observers.¹⁷⁰ GLIB's inclusion could, as noted above, be interpreted as a full-throated declaration that gay, lesbian, and bisexual people "have as much claim to unqualified social acceptance as heterosexuals."¹⁷¹ But it could also be interpreted quite a bit more narrowly—e.g., as merely recognizing that "some Irish are gay, lesbian, or bisexual."¹⁷² While it would be difficult for observers to infer any very specific message from GLIB's inclusion, it would be entirely reasonable for observers to impute at least two intentions to the organizers: (1) an intent to convey some accepting message or other to observers; and (2) an intent that observers should recognize the organizer's intent to impart some such message. Parades, after all, are standardly interpreted as

¹⁶⁹ *Hurley*, 515 U.S. at 574–75.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

manifesting their organizers' views about what groups merit inclusion.¹⁷³ Since imputed intentions (1) and (2) satisfy AT's two prongs, it follows from AT that the forced inclusion of GLIB is expressive.¹⁷⁴

2. *Ward* and *Barnes*.

As discussed above, *Ward* and *Barnes* pose a different challenge for a court wishing to articulate a general-purpose expressive conduct test than *Sumnum* and *Hurley*. The problem posed by the former cases is not that observers of expressive conduct may, in certain cases, be almost certain to recover entirely different messages. Nor is the problem that actors engaged in expressive conduct may sometimes be equally content to convey any one of a range of related messages to their audience. The problem is rather that actors engaged in expressive conduct may not seek to convey a message at all, but simply to induce an emotional response in their audience.¹⁷⁵

This is not, however, a problem for AT, which defines the notion of a "psychological response" broadly enough to encompass not only cognitive states, but also affective ones. According to AT, a performer engages in expressive conduct whenever they: (1) intend their performance to induce one or more of a range of possible emotional responses in some audience; and (2) intend the audience to recognize their intention to produce some such response. Suppose, for illustration, that the question arises whether Mystic Mark, a popular exotic dancer, is engaged in expressive conduct whenever he performs at bachelorette parties.¹⁷⁶ Mark asserts

¹⁷³ *Id.* at 575 (observing that it is "customary" for parade organizers to make such determinations).

¹⁷⁴ It could be objected that, if observers were aware that the inclusion of GLIB was compelled by law, then they would *not* interpret the inclusion as expressive. But this is true of all compelled speech. I am assuming that, when applying the reasonable person approach in compelled speech cases, courts will follow the usual practice of considering how observers would interpret the conduct at issue if they were *not* aware that it was performed under government compulsion. See *Hurley*, 515 U.S. at 576–77 (giving no consideration to the probable effect on observers of the knowledge that GLIB's inclusion was compelled).

¹⁷⁵ See *supra* Part I.B.2.

¹⁷⁶ Cf. *Eggert Group, LLC v. Town of Harrison*, 372 F. Supp. 2d 1123, 1139 (E.D. Wis. 2005) (characterizing nude dancing at a bachelorette party as a paradigmatic example of expressive conduct not subject to secondary effects regulation); *Clarkson v. Town of Florence*, 198 F. Supp. 2d 997, 1013 (E.D. Wis. 2002) (same); *Schultz v. City of Cumberland*, 228 F.3d 831, 842–43, 849 (7th Cir. 2000); *Dean v. Town of Hempstead*, 527 F. Supp. 3d 347, 402 n.31 (E.D.N.Y. 2021).

that he has the following intentions in giving his performances: (1) that viewers should experience such emotions as amusement, arousal, or excitement; and (2) that viewers should recognize that the performances are intended to produce emotional responses of this sort.

Applying the reasonable person approach, a court should almost certainly credit both of Mark's assertions, and therefore conclude that AT's two prongs are satisfied. A variety of considerations support this conclusion. First, it is common knowledge that there exists a market for erotic performances only because they tend to produce such emotions as amusement, excitement, and sexual arousal. The intent to produce such emotions can therefore reasonably be imputed to someone who performs such dances professionally. Second, an exotic dancer has very good reason to hope that observers of their performances will recognize their intent to produce such emotions. If an audience member fails to recognize that the performance was intended to be arousing, amusing, or exciting, they are unlikely to conclude that the performance was a very successful one. AT would therefore appear to easily capture the expressive character of erotic dance for the purposes of entertainment.

Consider, finally, the expressive character of musical performances, as discussed in *Ward*.¹⁷⁷ Suppose a musician claims that their musical performances constitute expressive conduct because, in giving each performance, the musician: (1) intends that the audience should experience one or more of a range of possible emotional responses; and (2) intends that the audience should recognize the musician's intent to induce some such response.

Even if the musician failed to make these assertions, a court applying the reasonable person approach should almost certainly find (1) and (2) to be true, and thus conclude that AT is satisfied. As Judge Posner noted in *Miller*, evoking emotional responses is an extremely commonplace objective of musical performances.¹⁷⁸ Absent some compelling indication to the contrary, an observer of such a performance is therefore likely to conclude that inducing such a response is among the performer's objectives. To the extent that a performer is rational, they will not intend otherwise. Moreover, like exotic dancers, musicians have very good reasons to

¹⁷⁷ *Ward*, 491 U.S. at 790.

¹⁷⁸ *Miller*, 904 F.2d at 1093.

hope that audiences will recognize their intention to impart specific emotions. Not only will this recognition enhance the connectedness between performer and audience that is the objective of so many musical performances, it will also enhance the audience's appreciation of the performance's virtuosity—i.e., how *well* the performer succeeded in evoking the emotions that they were intending to evoke. A court should therefore have little difficulty crediting a musician's assertion that they were concerned that the audience should “get” the performance—i.e., appreciate what they were trying to do.

While AT would appear to capture the expressive character of the conduct at issue in *Sumnum*, *Hurley*, *Barnes*, and *Ward*, one might worry that AT achieves this objective by adopting a far too generous conception of speech. Part III will address this concern. It will be argued that, despite being sufficiently flexible to encompass the behaviors at issue in these cases, AT is nevertheless a restrained test that coheres with Supreme Court precedent about what sorts of conduct are *not* expressive. It will be shown that AT exhibits kinds of restraint that the *Spence* test does not.

III. IS THE AMENDED TEST RESTRAINED?

If AT captured the expressive character of the conduct at issue in *Sumnum*, *Hurley*, *Barnes* and *Ward* only by bringing all human behavior within the protection of the First Amendment, AT would not be a very appealing rule. The implications of such a rule for the separation of powers would, for obvious reasons, be unacceptable. If all human conduct were subject to First Amendment protection, then all government regulation would be subject to heightened scrutiny—intermediate scrutiny, at a minimum.

Intermediate scrutiny is applied to content-neutral regulations of speech that are insensitive to the messages that particular speech acts express.¹⁷⁹ Content-based regulations, on the other hand, are subject to strict scrutiny, and do not survive unless they are the least speech-restrictive means of furthering “a compelling state interest.”¹⁸⁰ Assuming that most regulations of conduct would be subject only to intermediate scrutiny, courts would

¹⁷⁹ See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

¹⁸⁰ See *Boos v. Barry*, 485 U.S. 312, 321 (1988).

likely apply the *O'Brien* test to most challenged regulations.¹⁸¹ Courts would inquire, of any such regulation: (1) whether “it [was] within the constitutional power of the Government”; (2) whether “it further[ed] an important or substantial government interest”; (3) whether that “interest [was] unrelated to the suppression of free expression”; and (4) if so, whether the “incidental restriction on alleged First Amendment freedoms [was] no greater than [] essential to the furtherance of that interest.”¹⁸²

Needless to say, this standard of review would be a far cry from the highly permissive rational basis review that courts ordinarily apply to enactments of the legislature within its constitutionally enumerated powers. Courts would frequently be called upon to determine whether a given enactment “burden[ed] substantially more speech than [was] necessary to further the government’s legitimate interests.”¹⁸³ This would give courts considerable power to second-guess the legislature’s considered judgments about the most effective means to achieve its constitutional prerogatives.

The *Spence* test attempts to avoid this Lochnerian result by adopting a relatively narrow definition of speech, and thus limiting how often the *O'Brien* test will be applied. It might be supposed that AT’s definition, because it is “broader” than *Spence*’s, is also less respectful of the separation of powers. But this is, in fact, a gross oversimplification: The set of behaviors that constitute speech, according to the *Spence* test, is *not* a subset of the set of behaviors that constitute speech according to AT. As will be seen below, there are some behaviors that the *Spence* test entails are speech that AT entails are not. Thus, the *Spence* test is not a “more” restrained test than AT: it simply incorporates different restraints.

For illustration of the point, it will be useful to consider the Supreme Court’s most recent holding to the effect that a course of conduct was *not* expressive. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*,¹⁸⁴ FAIR, an association of law schools, sued to enjoin the enforcement of the Solomon Act,¹⁸⁵ which FAIR argued violated the schools’ First Amendment

¹⁸¹ The *O'Brien* test is applied to regulations of speech mixed with conduct, in cases where the government’s interest is in regulating the conduct element. See *Johnson*, 491 U.S. at 407.

¹⁸² *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

¹⁸³ See *Ward*, 491 U.S. at 799.

¹⁸⁴ 547 U.S. 47 (2006).

¹⁸⁵ 10 U.S.C. § 983(b).

rights.¹⁸⁶ The schools wished to deny military recruiters access to their campuses on the grounds that they disapproved of the military's "Don't Ask, Don't Tell" policy.¹⁸⁷ The Solomon Act, however, provided that law schools were ineligible to receive certain federal funds unless they granted military recruiters access to campus and to students "that is at least equal in quality and scope to the access . . . provided to any other employer."¹⁸⁸

In determining whether the Solomon Act violated the FAIR schools' First Amendment rights, the Court considered whether the conduct that the Act penalized—i.e., refusing equal access to military recruiters—was expressive conduct protected by the First Amendment.¹⁸⁹ It held that it was not, on the grounds that it was not "inherently expressive."¹⁹⁰ The Court observed that, if the law schools had not verbally explained their exclusion of military recruiters, observers would have had no way of knowing that the schools meant to express any message of disapproval by this conduct; they might well have thought that the "recruiters decided for reasons of their own that they would rather interview someplace else."¹⁹¹ But adding a verbal explanation to conduct is not "enough to create expressive conduct."¹⁹² Genuinely expressive conduct is communicative even without an accompanying verbal explanation: it is, in other words, "inherently expressive."¹⁹³

The FAIR Court's holding is seemingly at odds with the *Spence* test, which does not require that conduct be "inherently expressive" in order to constitute speech. It provides that conduct is expressive when: (1) "An intent to convey a particularized message [is] present, and [(2)] in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it."¹⁹⁴ The law schools' exclusion of the recruiters would seem to satisfy both factors. First, the law schools did

¹⁸⁶ *FAIR*, 547 U.S. at 53.

¹⁸⁷ *Id.* at 52.

¹⁸⁸ 10 U.S.C. § 983(b).

¹⁸⁹ *FAIR*, 547 U.S. at 65–66.

¹⁹⁰ *Id.* at 66.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *See id.* The Court distinguished *Hurley* on the grounds that the conduct at issue there was inherently expressive. *FAIR*, 547 U.S. at 64 ("Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive."). It stated that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters." *Id.* at 49.

¹⁹⁴ *Spence*, 418 U.S. at 410–11.

intend to convey a particularized message: their disapproval of “Don’t Ask, Don’t Tell.” Second, “in the surrounding circumstances,” the likelihood *was* “great” that that message would be understood by observers. The problem, from the point of view of the *FAIR* Court, is that the “surrounding circumstances” included a verbal explanation of the conduct at issue. And a verbal explanation cannot “transform conduct into ‘speech.’”¹⁹⁵

AT is more easily reconciled with the Court’s determination that the *FAIR* schools were not engaged in expressive conduct. AT’s first factor provides that an action is expressive only when the actor intended the action to *cause* one or more of a range of psychological responses. If a party asserts that they had such an intention, a court (applying the reasonable person approach) will inquire whether they reasonably could have thought that the action would cause the response in question. In *FAIR*, the Court determined that the law schools could not reasonably have intended the act of exclusion, on its own, to cause the psychological response that the schools allegedly intended to induce (i.e., recognition of their strong opposition to “Don’t Ask, Don’t Tell”).¹⁹⁶ If this determination was correct, then according to AT, the Court was right to conclude that the act of exclusion was not expressive.¹⁹⁷

This is, of course, a big “if.” It could well be the case that viewers would have understood what the schools meant to convey by excluding the recruiters from campus, even without a verbal explanation. It could also be the case that the act of exclusion would have communicated a message that could not have been communicated by words alone. If either of these claims is correct, then the *FAIR* Court’s decision was mistaken by the Court’s own reasoning: The act of exclusion was inherently expressive, even apart from the verbal explanation. My point here is not to endorse the correctness of the *FAIR* Court’s conclusion, but only to demonstrate how well the Court’s *reasoning* coheres with AT. If the Court’s factual premises are correct, its conclusion is precisely the one that AT would counsel. On the other hand, if the schools reasonably could have intended to communicate a message via the nonverbal conduct alone—or a message different from the one conveyed by the verbal explanation—then AT would counsel the

¹⁹⁵ *FAIR*, 547 U.S. at 66.

¹⁹⁶ *See id.*

¹⁹⁷ *Id.*

opposite conclusion. In either case, AT seems to respect the Court's own reasoning.

FAIR illustrates an important fact about the relationship between AT and the *Spence* test: while AT is a more forgiving test in some respects, it is a less forgiving test in others. The tests both avoid throwing open the First Amendment floodgates to all actions whatsoever. But they incorporate very different restraints. AT's causation language is a notable example, since it renders AT compatible with the Supreme Court's holding that conduct must be "inherently expressive" to count as speech. The *Spence* test, containing no such requirement, is more difficult to reconcile with the *FAIR* Court's determination. This is a notable limitation, since *FAIR* is one of the few cases in which the Supreme Court has ever held that conduct was not expressive.

For another illustration of how AT's causation language limits the category of "speech," consider the following example, which is due to Professor Jed Rubenfeld.¹⁹⁸ Suppose *A* is arrested for driving sixty-five miles per hour in a fifty-five miles per hour zone. The car in which *A* is driving bears a sign that reads, "I strongly oppose the 55 miles per hour speed limit and, for this reason, drive 65 miles per hour even when it's illegal." *A* is duly convicted of a traffic violation but argues on appeal that the traffic statute is unconstitutional as applied to his conduct.¹⁹⁹ He argues that the statute should be subjected to heightened scrutiny under *O'Brien*, since his actions were clearly expressive under the *Spence* test: an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by observers.²⁰⁰

As Rubenfeld observes, a court should almost certainly decline to apply heightened scrutiny in this case.²⁰¹ If the sign accompanying *A*'s conduct were enough to trigger heightened scrutiny, then any criminal statute could easily be subjected to the same treatment by a clever criminal wearing an appropriately labeled T-shirt. But as Rubenfeld notes, the *Spence* test does not enable a court to dispose of *A*'s conduct as nonexpressive: both *Spence* factors are apparently satisfied.²⁰²

¹⁹⁸ See Rubenfeld, *supra* note 26, at 771–75.

¹⁹⁹ See *id.* at 774–75.

²⁰⁰ See *id.*

²⁰¹ *Id.* at 771.

²⁰² *Id.* at 774–75.

AT, by contrast, entails that *A*'s speeding was nonexpressive. According to AT, in determining whether the speeding was expressive, a court should inquire: (1) whether *A* could have reasonably intended, merely by speeding, to cause the psychological effect that he supposedly intended (i.e., awareness of his deep opposition to the traffic statute); and (2) whether *A* could reasonably have intended observers to *recognize* the intention described in (1). In this case the answer to both questions is seemingly "no." Were it not for the accompanying sign, observers of *A*'s driving would have had no way of inferring an intent on *A*'s part to cause such a response. For all they would be able to infer, *A* merely intended to reach his destination as quickly as possible. In contrast, *A*'s display of the sign reasonably could have been intended to produce the awareness in question. The act of display, however, is not what the statute criminalized.

This example, like the one before it, illustrates the significant constraints that AT's causation requirement imposes on First Amendment protection. It is important to note, however, that AT's causation requirement is not the only meaningful constraint that the test embodies. Equally, if not more important, is AT's second clause.

An incredibly wide variety of human behavior could be convincingly argued to involve an intention to produce a psychological response of some kind. What is distinctive about "speech," according to AT's second clause, is its self-revelatory character. A person engaged in expressive conduct not only intends to produce a psychological response of some kind in an audience, but—by one and the same act—to reveal that intention to their audience. According to AT, the intentional revelation of one's own intentions is an essential feature of speech.

An example may help to illustrate the point. If *M*, a murderer, tampers with the scene of a killing in such a way that police are almost certain to conclude that *D*, an innocent person, committed the crime, few would be tempted to conclude that *M* had thereby engaged in "speech"—despite having clearly intended to produce a particular belief in the police. The problem, according to AT, is that condition (2) is not satisfied: *M* did not intend the police to *recognize M's* intention to induce this belief. *M's* actions lacked the self-revelatory character that is an essential feature of expressive conduct. If *M* had, on the other hand, left a signed note identifying *D* as the killer, the note clearly would have satisfied

both of AT's prongs. But this is the intuitively correct result; the note is intuitively expressive.

For a second illustration of the restraining function of AT's second clause, suppose that *T*, a master thief, steals a valuable sculpture from the Metropolitan Museum of Art. *T* does not particularly care for the sculpture but is thrilled by the idea of the museum's curators suddenly discovering, to their great surprise, that the sculpture has mysteriously disappeared. Clause (1) of AT is satisfied, since it would be perfectly reasonable for *T* to intend her actions to produce this psychological effect. Clause (2), however, is not, since *T* could not reasonably expect the curators to be able to recognize her intention to produce this effect. For all the curators would be able to infer, *T* might have strongly preferred that the theft go undiscovered for as long as possible. If *T* had taken some affirmative step to reveal her intentions to her audience (e.g., leaving a mocking note), clause (2) might then have been satisfied. But the note itself would very plausibly constitute speech.

For a third illustration, consider an issue that has recently confronted lower courts: whether participation in a competitive fighting sport, such as boxing or mixed martial arts, constitutes expression protected by the First Amendment.²⁰³ Suppose that *F*, a skilled fighter, participates in a mixed martial arts fight with the intent not just of winning, but of displaying great technical skill in the process. *F* defeats her opponent handily, and in so doing, conveys to her viewers that she is an extremely capable fighter. By conveying this "message," has *F* engaged in expressive conduct? Every court to consider the question thus far has held that conduct such as *F*'s is not inherently expressive.²⁰⁴ AT's second clause is straightforwardly consistent with this holding. For even if *F* very much wants viewers to believe that she is skilled, she may have no interest whatsoever in whether viewers *recognize* her intention to produce this belief. She may, in fact, strongly

²⁰³ See, e.g., *Jones v. Schneiderman*, 974 F. Supp. 2d 322, 334–35 (S.D.N.Y. 2013); *Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So.2d 496, 500–02 (Fla. Dist. Ct. App. 2003); *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y. 1995).

²⁰⁴ See *Jones*, 974 F. Supp. 2d at 336 (holding that "professional MMA . . . lacks [] essential communicative elements"); see also *Top Rank*, 837 So.2d at 498 (holding that "a boxing match does not constitute either pure or symbolic speech"); *Fighting Finest*, 898 F. Supp. at 195 (expressing "grave doubts" about whether plaintiffs' participation in an international boxing league constituted expressive conduct).

prefer that they not recognize this intention, lest it undermine her image of steely self-assurance.²⁰⁵

For a final illustration, suppose that *A*, an arsonist, sets fire to a home with the intention of producing terror in the residents. Suppose *A* takes precautions to ensure that the fire looks like an accident. Under the *O'Brien* test, even if *A*'s conduct were speech, it would not be shielded against criminal penalty.²⁰⁶ But AT entails that *A*'s conduct is not speech. Condition (2) provides that an action is expressive only when it is performed with the intention that observers *recognize* the actor's intent to produce a psychological effect in them. But here, *A* did not intend such recognition.²⁰⁷

As the above illustrations demonstrate, AT's causation and self-revelation requirements exclude a significant amount of conduct from the category of "speech" and therefore insulate much government regulation against heightened scrutiny. Whether AT excludes "enough" conduct from First Amendment coverage can only be settled with reference to the Court's particular holdings about what sorts of conduct are expressive and what sorts are not. And by this measure, AT enjoys clear advantages over the *Spence* test, which, as demonstrated above, fails to explain a variety of the Court's expressive conduct holdings.

CONCLUSION

This Comment has sought to articulate an "expressive conduct" test that coheres with Supreme Court precedent. I have argued that the *Spence* test fails to capture the expressive character of a variety of behaviors that the Supreme Court has determined to be expressive. In itself, this does not show that the *Spence* test is no longer good law. After all, the *Spence* test might conceivably be a test with a considerably narrower sphere of applicability

²⁰⁵ None of this is to deny that a fighter could communicate with their fans in all sorts of ways during a match. The point is simply that the act of participating in a match is not inherently expressive.

²⁰⁶ After all, the government has a substantial interest in preventing arson that is not related to the suppression of speech. A content-neutral law prohibiting arson is not "substantially broader than necessary to achieve the government's interest." See *Ward*, 491 U.S. at 800; see also *Tinius v. Choi*, 2022 WL 899238, at *11 (D.D.C. Mar. 28, 2022).

²⁰⁷ One can imagine an arsonist taking measures to ensure that the fire is recognized as deliberate and as intended to produce a psychological effect. He might, for example, create a recognizable symbol using accelerant. Such conduct might well constitute speech under both AT and the *Spence* test. But, of course, this speech would be subject to regulation under *O'Brien*, given the government's substantial, non-speech-related interest in preventing arson. See *Ward*, 491 U.S. at 800; see also *Smith v. Goguen*, 415 U.S. 566, 594 (1974) (Rehnquist, J., dissenting).

than the Court has ever explicitly stated. But even if this is correct, the question remains: How should courts determine whether conduct is expressive in those contexts where *Spence* does not apply?

I have argued that AT offers an answer to this question that demonstrates striking consistency with the Supreme Court's particularized judgments about what sorts of conduct are expressive. Like the *Spence* test, AT imposes meaningful restraints on what constitutes "speech," and thereby avoids bringing every behavior containing "some kernel of expression" within the protection of the First Amendment.²⁰⁸ But AT's choice of restraints enables the test to capture the expressive character of a wider variety of "unquestionably shielded" conduct.²⁰⁹ AT might therefore serve as useful inspiration to any court seeking to fashion a replacement for, or supplement to, the *Spence* test.

Different courts might reasonably implement AT in importantly different ways. The most conservative implementation would employ AT only in cases that are factually similar to one or more of the problem cases discussed in Part I.B—i.e., cases involving ambiguous communications, or emotive forms of expression. This "gap-filler" implementation seems best suited to courts that regard the *Spence* test as good law. Any such court will need to define the *Spence* test's proper domain with sufficient clarity to explain why it was proper for the Court to withhold the test in cases like *Hurley* and *Barnes*. But having accomplished this, such a court would be free to employ AT in cases falling outside the *Spence* test's proper domain.

Courts in circuits that have rejected the *Spence* test could, in principle, adopt the same restrained approach—applying AT only in cases that are factually similar to one or more of the cases discussed in Part I.B. That said, a more experimental approach would seem to be equally reasonable. As observed in the introduction, many courts have employed the *Spence* test as a general-purpose test, to be applied whenever the question arises whether conduct is expressive. This Comment has shown that, as a general-purpose test, AT enjoys important advantages over the *Spence* test, since AT: (1) captures a wider variety of the Court's affirmative holdings to the effect that certain kinds of conduct are expressive;²¹⁰ and (2) avoids some of the *Spence* test's incorrect

²⁰⁸ See *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

²⁰⁹ *Hurley*, 515 U.S. at 569 (quoting *Spence*, 418 U.S. at 411).

²¹⁰ See *supra* Part II.B.

predictions to the effect that nonexpressive kinds of conduct are expressive.²¹¹ Given these advantages, it would seem reasonable for a court to provisionally adopt AT as a replacement for the *Spence* test—absent some concrete reason to believe the *Spence* test is in some respect superior.

It could well turn out, over the long run of cases, that AT is an “expressive conduct” test with important limitations. But, without concrete evidence that AT is over- or underinclusive in a way that the *Spence* test is not, this abstract possibility should not deter a court from adopting AT on a provisional basis. AT need not, after all, be a perfect test in order to constitute a meaningful improvement on the *Spence* test. And it is improvement, not perfection, that is the imperative of common law innovation.

²¹¹ See *supra* Part III.