Gendered Liberty

Laura Portuondo*

Individual liberty is ascendant in constitutional law, but only for some. First Amendment doctrine has increasingly protected liberty interests in conduct linked to conscientious identity, as exemplified by newly successful claims to religious exemptions from antidiscrimination law. This contrasts with shrinking Fourteenth Amendment protections for liberty interests in conduct linked to gender identity, as exemplified by the recently eliminated right to abortion and imperiled rights to contraception, marriage, and sexual intimacy. More muscular protections for conscientious liberty have diminished even statutory protections for gender-related conduct. The result is a liberty jurisprudence that increasingly protects conservative religious objectors, even as it increasingly dismisses marginalized gender groups. This Article argues that this disparity is neither a requirement of constitutional doctrine nor an extension of a neutral theory of liberty. Instead, it emerges from a gendered theory of liberty—one that protects the freedom to enforce traditional ideas about gender and denies the freedom to challenge them.

By describing gendered liberty, this Article shows that the fall of liberty under the Fourteenth Amendment and its rise under the First Amendment are symbiotic. These doctrines work together to launder controversial judgments about the value of gender nonconformity into seemingly neutral stories about liberty. In doing so, they permit the U.S. Supreme Court to subordinate the autonomy and self-determination of those who would defy gender stereotypes to that of those who would enforce gender stereotypes. More importantly, these doctrines permit the Supreme Court to deny that it is engaged in a project of subordination at all. This Article resists these claims of neutrality and the stories about liberty they rely on by showing that liberty includes those who do not conform to gendered expectations.

* Assistant Professor, University of Houston Law Center. For their helpful comments and encouragement, I thank Sally Burns, Katie Eyer, Dave Fagundes, John Fee, Leah Fowler, Fred Gedicks, Linda McClain, James Nelson, Anthony Sampson, Liz Sepper, Reva Siegel, Nelson Tebbe, Lucy Williams, and the participants of the University of Houston Law Center Faculty Workshop, the Reproductive Rights/Reproductive Justice Roundtable, the Nootbaar Law and Religion Fellows Conference, the 2024 National Conference of Constitutional Law Scholars, and the BYU Individual Rights & Liberty Interests Colloquium.

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INTRODUCTION

For many people, constitutional liberty[1] is in decline. The U.S. Supreme Court has read a liberty right to abortion out of the U.S. Constitution.[2] The Court's reasoning, moreover, endangered related liberty rights to contraception, same-sex marriage, and sexual intimacy.[3] These shrinking protections for gender-related

1. This Article often draws a distinction between "liberty" and "equality" as both a doctrinal and theoretical matter. As a doctrinal matter, it uses this distinction to describe two different strands of constitutional rights jurisprudence: equality doctrine and liberty doctrine. Equality doctrine, which finds its home in provisions such as the Equal Protection Clause of the Fourteenth Amendment, forbids the government from discriminating in certain ways. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206 (2023) (holding that the Equal Protection Clause generally forbids race discrimination). Liberty doctrine, which finds its home in provisions such as the Due Process Clause of the Fourteenth Amendment, forbids the government from interfering with individuals' conduct in certain ways, even if that interference is nondiscriminatory. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 524, 535 (1925) (holding that the Due Process Clause generally forbids interfering with individuals' right to make decisions about the education of their children). As a theoretical matter, this Article draws a distinction between equality and liberty interests. Theories of equality generally suggest that individuals have an interest in not being discriminated against in certain ways. *See* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 568 (1998). Theories of liberty generally suggest that individuals have an interest in engaging in certain forms of conduct without government interference, regardless of whether that interference is discriminatory. *See id.*

These distinctions between liberty and equality are unstable and, at times, illusory. As a doctrinal matter, courts have long protected people by fusing both equality and liberty doctrine. "Equal liberty" claims under the Fourteenth Amendment offer one example. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 673–75 (2015) (protecting a right to same-sex marriage on both liberty and equality grounds). The Court's protection of liberty of conscience through equality doctrine, described *infra* Part I, offers another. Liberty and equality interests often bleed together as a theoretical matter, too. *See* Deborah Hellman, *The Epistemic Function of Fusing Equal Protection and Due Process*, 28 WM. & MARY BILL RTS. J. 383, 384 n.4 (2019) (gathering a robust body of scholarship arguing that liberty interests can illuminate the scope of equality interests and vice versa). One way that the government can discriminate, for example, is by selectively protecting or denying liberty interests. *See, e.g.*, Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam) (reasoning that laws are discriminatory where they treat "secular" conduct more favorably than "religious" conduct).

While the distinction between liberty and equality is unstable, this Article draws it to help clarify the conscience-related and gender-related rights jurisprudence it discusses. Even if liberty and equality are not distinct, both courts and scholars often invoke the supposedly distinctive nature of liberty and equality to help justify differential protection of conscience-related and gender-related rights. Employing the language of liberty and equality, and its associated doctrine and theory, is thus necessary to evaluate these justifications.

2. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

3. Although the majority in *Dobbs* claimed that its decision had no implications for these other rights, *see id.* at 262 (calling such concerns "unfounded"), its reasoning plainly imperils them. *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1182 (2023) (explaining that *Dobbs*'s narrow approach to substantive due process threatens the rights to interracial marriage, contraception, same-sex intimacy, and same-sex marriage). *Dobbs* adopted a backward-looking history-and-tradition approach to substantive due process that deems rights fundamental only where, described at a low level of generality, they are "deeply rooted in history." *Dobbs*, 597 U.S. at 257. This narrow test suggests that previous decisions were wrong to recognize substantive due process liberty rights to interracial marriage, contraception, same-sex intimacy, and same-sex marriage. While each of those rights has a claim to being deeply rooted at a higher level of generality—e.g., a right to marry—such rights have less of a claim when viewed at a lower level of generality—e.g., a right to marry someone of a different race

liberty have left women, queer people, and gender-nonconforming people especially vulnerable to regulation. Women, who disproportionately benefit from reproductive liberty guarantees,[4] can no longer count on the Constitution to protect them.[5] Gay, lesbian, and bisexual people are under real threat that political actors will claw back constitutional protections for their relationships and intimate lives.[6] Transgender[7] and nonbinary[8] people face unprecedented campaigns to curtail their freedom but are unlikely to find shelter in constitutional liberty jurisprudence.[9] This retrenchment in gender-related liberty most severely affects those who face intersecting forms of gender-based oppression, including nonwhite,[10] immigrant,[11] and disabled[12] women. For all those marginalized based on their gender, constitutional liberty is an increasingly hollow promise.

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or of the same sex. Indeed, things like interracial and same-sex marriage have a history of being criminalized in this country.

4. Studies show that denial of reproductive choice harms women in numerous ways, such as by creating lasting economic hardship, increasing the likelihood of domestic violence experiences, and worsening health outcomes. *See* ADVANCING NEW STANDARDS IN REPROD. HEALTH, INTRODUCTION TO THE TURNAWAY STUDY 3–4 (2022) [hereinafter TURNAWAY STUDY], https://www.ansirh.org/sites/default/files/2022-12/turnawaystudyannotatedbibliography122122.pdf [https://perma.cc/HSE7-B56D].

5. Trans and nonbinary people who can become pregnant are similarly without recourse. *See* Katherine Gallagher Robbins, Shaina Goodman & Josia Klein, *State Abortion Bans Harm More Than 15 Million Women of Color*, NAT'L P'SHIP FOR WOMEN & FAMS. (June 2023), https://nationalpartnership.org/report/state-abortion-bans-harm-woc/ [https://perma.cc/6FT2-6H8A] ("Many transgender and nonbinary people can become pregnant and are directly impacted by [*Dobbs*].").

6. Renewed efforts to ban same-sex marriage after *Dobbs* evidence this most glaringly. *See, e.g.*, H.R.J. Res. 8, 90th Gen. Assemb., Reg. Sess. (Iowa 2023) (proposing an amendment to the Iowa constitution banning same-sex marriage). But, as detailed *infra* Part III, First Amendment doctrine is also realizing this threat by limiting states' power to protect those in same-sex relationships from discrimination.

7. Transgender is a term used "to describe people whose gender identity differs from the sex they were assigned at birth." *Glossary of Terms: Transgender*, GLAAD, https://glaad.org/reference/trans-terms/ [https://perma.cc/96KJ-P3A2] (last visited Mar. 4, 2025).

8. Nonbinary is a term used to describe "people who experience their gender identity and/or gender expression as falling outside the binary gender categories of 'man' and 'woman.'" *Id.*

9. Although transgender litigants have had some success raising liberty claims in lower courts, *Dobbs* may put an end to this. *See* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1448 (2023) [hereinafter Eyer, *Transgender Constitutional Law*]. Moreover, lower courts have started to embrace broad theories of conscientious liberty that threaten existing antidiscrimination protections for transgender people. *See* Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1121, 1162 (2024) [hereinafter Eyer, *Anti-Transgender Constitutional Law*].

10. Abortion bans, for example, more significantly impact Black, Latina, Asian, and Native women because, among other things, these women face greater barriers to accessing contraception, have fewer resources to overcome restrictions, and face worse consequences when they are denied abortions. *See* Latoya Hill, Samantha Artiga, Usha Ranji, Ivette Gomez & Nambi Ndugga, *What Are the Implications of the* Dobbs *Ruling for Racial Disparities?*, KFF (Apr. 24, 2024), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities [https://perma.cc/4CYH-GNSP].

11. Society has long devalued and scrutinized immigrant women's reproduction. *See* Asees Bhasin, Dobbs v. Jackson Women's Health *and Its Devastating Implications for Immigrants' Rights*, HARV. L. PETRIE-FLOM CTR.: BILL OF HEALTH (Sept. 27, 2022), https://blog.petrieflom.law.harvard.edu/2022/09/27/dobbs-immigrants-rights/ [https://perma.cc/3PXL-4KAW]. As such, loosened restrictions on reproductive regulation disproportionately burden these women. *See id.*

12. Disabled women face uniquely pervasive forms of reproductive oppression, including sterilization abuse, barriers to contraception and abortion, restrictions on sexuality, and threats to their

For other people, however, constitutional liberty is on the rise. Things have never looked better for individuals asserting conscience-related liberty claims.[13] In case after case, the Supreme Court has held that religious and moral objectors need not comply with laws that burden their conscientious conduct—i.e., conduct linked to their religious or moral identity. These cases include a speech case permitting a plaintiff to disregard antidiscrimination law. These cases also include free exercise cases granting religious individuals and institutions exemptions from public health and public accommodations provisions that limit their religious exercise.[14] Although the Supreme Court has framed these novel protections as embracing a neutral value of conscientious liberty, these protections have almost exclusively benefitted conservative religious plaintiffs.[15] The result is a constitutional liberty jurisprudence that is increasingly protective of conservative religious objectors, even as it increasingly dismisses marginalized gender groups.

This Article argues that the disparate fates of gender- and conscience-related liberty are intertwined. Though these trends in liberty jurisprudence may emerge from different provisions of the Constitution and appear at odds, they embody a unified vision of liberty. Taken together, recent First and Fourteenth Amendment doctrines interact with conduct regulations in a patterned way. These doctrines consistently ensure protections for conduct that enforces traditional gender norms and actively undermine protections for conduct that resists them. Recent First Amendment decisions invalidating statutory protections for gendered conduct, such as LGBTQ+ antidiscrimination laws, on the ground that they improperly burden private actors' conscientious conduct exemplify this pattern.[16] First and Fourteenth Amendment doctrines work together to promote a gendered theory of

parenthood. Robyn M. Powell, *Disability Reproductive Justice*, 170 U. PA. L. REV. 1851, 1867–81 (2022). Shrinking liberty protections thus leave disabled women especially vulnerable.

13. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 582, 603 (2023) (holding that the Free Speech Clause forbade requiring a wedding-website designer to comply with an LGBTQ+ equality law).

14. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 542–43 (2021) (holding that the Free Exercise Clause barred the City of Philadelphia from terminating a contract with a Catholic foster agency that discriminated against LGBTQ+ foster parents); Tandon v. Newsom, 593 U.S. 61, 64 (2021) (per curiam) (holding that the Free Exercise Clause barred imposing public health restrictions that limited all in-home gatherings because they burdened some religious practices).

15. *See* Trump v. Hawaii, 585 U.S. 667, 706–10 (2018) (rejecting Muslims' claims of religious discrimination); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2464–69 (2021) (explaining how the *Trump v. Hawaii* plaintiffs should have had a strong claim under recent free exercise doctrine); *see also* David Schraub, *Liberal Jews and Religious Liberty*, 98 N.Y.U. L. REV. 1556, 1607 (2023) (noting that recent First Amendment jurisprudence embraces "a near-total conflation of religiosity and conservatism" that excludes more progressive believers, including liberal Jews); Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2335 (2023) ("[F]ree exercise victories thus far in the Roberts Court have mostly benefited religious conservatives . . . ."). This apparent preferentialism for conservative Christians appears likely to accelerate as more progressive believers attempt to take advantage of these novel protections. *See* Elizabeth Sepper, *Free Exercise of Abortion*, 49 BYU L. REV. 177, 206 (2023) ("[I]n response to the religious liberty of abortion seekers, some advocates and scholars have called for heightening the burdens on plaintiffs and limiting the meaning of religious exercise to ritual, dogma, and compulsion.").

16. *See, e.g.*, *303 Creative*, 600 U.S. at 581 (holding that the Free Speech Clause forbade requiring a wedding-website designer to engage in conduct that she argued expressed a message to which she objected); *Fulton*, 593 U.S. at 542–43 (holding that the Free Exercise Clause barred requiring a Catholic

liberty: one that supports individuals' freedom to enforce traditional gender norms and suppresses individuals' freedom to defy them.

The Supreme Court has, unsurprisingly, obfuscated its embrace of a gendered theory of liberty. In fact, it has denied that it has broadened its approach to conscience-related liberty at all.[17] Despite embracing ever-expanding protections for conscientious conduct, the Supreme Court has urged that longstanding and uncontroversial equality rules explain its decisions.[18] This assertion is implausible. Expanded protections for conscientious conduct rely on both a broader theory of equality than prior cases permitted and on individual autonomy values that sound in liberty.[19] Recent First Amendment doctrine demands equal respect for individuals' liberty of conscience—in other words, their liberty interest in developing and acting on conscientious beliefs free from undue government interference.[20] This liberty interest does not emerge from the importance of religious beliefs specifically but from the shopworn liberal ideal that individuals have a right to autonomy and self-determination in important aspects of their identity.[21]

The Supreme Court has not only denied its expansion of conscientious liberty protections but also aimed to naturalize diminishing liberty protections in the context of gender. The Court has done so, least convincingly, by implying that conscientious liberty does not reach certain gender-related conduct. *Dobbs v. Jackson Women's Health Organization*, for example, dismissed the notion that pregnant people's conscience—their "own concept of existence, of meaning, of the universe, and of the mystery of human life"—gives rise to a liberty right "*to act* in accordance with those thoughts."[22] Scholars and litigants have rightly resisted this unprincipled notion.[23]

This Article, however, resists a different fiction that the Court has used to naturalize a lack of gender-related liberty protections—the claim that most conduct regulations have nothing to do with gender at all. The Supreme Court's 1974

foster agency to work with LGBTQ+ foster parents, conduct the agency asserted violated its religious beliefs).

17. *See infra* Section I.A.

18. *See infra* Section I.A.

19. *See infra* Section II.B.

20. *See infra* Section II.B.

21. *See infra* notes 131–32 and accompanying text.

22. 597 U.S. 215, 255–56 (2022) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

23. *See* Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WIS. L. REV. 475, 497–98 (2023) (arguing that current doctrine supports religious exemptions from abortion restrictions); Elizabeth Reiner Platt, *The Abortion Exception: A Response to "Abortion and Religious Liberty,"* 124 COLUM. L. REV. F. 83, 85, 90–91 (2024) (collecting recent examples of litigation challenging abortion bans on religious grounds and arguing that these claims should succeed under a principled application of recent religious liberty jurisprudence); Sepper, *supra* note 15, at 193–211 (2023) (arguing that conscientious claims for abortion access should succeed under recent First Amendment jurisprudence and that any suggestion otherwise represents a combination of express preferentialism for conservative religions and an implicit skepticism of women's moral autonomy); Schwartzman & Schragger, *supra* note 15, at 2317–23, 2336 (arguing that conscientious claims for abortion access should succeed under recent free exercise doctrine and that unwillingness to recognize this point represents preferentialism for religious conservatives).

decision in *Geduldig v. Aiello*[24] exemplifies this fiction. In *Geduldig*, the Court held that pregnancy regulations do not necessarily implicate women's rights because not all women are pregnant.[25] Such regulations would only do so if they were a mere "pretext[] designed to effect an invidious discrimination against" women.[26] Although later doctrine departed from this reasoning,[27] the *Dobbs* Court enthusiastically revived it.[28] *Dobbs* held that conduct regulations do not implicate women's rights unless they are motivated by "invidiously discriminatory animus"[29]—a virtually insurmountable standard. If, as this standard suggests, the vast majority of conduct regulations have nothing to do with gender, it is only natural that the Supreme Court need not police such regulations to protect gender-related liberty.

This Article resists this claim that conduct regulations rarely implicate gender and, in doing so, undermines the Supreme Court's preferred story about the scope of constitutional liberty protections. Contrary to the Court's claims, it is possible to identify a broad array of "gendered conduct"—i.e., conduct linked to a person's gender identity.[30] As theorized in this Article, conduct qualifies as gendered where it is a likely site for the enforcement of gender stereotypes about people with that identity. Such gendered conduct—including pregnancy, abortion, same-sex intimacy, parenthood, gender transition, and more—is not just abundant. It implicates precisely the same liberty interests that justify novel conscientious conduct protections.[31] Gendered conduct, like conscientious conduct, implicates individuals' fundamental interests in autonomy and self-determination in important aspects of their identity. If neutral liberty values are truly at the heart of expanded First Amendment jurisprudence, it makes little sense for the Supreme Court to ignore gendered conduct. This is particularly true because it is possible to protect such conduct through the same doctrinal mechanisms that protect conscientious conduct.[32]

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24. 417 U.S. 484 (1974).

25. *See id.* at 496 & n.20.

26. *Id.* at 496 n.20.

27. It did so by recognizing that conduct regulations, including pregnancy regulations, can implicate constitutional sex-equality principles when they perpetuate harmful gender stereotypes. *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 731–36 (2003) (concluding that parental leave regulations implicate sex equality because such pregnancy-related policies likely reflect "sex-role stereotype[s]" that harm women); *see also* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 154 (2010) (explaining that *Hibbs* recognized "pregnancy . . . as a site of pervasive sex-role stereotyping"); Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 74–79 (2023) (tracing post-*Geduldig* case law that undermined its reasoning about the relationship between pregnancy and sex equality).

28. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022) (citing *Geduldig*, 417 U. S. at 496 n.20).

29. *Id.* (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993)).

30. *See infra* Section II.A.

31. *See infra* Section II.C.

32. *See infra* Section II.B.

Where neither doctrine nor a neutral theory of liberty can explain the Supreme Court's permissive approach to burdens on gendered conduct, this Article proposes that a gendered theory of liberty can.[33] This gendered theory of liberty recognizes the enforcement of gender norms as a fundamental freedom and denies that defiance of such gender norms has anything to do with freedom at all. This theory does not flow from an absence of liberty interests in gender nonconformity. Rather, it flows from the Supreme Court's judgment that gender nonconformity does not matter. This gendered theory of liberty explains an otherwise incongruous absence of protections for gendered conduct. It also accounts for the Supreme Court's repeated and facile resolution of rights conflicts in favor of conscientious objectors and against women and LGBTQ+ people. The Supreme Court's gendered theory of liberty allows it to conclude that women and LGBTQ+ people have no stakes in such conflicts at all.

In this way, the fall of liberty under the Fourteenth Amendment and its rise under the First Amendment are symbiotic. Fourteenth Amendment doctrine urges that the scope of liberty is not broad enough to encompass those who wish to defy gender stereotypes. First Amendment doctrine steps into the resulting vacuum to declare that those who wish to enforce gender stereotypes are both exercising a fundamental liberty and, conveniently, harming no one. These doctrines thus dovetail to affirmatively and artificially subordinate the autonomy and self-determination of those who would defy gender stereotypes to that of those who wish to enforce those stereotypes. Perhaps more importantly, they permit the Supreme Court to deny that it is engaged in a project of subordination at all. First and Fourteenth Amendment doctrines work together to launder controversial judgments about the value of gender nonconformity into seemingly neutral narratives about constitutional liberty.

Despite the Supreme Court's suggestions to the contrary, liberty extends to those who do not conform to gendered expectations. It extends to Black women, who engage in creative self-construction against intersecting stereotypes that

33. In doing so, this Article joins Professor Melissa Murray in arguing that seemingly disparate trends in constitutional law can be best understood as embodying judgments about gender. *See* Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 803–04 (2023). Professor Murray has argued that the Roberts Court's jurisprudence concerning the First, Second, and Fourteenth Amendments should be viewed together as advancing a "jurisprudence of masculinity" that "prioritiz[es] rights that code 'male'" and "recast[s] the legal imaginary in ways that privilege men." *Id.* at 827.

This Article proposes that this jurisprudence should also be understood as privileging gender conformity. Focusing on gender conformity helps explain why the Court on occasion protects individual women plaintiffs. It often does so when those women (usually religious conservatives) attempt to enforce traditional gender norms on others (usually queer men and women). *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 582, 603 (2023) (ruling in favor of a woman wedding-website designer who objected to complying with an LGBTQ+ equality law); *see also* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 668, 687 (2020) (ruling in favor of a group of nuns who objected to a law supporting women's access to contraceptives). Thus, men may lose access to privileged rights by declining to conform to traditional masculinity. And women may gain access to privileged rights by enforcing traditional gender roles on others.

pathologize their motherhood and police their reproductive lives.[34] It extends to transgender men and women, who find joy and self-definition in transcending gender stereotypes—despite being met with discrimination and violence.[35] It includes disabled and queer people, who have found pride in inhabiting forms of sexuality and parenthood that society devalues.[36] And it includes those who assert control over their destiny and defy gender norms by terminating a pregnancy.[37] By illustrating how liberty includes these people, this Article resists prevailing stories about liberty that have left too many people out for too long and are leaving more people out each day. This Article invites others to do the same by providing theoretical and doctrinal tools for such resistance.

This Article proceeds in three Parts. Part I contextualizes and documents expanding protections for conscientious conduct. Part II argues that the doctrine and theory underpinning these expanded protections are inconsistent with shrinking protections for gendered conduct. To do so, it both develops a novel theory of "gendered conduct" and argues that protecting such conduct would promote the same equality and liberty values that underlie expanded conscientious conduct protections. Part III offers a theory for why, despite recent First Amendment doctrine and theory contradicting this result, the Supreme Court has been so hostile to protecting gendered conduct. It posits that First and Fourteenth Amendment doctrines make sense and complement each other when viewed through the lens of gendered liberty.

I. PROTECTING CONSCIENTIOUS CONDUCT

First Amendment doctrine has become increasingly protective of certain forms of conscientious conduct—i.e., conduct linked to a person's religious or moral identity. More than ever before, this body of law endorses the notion that, where

34. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 303 (1997) (describing how Black women's capacity to survive and transcend such pervasive conditions of oppression "defies the denial of self-ownership inherent in slavery" and represents a powerful exercise of "will," "creativity," and "self-definition"). Dorothy Roberts traces the systemic ways in which Black women's bodies and motherhood have been devalued and pathologized in the United States, from the policing of Black pregnancies and families to the denial of reproductive autonomy and sterilization. *See generally id.*

35. *See* ASHLEY KIRZINGER ET AL., WASH. POST/KFF SURV. PROJECT, KFF/THE WASHINGTON POST TRANS SURVEY 3–4 (2022), https://files.kff.org/attachment/REPORT-KFF-The-Washington-Post-Trans-Survey.pdf [https://perma.cc/N5ST-JKBH] (documenting that trans adults experience high levels of discrimination and violence because of their gender identity and expression); Stef M. Shuster & Laurel Westbrook, *Reducing the Joy Deficit in Sociology: A Study of Transgender Joy*, 71 SOC. PROBS. 791, 805 (2022) (describing how transgender people find joy and transcendence in defining themselves beyond existing gender norms and stereotypes).

36. *See* ELI CLARE, EXILE AND PRIDE: DISABILITY, QUEERNESS AND LIBERATION 104–19, 125–26 (1999) (tracing how both queer and disabled liberation movements have found success by taking pride in identities that defy stereotypes, including those stereotypes that deny or pathologize their sexuality and families).

37. *See Our Stories Are Ours to Tell*, SHOUT YOUR ABORTION, https://shoutyourabortion.com/stories [https://perma.cc/52AN-T59B] (last visited Mar. 4, 2025) (collecting first-person abortion stories that illustrate the diverse ways in which abortion is a tool that helps people define their own lives).

certain individuals act based on their moral or religious beliefs, that conduct should be shielded from government interference. This Part contextualizes and documents this trend. While the Supreme Court historically offered limited protections for conscientious conduct, it has recently strengthened those protections. The Supreme Court has urged that these new protections rely on a straightforward application of longstanding equality principles.[38] In reality, they employ a broader theory of equality than prior case law has allowed. These new protections, moreover, rely on individual autonomy values that sound in liberty.

To be clear, this Part's purpose is to offer a formalist account of recent First Amendment doctrine. It attempts to explain how the Supreme Court itself has described and justified this jurisprudence. In doing so, this Part sets aside obvious objections to this account, such as the observation that recent First Amendment doctrine has functioned to protect conservative religious objectors alone, not conscience in some neutral way.[39] This Article does not dispute these objections.[40] Instead, it provides groundwork for a more precise critique of recent First Amendment doctrine. By identifying what values supposedly underlie this doctrine, that is, this Article reveals exactly why these values are inadequate to explain trends in constitutional liberty jurisprudence.

This Part begins by explaining the historically limited nature of conduct protections under both free exercise and free speech doctrine. It then details how the Supreme Court has recently expanded these protections in both contexts. Finally, it demonstrates that the Supreme Court has justified these expanded protections by reference to a broad liberal ideal of autonomy and self-determination in individual identity formation and expression.

A. HISTORICAL LIMITS ON CONSCIENTIOUS CONDUCT PROTECTIONS

Neither free exercise nor free speech jurisprudence has ever fully protected conscientious conduct from government interference. Although the Supreme Court has long held that the Free Exercise Clause encompasses both religious belief and action, it has emphasized that this latter "freedom to act" is "subject to regulation for the protection of society."[41] The extent of permissible regulation has varied over time. Early free exercise law, for example, permitted most nondiscriminatory regulations of religious conduct.[42] The Supreme Court later adopted a more

38. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 585–87 (2023) (describing novel protections for conscientious objectors as simply "[a]pplying" "foundational principles" of free speech doctrine); Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (insisting that expansive new protections for religious objectors were entirely consistent with prior precedent's narrow equality approach to free exercise).

39. *See supra* note 15.

40. To the contrary, it builds on them. *See infra* 277–297 and accompanying text.

41. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

42. *See* Braunfeld v. Brown, 366 U.S. 599, 607–09 (1961) (plurality opinion) (holding that a Sunday closing law did not violate Jewish plaintiffs' free exercise rights because it did not have a discriminatory purpose and was reasonably tailored to its purpose); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940) (holding that "[c]onscientious scruples" do not "relieve[] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs").

stringent liberty-based rule, maintaining that laws could substantially burden religious conduct only if they were the least restrictive means of achieving a compelling interest.[43] Even this seemingly strict test was "ever-so-gentle in fact" and permitted most regulations of religious conduct.[44] And the Supreme Court eventually returned to a permissive equality model in *Employment Division v. Smith*.[45] *Smith* held that laws do not violate the Free Exercise Clause unless they are not "neutral" or "generally applicable."[46] Until recently, courts interpreted these two requirements to forbid only those laws that are motivated by a specific discriminatory purpose[47] or that otherwise target religious conduct.[48] These rules have historically permitted broad regulation of religious conduct.[49] Indeed, for more than twenty-five years following *Smith*, the Supreme Court found only one facially neutral law that violated it.[50]

Although free speech law has long protected some conscientious conduct, the protections have been similarly limited. The Supreme Court protects conscientious conduct primarily through expressive conduct doctrine.[51] This doctrine provides that conduct is entitled to speech protections if it is sufficiently expressive, meaning that it is both intended to and likely to convey a message to others.[52]

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43. Sherbert v. Verner, 374 U.S. 398, 403–09 (1963) (establishing this rule under the Free Exercise Clause); *see also* United States v. Lee, 455 U.S. 252, 256–60 (1982) (applying this test); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) (same); Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972) (same).

44. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756–57 (1992) (explaining that the *Sherbert* test and its progeny were "strict in theory, but ever-so-gentle in fact"); *see* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1127 (1990) (explaining that this standard of scrutiny was "far more relaxed" than the "compelling interest" language suggests).

45. 494 U.S. 872, 881 (1990).

46. *Id.* at 881, 890.

47. *See* City of Boerne v. Flores, 521 U.S. 507, 534–35 (1997).

48. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993) (explaining that laws lack general applicability whenever they "in a selective manner impose burdens only on conduct motivated by religious belief").

49. *See* Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 157–58 (1997) (explaining that *Smith* rendered "the Free Exercise Clause . . . of little practical importance" and left "religious claimants [with] no legal leverage under federal law").

50. *See Lukumi*, 508 U.S. at 524, 534 (invalidating a law forbidding animal sacrifice due to significant evidence that lawmakers were targeting a minority religion).

51. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized . . . . that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" (first quoting United States v. O'Brien, 391 U.S. 367, 376 (1968); and then quoting Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam))).

52. *See Spence*, 418 U.S. at 410–11 (establishing that conduct is expressive where (1) "[a]n intent to convey a particularized message was present" and (2) "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it"); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984) (explaining that conduct can qualify as speech where it "is intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative"). Some scholars have noted that even satisfying both these subjective and objective prongs is not sufficient to afford conduct First Amendment protections. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252 (1995) (explaining that speech protections depend on "social context" in addition to "speaker's intent, a specific message, and an audience's

Individuals' assertions that their conduct expresses their beliefs can help meet the first, subjective prong of this expressive conduct test. These assertions, however, have never been sufficient to trigger speech protections.[53] That is because individuals' assertions that their conduct is intended to express a message does not show that this message is objectively likely to be understood.[54] Even where plaintiffs can show that their conduct meets this second objective prong, their conduct is not necessarily immune from regulation. Instead, courts have treated regulations of expressive conduct as presumptively unconstitutional only where they are content-based, i.e., "*directed at* the communicative nature of conduct."[55] Conduct regulations, in other words, must be specifically intended to suppress or compel expression to trigger strict scrutiny.[56] Where conduct regulations do not target expression in this way, the Supreme Court has applied a lax form of intermediate scrutiny.[57]

Thus, in both the free exercise and free speech contexts, the Supreme Court has historically afforded limited protections to conscientious conduct. While the precise contours of each doctrine are different, these doctrines are limited in a similar way. Under both free exercise and free speech jurisprudence, the Supreme Court has generally protected conscientious conduct only where plaintiffs can show that lawmakers acted based on a conscious desire to suppress

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potential reception of that message"); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 337–38 (2018) (arguing that "the applicability of the First Amendment is not simply about recognizing whether 'speech' is there in some objective sense," but "instead reflects shared cultural norms about social activities and their meanings").

53. *See O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

54. *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR), 547 U.S. 47, 66 (2006) (rejecting law schools' claim that excluding military recruiters from interviewing at their schools was expressive because the point of such exclusion was "not 'overwhelmingly apparent'" (quoting *Johnson*, 491 U.S. at 406)).

55. *Johnson*, 491 U.S. at 406, 412 (1989) (holding that content-based laws that are "*directed at* the communicative nature of conduct" are subject to strict scrutiny (quoting Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622–23 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom. Clark*, 468 U.S. 288)); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (holding that content-based regulations are subject to strict scrutiny); Post, *supra* note 52, at 1256 (noting that, at least historically, cases addressing expressive conduct regulations "almost invariably turn[ed] on judicial scrutiny of the purposes served by the regulation at issue").

56. *Compare Johnson*, 491 U.S. at 410 (holding that a prohibition on flag burning was content-based because it explicitly aimed to "preserv[e] the flag as a symbol of nationhood and national unity" and thus aimed to "suppress[] . . . free expression"), *and* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a mandatory flag salute was subject to strict scrutiny because it aimed to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"), *with O'Brien*, 391 U.S. at 382 (holding that a prohibition on burning draft cards was not subject to heightened scrutiny because it was not specifically "aimed at suppressing communication").

57. *O'Brien*, 391 U.S. at 376–77 (holding that incidental burdens on expressive conduct are permissible so long as they advance a "substantial government[] interest" and restrict speech no more "than is essential to the furtherance of that interest"). Most regulations survive this test. *See* Neel U. Sukhatme, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2852–53 (2005) (noting that the *O'Brien* test amounts to a "waivable presumption that" incidental burdens on expressive conduct are permissible).

plaintiffs' expression of their beliefs. This specific intent requirement has historically been very difficult to satisfy. As a result, plaintiffs have generally been unable to challenge laws that limit their ability to act on their religious or moral beliefs on First Amendment grounds.

B. RECENT EXPANSION OF CONSCIENTIOUS CONDUCT PROTECTIONS

The Supreme Court has recently embraced broader protections for conscientious conduct. This Section documents this development, beginning with free exercise doctrine and then moving to free speech doctrine. It shows how both contexts have expanded protections for conscientious conduct through two doctrinal mechanisms. First, both contexts have embraced a broader definition of discriminatory purpose. Second, both contexts have created exceptions to this discriminatory-purpose rule, allowing plaintiffs to bring claims without needing to prove lawmakers' malign intent.

Before proceeding, it is important to emphasize that this Section offers a broad reading of recent First Amendment doctrine.[58] Narrower readings are both possible and preferable.[59] This Section, however, proceeds with a broad reading because it is the one that the Supreme Court will most likely adopt. In recent years, the Supreme Court has repeatedly issued cryptic First Amendment decisions only to later cite those decisions as having clearly established broad new First Amendment principles.[60] This pattern is likely strategic: it permits the Supreme Court to revolutionize First Amendment law without ever acknowledging—let alone defending—these changes. Whether strategic or not, however, this pattern provides reason to believe that the Supreme Court will interpret the decisions discussed below broadly.[61] This Section thus proceeds on the assumption that it will.

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58. Many scholars have argued for narrower readings. *See, e.g.*, Dale Carpenter, *How to Read* 303 Creative v. Elenis, VOLOKH CONSPIRACY (July 3, 2023, 2:11 PM), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/QP5L-8WX3] (arguing that *303 Creative* will have a limited impact); Carlos A. Ball, *First Amendment Exemptions for Some*, 137 HARV. L. REV. F. 46, 46–47 (2023) (arguing that *303 Creative* may be more limited than some fear).

59. Scholars have argued that reading recent First Amendment doctrine broadly is necessary to avoid gutting competing constitutional values. *See, e.g.*, Eyer, *Anti-Transgender Constitutional Law*, *supra* note 9, at 1119, 1187. This Article adds to this critique by showing how First Amendment doctrine undermines equally important protections for gender-related liberty.

60. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) (citing a non-majority portion of a confusing Establishment Clause decision to conclude that the Court "long ago abandoned" the *Lemon* test (citing Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 48 (2019) (plurality opinion))); Fulton v. City of Philadelphia, 593 U.S. 522, 534 (2021) (applying a broad new religious equality rule—termed the most-favored-nation rule—set out in a series of confusing emergency-docket decisions that many thought were not precedential); Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam) (asserting that a series of conflicting and arguably non-precedential emergency-docket decisions "clear[ly]" established the most-favored-nation rule).

61. The broader historical context of these decisions provides further reason to believe that the Supreme Court will adopt maximalist understandings of the conscience protections articulated in them. As Kate Redburn has shown, these decisions are the product of decades of organizing by Christian conservatives whose ultimate goal is to constitutionalize a freewheeling right to religious exemptions. *See generally* Kate Redburn, *The Equal Right to Exclude: Compelled Expressive Commercial Conduct*

1. Free Exercise Doctrine

The Supreme Court has most obviously expanded protections for conscientious conduct in the free exercise context. This expansion started around 2016, when some conservative Justices began to advance a new interpretation of *Smith*. As noted above, the Court historically interpreted *Smith* to forbid only those laws that "had the object of stifling or punishing free exercise"[62] or targeted religious conduct alone.[63] Beginning in 2016, some Justices began to reinterpret these neutrality and general applicability rules to forbid any law that "devalues" religious conduct.[64] These Justices later translated this novel devaluation theory into a specific doctrinal rule in a series of emergency-docket decisions arising from the COVID-19 pandemic.[65] In those cases, first a minority and then a majority of Justices struck down public health restrictions based on a new rule that "regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[66] At first, there was some question about whether this rule—sometimes called the most-favored-nation rule[67]—would apply beyond the emergency docket.[68]

and the Road to 303 Creative v. Elenis, 112 CALIF. L. REV. 1879 (2024). Though *Fulton* and *303 Creative* may not establish such a right themselves, the current Supreme Court's affinity for the conservative Christian movement suggests that it will interpret these decisions broadly to move closer to this goal.

62. City of Boerne v. Flores, 521 U.S. 507, 534–35 (1997).

63. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

64. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 639 (2018) (holding that enforcement of an antidiscrimination statute against a religious baker was not neutral because it reflected "a negative normative 'evaluation of the particular justification' for his objection and the religious grounds for it" (quoting *Lukumi*, 508 U.S. at 537)); Stormans, Inc. v. Wiesman, 579 U.S. 942, 949–50 (2016) (Alito, J., dissenting from denial of certiorari) (arguing that pharmacy regulations were neither neutral nor generally applicable because they created secular, but not religious, exemptions and thereby "'devalue[d] religious reasons' for declining to dispense medications" (quoting *Lukumi*, 508 U.S. at 537)); *see* Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1519–25 (2023) (explaining how *Stormans* and *Masterpiece* reflected a growing number of Justices' view that laws that "devalue" religious interests violate *Smith*).

65. *Tandon*, 593 U.S. at 63 (challenging COVID-related restrictions on private indoor and outdoor gatherings); S. Bay United Pentecostal Church v. Newsom (*South Bay I*), 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring in denial of application for injunctive relief) (challenging COVID-related occupancy caps); S. Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716, 716 (2021) (same); Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 15–18 (2020) (per curiam) (challenging a COVID-related capacity limitation); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020) (mem.) (Alito, J., dissenting from denial of application for injunctive relief) (same).

66. *Tandon*, 593 U.S. at 62 (characterizing this doctrinal rule as a clear statement of all of the Supreme Court's COVID-19 free exercise precedent); *see also* Portuondo, *supra* note 64, at 1538–40 (explaining why this rule is an expression of the "devaluation" theory of free exercise articulated in earlier case law).

67. *See* Schwartzman & Schragger, *supra* note 15, at 2319 ("As some commentators have put it, religious exercise has 'most-favored nation status,' meaning that government regulation must treat religious activities at least as well as the most favorably treated comparable secular activities." (footnote omitted)).

68. *See* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 828–35 (2021) (noting the difficulty of determining the precedential effect of emergency-docket decisions such as the COVID-19 free exercise decisions).

The 2021 free exercise case *Fulton v. City of Philadelphia* dispelled this doubt.[69] *Fulton* addressed the constitutionality of the City of Philadelphia's decision not to renew a public contract with a Catholic foster care agency.[70] Philadelphia declined to renew the contract upon learning that the agency refused to comply with a contractual provision and local ordinance prohibiting sexual orientation discrimination.[71] The Supreme Court held that Philadelphia's actions violated the Free Exercise Clause.[72] In doing so, the Supreme Court clarified that the most-favored-nation rule that it adopted in its COVID-19 decisions was in fact good law. For the first time in a regular majority opinion, the Court asserted that laws are not neutral and not generally applicable whenever they "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[73]

This new definition of neutrality and general applicability has expanded protections for conscientious conduct. Unlike prior interpretations of *Smith*, the most-favored-nation rule that *Fulton* adopted allows courts to invalidate many laws that do not have a discriminatory purpose in a traditional sense.[74] This rule does so first by defining a lack of neutrality to include devaluation,[75] a standard that affords judges broad discretion to deem laws discriminatory. This discretion is illustrated by recent free exercise challenges to vaccine mandates that permit medical, but not religious, exemptions.[76] Whether these mandates can be said to devalue religious conduct mostly depends on how judges describe the governmental interest at stake. If, as some judges assert,[77] vaccine mandates aim to

69. 593 U.S. 522 (2021).

70. *Id.* at 531.

71. *Id.*

72. *Id.* at 543.

73. *Id.* at 534.

74. *See* City of Boerne v. Flores, 521 U.S. 507, 534–35 (1997) (defining a lack of neutrality as having "the object of stifling or punishing free exercise"); Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2269 (2023).

75. Although *Fulton* did not explicitly adopt such a devaluation theory of neutrality, scholars have explained how the most-favored-nation rule incorporates this broad vision of a lack of neutrality. *See* Portuondo, *supra* note 64, at 1531–32 (explaining that, in developing the most-favored-nation rule, the Justices have frequently framed it as ensuring neutrality by guarding against devaluation); Tebbe, *supra* note 15, at 2438 ("When the government regulates those engaged in a protected activity while exempting others, even though its interests apply equally to both, it presumptively devalues the protected actors or activities.").

76. *See* Lowe v. Mills, 68 F.4th 706, 715 (1st Cir. 2023) (addressing a free exercise challenge to the Maine healthcare-worker vaccine mandate that permits medical, but not religious, exemptions); We The Patriots USA, Inc. v. Hochul, 17 F.4th 266, 272 (2d Cir. 2021) (per curiam) (addressing a free exercise challenge to New York law requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19, and that had a medical, but not religious, exemption); Dr. T. v. Alexander-Scott, 579 F. Supp. 3d 271, 277 (D.R.I. 2022) (addressing a challenge to a Rhode Island healthcare-worker vaccine mandate that has a medical, but not religious, exemption).

77. *Lowe*, 68 F.4th at 715 (noting the state's asserted interest to be, among other things, "protecting the lives and health of Maine people"); *We The Patriots*, 17 F.4th at 285 (noting the state's asserted interest to be, among other things, "protecting the health of healthcare employees"); *Dr. T.*, 579 F. Supp. 3d at 282 (describing "the state's principal purpose" to be "protecting public health").

advance public health generally, there is no devaluation because religious and medical exemptions are not comparable.[78] Making people get vaccinations that might kill them undermines public health; making people get vaccinations they religiously oppose does not. If, as other judges urge,[79] the mandates simply aim to maximize vaccinations, there is devaluation because religious and medical exemptions are comparable.[80] Medical and religious exemptions alike reduce the vaccinated population by one. As judges' very different characterizations of the interests at stake in vaccine cases illustrate, *Fulton* affords judges broad discretion to reframe government interests until they find that a law devalues religious activity.[81]

Fulton provides further tools to invalidate regulations of religious conduct. For example, it expanded the "general applicability" requirement, making it easier for plaintiffs to show a free exercise violation without proving a discriminatory purpose at all.[82] It urged that laws lack general applicability whenever they create "a formal mechanism for granting exceptions"—even if no exemption has ever been granted.[83] While *Smith* referenced such a "formal mechanism" rule, *Fulton*'s claim that it applies where no exemption has ever been granted is both novel and sweeping.[84] Because discretion is virtually inevitable in the administration of laws, this rule permits a judge to deem almost any law not generally applicable.[85]

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78. Koppelman, *supra* note 74, at 2261 (explaining that a general interest in "promoting public health . . . is not promoted by vaccinating people for whom it is medically contraindicated").

79. Some Justices have urged such narrow constructions of state interests in vaccine cases. *See* Does 1–3 v. Mills, 142 S. Ct. 17, 20 (2021) (mem.) (Gorsuch, J., dissenting from the denial of application for injunctive relief) (warning lower courts against "restating the State's interests . . . at an artificially high level of generality").

80. Justice Gorsuch's assertion that "allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones," for example, makes the most sense if the state's goal is solely to vaccinate as many people as possible. Dr. A v. Hochul, 142 S. Ct. 552, 556 (2021) (mem.) (Gorsuch, J., dissenting from the denial of application for injunctive relief). However, even this argument does not hold if there are substantially more religious objectors than individuals who need medical exemptions.

81. *Compare South Bay II*, 141 S. Ct. 716, 718–20 (2021) (statement of Gorsuch, J.) (breaking California's interest in reducing COVID-19 transmission into four specific sub-interests, and concluding that the state's public health restrictions failed to regulate secular conduct that was comparable under each sub-interest), *with id.* at 722 (Kagan, J., dissenting) (concluding that California's interest was in reducing COVID-19 transmission broadly, and arguing that regulated religious conduct was not comparable to unregulated secular conduct based on this interest).

82. Fulton v. City of Philadelphia, 593 U.S. 522, 534 (2021).

83. *Id.* at 537.

84. Prior to *Fulton*, this rule was of little import. *Smith* explained that this rule applied only to a narrow set of cases that likely did not extend "beyond the unemployment compensation field." Emp. Div. v. Smith, 494 U.S. 872, 884 (1990). Indeed, defenders of religious liberty have argued that this rule essentially lacked any substantive content and functioned primarily "to enable the Court to reach the conclusion it desired in *Smith* without openly overruling any prior decisions." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122–24 (1990). The former narrowness of this rule is exemplified by the fact that no case applied it for more than thirty years after *Smith*.

85. Koppelman, *supra* note 74, at 2285 ("It is not clear that there is any way for the state to immunize itself from this variant, since discretion in administration is inevitable."); Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. F.

Beyond expanding these neutrality and general applicability rules, *Fulton* also guarantees that any law that runs afoul of them is unconstitutional. *Fulton* held that "the strictest scrutiny" applies to laws that are not neutral and generally applicable,[86] and clarified that a law that permits exemptions cannot survive this standard.[87] The very underinclusiveness that triggers strict scrutiny under *Fulton*, in other words, ensures failure under it.[88] This circular standard means that a judge's initial, discretionary determination that a law does not (or potentially will not) regulate religious and secular conduct consistently renders that law unconstitutional. This has transformed *Smith* from a toothless standard into one that permits judges to guard religious conduct from virtually all regulation.

2. Free Speech Doctrine

Free speech law has similarly expanded protections for conscientious conduct. It has done so by expanding the scope of compelled expressive conduct claims. Compelled expressive conduct claims are a subset of expressive conduct claims. As noted above, the Supreme Court has long extended free speech protections to conduct that is both subjectively and objectively expressive.[89] The Supreme Court protects such expressive conduct not just from laws that suppress expression but also from laws that compel expression. Under this latter compelled expressive conduct doctrine, the government may not compel individuals to express certain messages through their actions.[90] This bar on compelled expressive conduct has historically been limited in the same way as other expressive conduct protections. As with all expressive conduct claims, the Supreme Court has generally declined to find a compelled expressive conduct violation absent evidence that lawmakers specifically intended to regulate individual expression.[91]

The Supreme Court has expanded speech protections for conscientious conduct by loosening this intent requirement. It did so in *303 Creative v. Elenis*,[92] a case that addressed a would-be wedding-website designer's challenge to a Colorado public accommodations law prohibiting sexual orientation discrimination.[93] The

1106, 1130 (2022) ("According to *Fulton*'s holding, *any* amount of discretion regarding *any* potential exemption for *any* category of persons renders *any* law without religious exemptions presumptively unconstitutional.").

86. *Fulton*, 593 U.S. at 541 (holding that "[a] government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests," and explaining that this is "the most rigorous of scrutiny" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))).

87. *Id.* at 542 (explaining that the fact that Philadelphia's antidiscrimination policy contemplated exceptions meant that Philadelphia did not have a compelling interest in preventing discrimination, even though no exception had ever been granted).

88. *See* Tebbe, *supra* note 15, at 2450 (highlighting this circularity).

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

90. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein." (emphasis added)).

91. *See supra* notes 51–57 and accompanying text.

92. 600 U.S. 570 (2023).

93. *Id.* at 580–81.

designer argued that the law, if applied to require her to create wedding websites for same-sex couples, would impermissibly compel her speech.[94] The Supreme Court agreed.[95] While the Court's rhetoric suggested that Colorado's law ran afoul of compelled speech doctrine's longstanding specific intent rule,[96] the Court's reasoning suggested that it had loosened this intent requirement. The Court rejected Colorado's argument that it regulated speech only incidentally (i.e., not purposefully)[97] on the ground that its regulation "affect[ed]," "'alter[ed]' the 'expressive content' of," and "'interfer[ed] with' [the plaintiff's] 'desired message.'"[98] The law's impermissible purpose, that is, was evidenced by its effects on the plaintiff's speech. By allowing evidence of impact alone to prove purpose in this way, the Court appeared to apply something less than a specific intent standard. As described in more detail below, in Section I.C, the Court has generally viewed such attention to effects as inconsistent with this standard.[99]

It is also possible to interpret *303 Creative* as expanding an exception to compelled speech doctrine's specific intent rule, rather than reforming the rule itself. This exception, first set out in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, provides that laws are subject to strict scrutiny whenever they "alter the expressive content" of an individual's expressive conduct.[100] To benefit from this exception, plaintiffs have long needed to show that a law objectively alters their expression.[101] Plaintiffs, that is, cannot simply assert a

94. *Id.* at 580.

95. *Id.* at 603.

96. It repeated the Tenth Circuit's dubious claim, for example, that Colorado's "very purpose" of applying the public accommodations law was to "'[e]liminat[e]' . . . dissenting 'ideas' about marriage." *Id.* at 588 (first alteration in original) (quoting 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021)).

97. The state insisted that its law was "intended to remedy . . . discrimination," not compel speech. *303 Creative*, 6 F.4th at 1178.

98. *303 Creative*, 600 U.S. at 596–97 (quoting Rumsfeld v. FAIR, 547 U.S. 47, 63–64 (2006)) (repeating the same argument in response to the dissent).

99. Under a specific theory of intent, a law's effects alone are not necessarily indicative of an improper purpose because they might simply reflect lawmakers' negligence or ignorance. *See infra* 109–117 and accompanying text; *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that evidence of discriminatory impact is relevant to "intent as volition or intent as awareness of consequences" but is not relevant to a specific intent requirement).

100. 515 U.S. 557, 572–73, 578 (1995) (holding that Massachusetts could not apply an antidiscrimination law to require parade organizers to include a group of gay marchers, even though the law was not targeted at expression, because this requirement would "alter the expressive content of the[] parade"). This rule is a version of the classic speech principle that the government may not compel certain speakers to "alter[] the content" of their speech by including a government or third-party message. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988) (finding that a law that required professional fundraisers to disclose certain information before seeking donations violated the First Amendment); Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal. (*Pacific Gas*), 475 U.S. 1, 20 (1986) (concluding that a law requiring a private utility to include another group's messages in its newsletter violated the First Amendment).

101. *Compare* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994) (finding that a regulation that required carriage of local broadcast stations on cable systems did not violate this rule because there was "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator"), *with Pacific Gas*, 475 U.S. at 16 (finding

subjective belief that a law alters their expression. They must also show that third-party observers would agree.[102] To the extent *303 Creative* applied this *Hurley* exception, it ignored this objective requirement. Colorado urged that although its law would require the plaintiff to produce websites for same-sex couples, onlookers would not understand this conduct to reflect the plaintiff's endorsement of same-sex marriage.[103] Instead, onlookers would understand the plaintiff to be complying with antidiscrimination law.[104] Rather than address this argument, the Supreme Court simply adopted the plaintiff's allegations that the law would "compel her to create websites celebrating marriages she does not endorse."[105] By relying on the plaintiff's subjective views in this way, the Supreme Court appeared to jettison *Hurley*'s objective prong.[106] In doing so, it expanded this exception to allow plaintiffs to secure strict scrutiny anytime they can show that they are engaged in expressive conduct and subjectively believe that their message has been altered.

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that a law improperly altered a utility company's speech because it required that company to "propound" and "affirm" a message with which it disagreed).

102. *Hurley* itself relied on this requirement to distinguish prior failed compelled speech claims. *Hurley*, 515 U.S. at 575 (distinguishing the parade organizers' claim from prior failed compelled speech claims on the ground that viewers would "likely . . . perceive[]" inclusion of the gay rights groups as communicating the parade organizers' view that the group's "message was worthy of presentation and quite possibly of support as well"). The Supreme Court also relied on this second objective prong to reject a compelled speech claim in *Rumsfeld*. *See* 547 U.S. at 63–65 (2005). There, the Court held that requiring law schools to provide equal access to military recruiters did not alter those schools' expression because third-party observers would not attribute the speech to the schools. *Id.* The Court asserted that students would understand that the law schools were not "sponsor[ing]" the recruiters' speech but were instead "legally required" to permit the speech "pursuant to an equal access policy." *Id.* at 65.

103. *See* Brief on the Merits for Respondents at 20, 22, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (explaining that Colorado law did not require the plaintiff to produce speech that was different from what she would otherwise create and that the "stipulated facts say nothing about whether onlookers would understand the Company to be communicating a message" by complying with CADA).

104. *See id.* at 21.

105. *303 Creative*, 600 U.S. at 581.

106. One could argue that the Supreme Court deferred in this way because it thought it obvious that creating a website for a same-sex couple endorses that couple's marriage. If this is so, however, it illustrates how well-resourced litigants can circumvent this prong. If the Court thinks that serving same-sex couples is obviously expressive, it is probably because conservative advocacy organizations and individual parties have poured significant resources into making this argument in front of courts. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018). Evidence suggests that, at the very least, this campaign has worked to change moral objectors' understanding of the import of serving same-sex couples. Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from* Masterpiece Cakeshop, 50 J. LEGAL STUD. 75, 75 (2021) (finding that the *Masterpiece* litigation "significantly reduced the willingness [of wedding businesses] to serve same-sex couples as compared with opposite-sex couples, even among previously willing vendors"). Well-resourced moral objectors thus have the power to create the very objective meaning that they purport to oppose. *Cf.* David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade (describing how the well-funded Christian litigation group Alliance Defending Freedom has litigated cases like *Masterpiece Cakeshop* and *303 Creative* as part of an aggressive campaign to expand the rights of conservative Christian objectors to sex and LGBTQ+ equality laws).

Like recent free exercise doctrine, then, recent free speech doctrine has expanded formerly narrow protections for conscientious conduct. Specifically, *303 Creative* weakened the longstanding rule that conduct regulations are subject to strict scrutiny only if they specifically target expression. Although *303 Creative* is ambiguous, it appears to have done so by either broadening compelled speech doctrine's discriminatory purpose requirement or expanding an exception to this rule. How broadly these new rules will apply largely depends on how much conduct courts are willing to deem objectively expressive. But, as in the free exercise context, these rules already equip motivated judges with substantial discretion to invalidate regulations of conscientious conduct.[107]

C. THEORETICAL JUSTIFICATIONS

In both the religion and speech contexts, the Supreme Court has insisted that more muscular conscientious conduct protections simply implement longstanding equality principles.[108] But those protections rely on two theoretical innovations that belie the Court's claims to fidelity with prior doctrine. First, decisions in both contexts advance a broader theory of equality than prior case law contemplated. Second, decisions in both contexts rely on individual autonomy interests that sound in liberty.

To understand the theoretical innovations that underlie recent conscientious conduct doctrine, it is helpful to revisit the theories that justified their narrower predecessors. The Supreme Court's historical protection of conscientious conduct only from laws that facially or purposefully disfavored religious[109] or expressive conduct[110] reflects the "formal" equality approach the Court long applied in those contexts.[111] Under this formal theory of equality, improper discrimination occurs only where the government disfavors conduct because of its protected nature—that is, because it is religious or expressive.[112] The Court applied an especially

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107. Much like *Fulton*'s most-favored-nation rule, determining whether conduct is objectively expressive is discretionary. Motivated judges therefore can insulate a broad range of conscientious conduct from regulation. Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 246 (2023) ("[T]he real boundaries of what constitutes 'expressive conduct' remain profoundly uncertain, such that this principle may not provide the limitation it appears to provide.").

108. It has done so by insisting that its recent decisions are a straightforward application of First Amendment doctrine, which, as described *supra* Section I.A, relies on narrow equality principles. *See 303 Creative*, 600 U.S. at 585–87 (describing novel protections for conscientious objectors as simply "[a]pplying" "foundational principles" of free speech doctrine); Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (insisting that expansive new protections for religious objectors were entirely consistent with *Smith*'s narrow equality approach to free exercise).

109. *See supra* notes 42–50 and accompanying text.

110. *See supra* notes 52–57 and accompanying text.

111. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2121–39 (2018) (tracing how, since the 1970s, free speech law has generally adopted a formal theory of equality); Portuondo, *supra* note 64, at 1543–44 (characterizing *Smith*'s neutrality and general applicability rules as adopting a formal theory of equality).

112. *See* Lakier, *supra* note 111, at 2124 (explaining that a formal theory of speech equality "only" requires "that the government not treat speakers differently because of who they are or what they have to say"); Portuondo, *supra* note 64, at 1544 (explaining that a formal theory of religious equality only forbids the state from "utiliz[ing] religion as a standard for action or inaction") (quoting Douglas

narrow version of this theory, which defined discriminatory purpose to include only laws motivated by a specific desire to disfavor religious[113] or expressive conduct.[114] Under this specific theory of intent, a law's effects alone are not necessarily indicative of an improper purpose because they might simply reflect lawmakers' negligence or ignorance.

The first theoretical departure in recent First Amendment doctrine is to implement a vision of formal equality that jettisons the traditional requirement of a specific discriminatory purpose. This is most obvious in the free exercise context, where the Supreme Court has embraced the view that laws are discriminatory where they "devalue" religious conduct—a conclusion that courts can reach without attributing to lawmakers any specific purpose to harm religious interests.[115] If, as the Supreme Court insists,[116] this is a formal equality theory, it is one that is expansive enough to forbid even unintentional disfavoring of religious conduct. This devaluation theory renders a law's effects on religious conduct far more important because disparate effects on religious conduct are prima facie evidence that lawmakers negligently or ignorantly disfavored religious interests. Free speech doctrine has similarly expanded its formal theory of equality. Whether by redefining discriminatory purpose or broadening an exception to it, recent free speech doctrine has embraced the view that laws that affect expressive conduct should be subject to strict scrutiny.[117] If this is a formal equality rule, it is one that—like the devaluation theory of religious equality—discerns improper government intent based on negative effects on conscientious conduct.

The Supreme Court's second theoretical revision has been to import liberty values into this expanded equality framework. This dependence on liberty values is necessitated by the Court's reliance on subjective beliefs to identify which laws regulate conscientious conduct. In the free exercise context, the Court relies on plaintiffs' subjective beliefs to conclude that a law affects their religious exercise.[118] In the speech context, once the Court has concluded that a plaintiff's conduct is expressive, it defers to that plaintiff's subjective beliefs that a law has

Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999 (1990) (alteration in original))).

113. *See* Portuondo, *supra* note 64, at 1543–44.

114. *Compare* Texas v. Johnson, 491 U.S. 397, 410 (1989) (holding that a prohibition on flag burning was content-based because it explicitly aimed to "preserv[e] the flag as a symbol of nationhood and national unity" and thus aimed to "suppress[] . . . free expression"), *with* United States v. O'Brien, 391 U.S. 367, 376, 382 (1968) (holding that a prohibition on burning draft cards was not subject to heightened scrutiny because, even though it prevented some expression, the law was not specifically "aimed at suppressing communication").

115. *See supra* notes 64–73 and accompanying text.

116. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (insisting that the most-favored-nation rule does not require overruling *Employment Division v. Smith* and the formal equality rules set forth therein); *see also* Portuondo, *supra* note 64, at 1543–44 (explaining how both the Supreme Court and scholars have identified the most-favored-nation or "devaluation" approach to free exercise rights as advancing a theory of equality).

117. *See supra* notes 51–57, 92–109, and accompanying text.

118. *See Fulton*, 593 U.S. at 532.

"altered" or "affected" that expression.[119] This willingness to rely on subjective beliefs to identify conscientious conduct regulations stretches a formal theory of equality to a breaking point. If niche or idiosyncratic beliefs can dictate whether a regulation affects conscientious conduct, it is hard to see how the government could, or should, have been aware of these effects in advance. Without such knowledge, it is unclear how a law could even target those beliefs.[120] Protecting conscientious conduct in such cases thus must rely upon values beyond those associated with a formal theory of equality.

The Supreme Court's rhetoric in recent First Amendment cases reveals that those values are associated with individual liberty jurisprudence. A majority of Justices in *Fulton*, for example, urged that the decision was about securing religious "freedom."[121] A later decision characterized the Free Exercise Clause as "protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life."[122] In *303 Creative*, the Court insisted that its decision advanced the Free Speech Clause's core goal of protecting the "freedom to think as you will and to speak as you think."[123] This rhetoric echoed other cases asserting that novel compelled expression protections ensured speakers' "autonomy" and "freedom."[124] This focus on protecting individual freedom of thought and action sounds in liberty jurisprudence.[125]

This rhetoric and the Supreme Court's subjective method of identifying conscientious conduct reveal that expanded protections for conscientious conduct also

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119. *See supra* notes 100–06 and accompanying text.

120. An illustrative example is *Tandon v. Newsom*, a case in which the Supreme Court concluded that a public health regulation that limited in-home gatherings was not neutral or generally applicable because it treated religious conduct worse than secular conduct. 593 U.S. 61, 62 (2021) (per curiam). But the law on its face regulated all in-home gatherings, not just religious ones. *See id.* at 63. The law counted as a religious conduct regulation only because plaintiffs urged that in-home gatherings were an important part of their religious conduct. *See id.* It is hard to see how the public regulation had a foreseeable negative effect on religious exercise given this effect was entirely a product of the plaintiffs' subjective religious beliefs.

121. Justices Barrett and Kavanaugh suggested that the case was about protecting a "First Amendment freedom[]," albeit through an antidiscrimination requirement. *Fulton*, 593 U.S. at 543 (Barrett, J., concurring). Justices Alito, Thomas, and Gorsuch forthrightly urged that liberty offered the reason to protect the plaintiff's conduct. *Id.* at 575 (Alito, J., concurring).

122. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 524 (2022).

123. 303 Creative LLC v. Elenis, 600 U.S. 570, 584 (2023) (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000)). In doing so, the Supreme Court invoked a long line of cases that have noted the importance of protecting "the sphere of intellect and spirit . . . from all official control." *Id.* at 585 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

124. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878, 893 (2018) (holding that compelled speech is problematic because "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning"); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 624 (2018) (characterizing a compelled speech case as implicating "the right of all persons to exercise fundamental freedoms under the First Amendment"); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995) (holding that compelling expressive conduct violates the "principle of autonomy to control one's own speech").

125. *See* Gedicks, *supra* note 1, at 568 ("Equality rights generally prevent government from imposing a burden on one person unless it imposes the burden on everyone. Liberty rights generally prevent the state from imposing the burden at all, even if it imposes it on everyone.").

rest on a theory of liberty—namely, they advance a theory of liberty of conscience. Under this theory, individuals have a right to develop and act on conscientious beliefs free from undue government interference.[126] Scholars have articulated theories of liberty of conscience that require protecting only religious or quasi-religious beliefs.[127] But these theories are unpersuasive. They often rely on overtly religious reasoning, such as a claim that God imposes duties on humankind that take priority over positive law or a claim that religious believers suffer more when forced to choose between their conscience and legal duties.[128] Such religious justifications are unpersuasive to nonreligious people and likely violate principles of government neutrality towards religion.[129] When they do not rely on overtly religious premises, moreover, justifications for protecting religious conscience invariably apply with equal force to nonreligious belief systems.[130] Finally, theories focused on religious conscience alone cannot account for speech doctrine's protections for secular conscientious conduct.[131] For these reasons, the liberty of conscience invoked by recent First Amendment law is best understood as a liberal ideal rooted in principles of autonomy and self-determination, not specific ecumenical values. Under this theory, protecting conscientious conduct is important because such conduct is part of how individuals constitute their identities and cultivate lives that are their own.[132]

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126. *See* JOHN STUART MILL, ON LIBERTY 15, 52 (Batoche Books Ltd. 2001) (1859) (defending "liberty of conscience" as individuals' right "to form opinions, and to express their opinions without reserve" and "to act upon their opinions . . . so long as it is at their own risk and peril"); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1576 & n.41 (collecting legal and philosophical literature arguing that "respect for conscience provides the normative foundation for free exercise law"); Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1395–97 (2012) (defining "freedom of conscience" as encompassing a right to "act[] on the basis of a sincere conviction about what is morally required or forbidden" and to do so, historically, without undue government interference); Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 276 (2021) ("Liberty of conscience applies a presumption of unconstitutionality to government actions that substantially burden religion or conscience.").

127. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 316–19 (1996) (defending special liberty protections for conduct motivated by religious beliefs); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 691–94 (1992) (same); Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160 (2013) (same).

128. *See, e.g.*, Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1365–66 (2012).

129. *See id.* at 1373–74.

130. *See* Laura Portuondo & Claudia E. Haupt, *The Limits of Defining Identity in Religion-Gender Conflicts: A Response to Patrick Parkinson*, 38 J.L. & RELIGION 38, 43 (2023) (collecting scholarship showing that "defenders of religious exemptions almost invariably rely on reasoning that applies with equal force to nonreligious belief systems"); *see also* Gedicks, *supra* note 1, at 557–68 (setting out common defenses for religious exemptions and explaining why they support secular moral exemptions, too); Schwartzman, *supra* note 128, at 1377–1402 (same); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 613–23 (1990) (same).

131. *See* Yoshino, *supra* note 107, at 246 (noting that people "can assert a conscience-based objection under . . . free speech jurisprudence without regard to religious affiliation").

132. *See* JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 10–11 (Jane Marie Todd trans., 2011) (explaining that liberty of conscience "recognizes the individual

This theory of liberty of conscience clarifies the Supreme Court's subjective method of identifying conscientious conduct. Liberty of conscience recognizes individuals as moral agents with final authority over both their beliefs and how to operationalize their beliefs in their lives.[133] By valuing plaintiffs' claims about what kinds of conduct their beliefs dictate and forbid, the Court appears to endorse this notion that individuals have an important autonomy interest in aligning their conduct with their beliefs.[134] Though cases like *Fulton* and *303 Creative* do apply equality protections, those equality principles are thus parasitic on individual autonomy.

Rather than advancing the limited theory of equality that has long characterized First Amendment law, expanded protections for conscientious conduct advance broad new equality and liberty values. Specifically, this doctrine demands equal respect for individuals' "liberty of conscience," that is, a liberty interest in developing and acting on conscientious beliefs free from undue government interference. This liberty interest does not emerge from the importance of religious beliefs specifically but from the liberal ideal that individuals have a right to autonomy and self-determination in important aspects of their identity. Understanding this theory not only shines light on recent First Amendment doctrine. It also uncovers a growing tension between that doctrine and Fourteenth Amendment gender jurisprudence.

II. PROTECTING GENDERED CONDUCT

In contrast to recent First Amendment law, Fourteenth Amendment gender jurisprudence has become less protective of individual liberty. This is best illustrated by *Dobbs v. Jackson Women's Health Organization*.[135] In eliminating the

agent's ultimate authority over the set of beliefs that will allow him or her to interpret the world and his or her place in it"); John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 788–90 (1986) (summarizing liberty of conscience as concerned with protecting conduct that promotes individual autonomy and self-realization); Nelson, *supra* note 126, at 1578 (arguing that it is conscience's role in "the autonomous process of self-authorship that justifies respect for the freedom of conscience"); Sawicki, *supra* note 126, at 1406 ("There is intrinsic moral value in autonomy and self-determination . . . and the best way for the state to promote this value is to accommodate those with sincere conscientious beliefs.").

133. *See* MACLURE & TAYLOR, *supra* note 132, at 81 (explaining that a subjective approach to identifying conscientious conduct is justified by the liberal view that "[i]t is up to individuals, perceived as moral agents capable of providing themselves with a conception of the good, to position themselves in relation to the different understandings of the world and of the meaning of human life" (emphasis omitted)); MILL, *supra* note 126, 54–56 (arguing that humanity itself is derived from individuals' capacity to develop and operationalize their unique sets of beliefs); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1274–75 (1994) (noting that protections for conscientious conduct are rooted in the fact that "our political community deeply respects the capacity of its members to arrive at and champion their individual understandings of the world").

134. *See* 303 Creative LLC v. Elenis, 600 U.S. 570, 584 (2023) ("[T]he freedom to think and speak is among our inalienable human rights."); Fulton v. City of Philadelphia, 593 U.S. 522, 532 (2021) (defending its deference to plaintiff's subjective beliefs by urging that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection" (quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981))).

135. 597 U.S. 215 (2022).

federal right to abortion, *Dobbs* dismissed the view that pregnant people's moral autonomy—their "own concept of existence, of meaning, of the universe, and of the mystery of human life"—gives rise to a liberty right "*to act* in accordance with those thoughts" under the Fourteenth Amendment.[136] Although such liberty interests might exist, the Supreme Court insisted that it had no power to protect them. In contrast to recent First Amendment doctrine, *Dobbs* declined to enforce these liberty values through equality doctrine. Quite the opposite, the Court asserted that the Equal Protection Clause only guards against laws motivated by "'invidiously discriminatory animus' against women."[137] *Dobbs*'s reasoning not only eliminated existing protections for reproductive conduct but also threatened a range of other gender-related-conduct protections—such as the rights to contraception, same-sex marriage, and same-sex intimacy.[138]

This Part argues that this retrenchment in constitutional gender jurisprudence is inconsistent with liberalizing First Amendment jurisprudence. The doctrine and theory expanding conscientious conduct in the First Amendment context compel the conclusion that constitutional protections for gender-related conduct should be experiencing a similar renaissance. Understanding this point begins with recognizing that, just as it is possible to identify conscientious conduct, it is possible to identify "gendered conduct"—i.e., conduct linked to a person's gender identity. It is also possible to protect it in a similar way to conscientious conduct. Embracing such protections would, in fact, advance the same values that justify expanded conscientious conduct protections.

A. IDENTIFYING GENDERED CONDUCT

Although "gendered conduct" is not as familiar a legal concept as "religious" or "expressive" conduct, the notion that conduct and gender identity may be linked under the Constitution is not novel. Feminist, queer, and critical race theorists have offered various accounts of how conduct and gender are related and should be recognized as such by the law.[139] And the Supreme Court has offered its own view on when conduct can or cannot be said to be linked to gender under the Constitution.[140] Drawing on these sources, this Section develops and defends a novel test to identify gendered conduct. It proposes that conduct is gendered if (1) regulations burdening that conduct enforce social stereotypes about people or a subset of people with a particular gender identity, or (2) regulations burdening that conduct disparately harm people or a subset of people with a particular gender identity.

Though the Supreme Court has never explicitly developed a theory of gendered conduct, it has explored the question of when conduct is linked to gender in

136. *Id.* at 239–40, 255–56 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

137. *Id.* at 236–37 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993)).

138. *See supra* note 3.

139. *See infra* notes 165–73, 179–91, and accompanying text.

140. *See infra* notes 174–78 and accompanying text.

various decisions. The most infamous is *Geduldig v. Aiello*.[141] In *Geduldig*, the Court addressed the constitutionality of a disability insurance program that excluded disabilities arising from pregnancy.[142] Whether the program's classification based on pregnancy amounted to a classification based on sex was a central question in the case.[143] The Court concluded that the pregnancy-based classification was not an impermissible sex-based classification.[144] The pregnancy exclusion was not "discrimination based upon gender as such" because, although "only women [could] become pregnant," there were plenty of "nonpregnant" women who were unaffected by the exclusion.[145] Pregnancy, in other words, was conduct that could not be linked to women because not all women were pregnant. This reasoning set the bar for establishing a link between gender and conduct impossibly high; there is no form of conduct that all individuals with a particular gender identity invariably engage in.

Geduldig's reasoning, though the subject of much criticism,[146] captures a real difficulty with identifying gendered conduct. Asserting that certain conduct is properly linked to people with a certain gender identity risks promoting gender essentialism. Gender essentialism, broadly defined, is the view that all people with a certain gender identity invariably share certain characteristics.[147] One way to understand *Geduldig* is as resisting gender essentialism by insisting that a woman's capacity to become pregnant is not a reason to assume that all women do become pregnant. This reasoning might especially resist biological essentialism—the view that biology dictates that people share certain innate gendered characteristics and traits.[148] Biologically essentialist attempts to link conduct and gender identity pervade our culture. Even some self-identified feminists, for example, invoke purported biological reality as a reason to criticize *Geduldig*[149] and link pregnancy exclusively to cis-gender women.[150]

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141. 417 U.S. 484 (1974).

142. *Id.* at 486, 492.

143. *Id.* at 496–97, 496 n.20.

144. *See id.* at 497.

145. *Id.* at 496 n.20.

146. *See, e.g.*, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 268–70, 268 n.21 (1992) (describing such criticisms and offering their own).

147. *See* Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 275 (1999).

148. *See id.*

149. *See, e.g.*, Diane L. Zimmerman, Comment, Geduldig v. Aiello*: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 448 (1975) (arguing that *Geduldig* was wrong because "[w]hile it is true that not all women are pregnant at any one time, all women, as a class, are *susceptible* to pregnancy").

150. *See, e.g.*, Katchie Ananda, *Transfeminism and TERFS: A Clash Between Biology and Ideology*, MEDIUM: WOMEN'S VOICES NOW (Jan. 18, 2019), https://medium.com/the-wvoice/transfeminism-and-terfs-a-clash-between-biology-and-ideology-eccd9853aa5f [https://perma.cc/KQZ5-6JTH] (asserting that the phrase "birthing people" ignores that "biology," including pregnancy, "define[s] the physical reality of being a woman"); Carrie N. Baker & Carly Thomsen, *The Importance of Talking About Women in the Fight Against Abortion Bans*, MS. MAG. (June 23, 2022), https://msmagazine.com/2022/06/23/women-abortion-bans-inclusive-language-pregnant-people/ [https://perma.cc/47PE-7Q7B]

Definitions of gendered conduct that rely on biological essentialism are harmful in at least two ways. First, urging that certain conduct is gendered by nature tends to naturalize gender inequality itself. Asserting that only women can get pregnant, for example, allows lawmakers to claim that it is this innate sex-based difference,[151] not policy,[152] that drives pregnancy-related inequality. *Dobbs*'s claim that abortion regulations are not discriminatory because "only one sex can undergo" abortion exemplifies this reasoning.[153] This wrongly implies that it is physiological difference, not the government, that is responsible for the gendered burdens of abortion regulations.[154] Second, defining gendered conduct by reference to biological essentialism is exclusionary. Insisting that pregnancy naturally attends womanhood, for example, implies that women who do not become pregnant—whether because they are transgender, struggle with infertility, or simply do not want to become pregnant—are not really women.[155] It also denies the existence of transgender men and nonbinary people who can and do become pregnant, but are not women.[156] Biologically essentialist understandings of the relationship between gender and conduct thus lack real explanatory power. More importantly, defining gendered conduct by reference to biology marginalizes and denies protection to those who do not conform to gendered expectations.[157]

("Abortion bans harm people based on sex because pregnancy is a biological process related to sex. To make a sex equality argument, we must name that reality.").

151. The Supreme Court has, for example, invoked supposed "real" differences between men and women to insulate discriminatory regulations from equal protection challenges. *See, e.g.*, Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53, 62–64, 73 (2001) (upholding an immigration law that overtly classified based on sex by reasoning that only women give birth); *see also* Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1084–90 (2023) (describing this "real differences" line of reasoning in case law).

152. The Supreme Court's reliance on purported physiological differences to justify the regulation of women's bodies obscures how such regulations are better understood as "reflect[ing] and enforc[ing] social judgments concerning women's roles." Siegel, *supra* note 146, at 266.

153. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022).

154. *See id.* This reasoning is flawed: "A pregnant woman seeking an abortion has the practical capacity to terminate a pregnancy, which she would exercise but for the community's decision to prevent or deter her. If the community successfully effectuates its will, it is the state, and not nature, which is responsible . . . ." Siegel, *supra* note 146, at 350.

155. *See* Ann V. Bell, *"I'm Not Really 100% a Woman if I Can't Have a Kid": Infertility and the Intersection of Gender, Identity, and the Body*, 33 GENDER & SOC'Y 629, 637 (2019) ("[W]omen are taught throughout their 'entire lives' that inherent in womanhood is having children. And if they are unable to do so themselves, their gender is called into question."); Annily Campbell, *Cutting Out Motherhood: Childfree Sterilized Women*, *in* GENDER, IDENTITY & REPRODUCTION: SOCIAL PERSPECTIVES 191, 194 (Sarah Earle & Gayle Letherby eds., 2003) ("One of the consequences of having no children is the danger of being perceived as not a 'real' woman, and this is felt deeply by many women who are involuntarily childless . . . ."); Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 234 (2016) (explaining "[s]cholarship . . . erases the existence of women who are transgender and unable to become pregnant by conflating the definition of womanhood with an ability to be or become pregnant").

156. *See* Strangio, *supra* note 155, at 235 (explaining how conflating pregnancy and womanhood means that "the transgender man who is pregnant" is "quite literally written out of existence").

157. This harm is amplified in a current political climate that has increasingly vilified and punished people who do not conform to gender norms. This most obviously includes a growing body of legislation that has targeted transgender people. *See generally* Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024) (documenting the depth and breadth of recent laws targeting transgender

The risk of slipping into biological essentialism does not, however, justify abandoning the task of identifying gendered conduct. Denying that there is any good way to connect conduct and protected forms of identity can itself be harmful. *Geduldig*'s refusal to protect pregnant workers on anti-essentialist grounds offers one example. Race equality doctrine, which relies on anti-essentialist rhetoric to limit race equality rights, offers another. In that context, the Supreme Court has adopted a "colorblind" theory of equality that posits that any state consideration of race, even to remedy racial inequality, is invidious.[158] Considering race is always harmful, the Supreme Court insists, because it "stereotypes" people and reflects "the assumption that members of the same racial group . . . think alike."[159] Under this view, suggesting that racial identity can be linked to any kind of conduct or characteristic is necessarily essentialist and, by extension, racist. While claiming an anti-essentialist high ground, this colorblindness theory exacerbates racial inequality. It prevents the state from directly targeting racial hierarchy[160] and obscures the law's continued enforcement of it.[161] The logic of colorblindness threatens even formally neutral laws that aim to avoid or remediate racially disparate impacts.[162] Colorblindness perpetuates gender inequality,

people and arguing that such legislation evinces constitutionally impermissible animus). But it also includes a political discourse that openly devalues women who decline to have children or embrace traditional family roles. *See* Moira Donegan, Opinion, *The Republican Party's Obsession with Families Has Taken a Fanatical Turn*, GUARDIAN (July 29, 2024, 6:09 AM), https://www.theguardian.com/commentisfree/article/2024/jul/29/the-republican-partys-obsession-with-families-has-taken-a-fanatical-turn [https://perma.cc/4FA9-JSKD] (noting that Republican politicians have increasingly taken to disparaging women who do not conform to a narrow conception of traditional family life, as exemplified by vice presidential candidate JD Vance's criticism of "childless cat ladies").

158. *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 987 (2007) ("Under this [colorblind] approach . . . the Fourteenth Amendment demands the highest level of justification whenever the state employs a racial distinction, irrespective of whether such race-conscious means are advanced to enforce or to ameliorate racial inequality.").

159. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206, 220 (2023) (quoting Schuette v. BAMN, 572 U.S. 291, 308 (2014) (plurality opinion)); *see also* Miller v. Johnson, 515 U.S. 900, 920 (1995) (explaining that a race-conscious redistricting plan violated the Equal Protection Clause because it "assume[d] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls'" (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993))).

160. *See* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 195 (1994) (explaining how colorblindness prevents the government from using "the best proxy we have for race-based disadvantage—race—to try to alter its presence in the body politic").

161. *See* Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 29 (2022) (noting how colorblindness jurisprudence "remove[s] from the purview of constitutional remedy facially race-neutral laws and processes that reproduce racial hierarchies"); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1611 (2009) ("[T]he Court's colorblindness principle scrupulously fail[s] to capture the law's long-running complicity with white supremacy and equally fail[s] to undo its effects."); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 2–3 (1991) ("A colorblind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.").

162. *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1873 (2012) (explaining how colorblindness suggests that "considering racial impact in order to avoid potential discrimination itself constitute[s] racial discrimination"); Richard Primus, *The Future of Disparate Impact*, 108 MICH.

too, by forbidding attention to ways in which many conduct regulations—such as reproductive regulations[163]—burden people along lines of race and gender.[164]

Fortunately for the project of identifying gendered conduct, linking conduct with gender identity need not rest on biological essentialism. To the contrary, feminist, queer, and critical race theorists have shown that gender identity and conduct can be linked through other means. Judith Butler, for example, has argued that gender identity and conduct are fundamentally intertwined as a matter of social meaning.[165] According to Butler, gender identity is not innate, but something that is created over time through "performance"[166] or repeated engagement in socially meaningful forms of conduct.[167] Such conduct includes "bodily gestures, movements, and styles of various kinds" that individuals and the society around them associate with a particular gender identity.[168] Pregnancy offers an example. Even though being a woman is neither necessary nor sufficient to become pregnant, many people closely associate pregnancy with womanhood.[169] When women become pregnant, they may thus be more readily perceived by others or even by themselves as women.[170] When women do not become pregnant, on the other hand, they may be perceived as less than "real" women.[171] Finally, when men or nonbinary people become pregnant, they may be misgendered or erased.[172] Under

L. REV. 1341, 1350 (2010) (explaining how the logic of colorblindness undermines acknowledgment of racial impacts because "disparate impact remedies are always race-conscious").

163. *See* Hill et al., *supra* note 10.

164. Kimberlé Crenshaw's groundbreaking work on intersectionality has shown how "feminism must include an analysis of race if it hopes to express the aspirations of non-white women" because race so often colors how women experience gender inequality. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166.

165. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 140–41 (1990).

166. *Id.* at 25, 137 ("[G]ender proves to be performative—that is, constituting the identity it is purported to be.").

167. *Id.* at 33 ("Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance . . . .").

168. *Id.* at 140.

169. *See* Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1532 (1974) (characterizing the stereotype that women are destined to become pregnant and to mother as one of the "most common Western stereotypes about women"); Blas Radi, *Reproductive Injustice, Trans Rights, and Eugenics*, 28 SEXUAL & REPROD. HEALTH MATTERS 396, 400 (2020) ("[I]t is understood that pregnancy is an experience unique to women and that women are women because they get pregnant . . . .").

170. Maura Ryan, *The Gender of Pregnancy: Masculine Lesbians Talk About Reproduction*, 17 J. LESBIAN STUD. 119, 121, 125 (2013) (noting that pregnancies can "ma[ke] women feel more womanly" and "that pregnancy introduces bodily changes that highlight biological femaleness, which is conflated with femininity").

171. *See supra* note 155 and accompanying text.

172. Radi, *supra* note 169, at 400 (explaining that social beliefs such as "pregnancy [being] synonymous with a woman's identity[] result[] in turning a pregnant man into an oxymoron"); Trevor MacDonald et al., *Transmasculine Individuals' Experiences with Lactation, Chestfeeding, and Gender Identity: A Qualitative Study*, BMC PREGNANCY & CHILDBIRTH, May 2016, at 1, 7 (noting that pregnant men report being misgendered as a result of their bodies changing during pregnancy).

Butler's theory, recognizing these kinds of links between conduct and gender identity is not essentializing so long as one recognizes that these links are socially constructed—that is, produced by the social world around us.[173]

Courts, too, can discern the social links between conduct and gender. Cary Franklin has traced how courts have long employed an "anti-stereotyping" theory of sex discrimination that depends on their capacity to recognize social links between conduct and gender.[174] Under this theory, courts determine whether a law is unconstitutional by asking whether it "reflect[s] or reinforce[s] traditional conceptions of men's and women's roles."[175] This standard necessarily requires courts to make judgments about what kinds of conduct regulations—and thus what kinds of conduct—reflect social conceptions about gender.[176] In *Nevada Department of Human Resources v. Hibbs*, for example, the Supreme Court concluded that parental leave regulations implicate sex equality because such pregnancy-related policies likely reflect "sex-role stereotype[s]."[177] The Supreme Court identified these stereotypes, or social links between pregnancy and gender, by looking to congressional findings, statistical surveys, expert testimony, and precedent to reach this conclusion.[178] Courts could similarly identify gendered conduct by making a holistic inquiry into what forms of conduct are socially linked to gender identity.

Courts can also identify gendered conduct by looking to the real-world effects of these social links. Catharine MacKinnon has shown how ideas about gender difference, constructed though they may be, tend not to simply stay ideas.[179] Instead, they shape material reality, often because they are enforced by law.[180] Pregnancy regulations illustrate this point. Close cultural associations between pregnancy and womanhood mean that pregnancy regulations often reflect ideas, or stereotypes, about women. Lax pregnancy discrimination regimes and harsh abortion regulations, for example, often reflect the view that a woman's proper role is as a mother in the home.[181] Such regulations, moreover, enforce these stereotypes by

173. BUTLER, *supra* note 165, at 140–41.

174. *See* Franklin, *supra* note 27, at 88–91.

175. *See id.* at 88.

176. *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 733–36 (2003); Franklin, *supra* note 27, at 152–54 (explaining that *Hibbs* recognized "pregnancy[] . . . as a site of pervasive sex-role stereotyping").

177. *Hibbs*, 538 U.S. at 731.

178. *Id.* at 728–37.

179. Catharine A. MacKinnon, *A Feminist Defense of Transgender Sex Equality Rights*, 34 YALE J.L. & FEMINISM 88, 91 (2023) ("Women are not oppressed by our bodies—our hormones, chromosomes, vaginas, breasts, ovaries. We are placed on the bottom of the gender hierarchy by the misogynistic meanings male dominant societies create and project onto us . . . .").

180. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 3, 33 (1987) ("The idea of gender difference helps keep the reality of male dominance in place.").

181. *See* Bartlett, *supra* note 169, at 1563–64 (explaining how singling out pregnancy can reflect stereotypes "that women belong in the home raising children; . . . that pregnancy[] . . . is not a 'disability' but a blessing which fulfills every woman's deepest wish; that women are and should be supported by their husbands" and other "beliefs about woman's place in the world as childbearer"); Siegel, *supra* note 146, 360–63 (arguing that abortion prohibitions, which single out pregnancy-related conduct, reflect

pushing women out of the workforce[182] and forcing them into motherhood.[183] In this way, the social meaning that links pregnancy with women creates the conditions for the social, economic, and political reality of women's subordination. This material reality is not abstract but visible in the concrete effects of pregnancy regulation, including increased poverty[184] and poor health outcomes.[185] These visible effects provide reason to believe that pregnancy is linked to women. Looking to such effects is thus a mechanism for courts and other legal actors to identify gendered conduct.

Relying on social meaning and its material consequences to identify gendered conduct, moreover, does not require erasing important differences within gender categories. As Angela Harris has shown, to assume that uniform meanings or material realities attach to gender identity independent of other forms of identity is itself a kind of essentialism.[186] Though not biological, this essentialism ignores how gender and other forms of identity are inseparable.[187] Courts need not embrace such essentialism but can instead attend to how gender stereotypes often vary based on other aspects of identity. Though pregnancy regulations often reflect the stereotype that women should be mothers, for example, they may reflect different or additional stereotypes when they target nonwhite, queer, disabled, or otherwise marginalized women. The stereotype that Black women are bad mothers, for example, leads to harsher regulation and criminalization of their conduct while pregnant.[188] The stereotype that disabled women are unfit to mother underpins special legal limits on their freedom to become pregnant and

views about women, including "normative judgments about women's sexual conduct" and the "assumption that motherhood is women's 'normal' condition").

182. *See* DINA BAKST, ELIZABETH GEDMARK, SARAH BRAFMAN & MEGHAN RACKLIN, A BETTER BALANCE, LONG OVERDUE 4–6 (2021) (explaining how a lack of workplace pregnancy-discrimination protections often pushes women out of their jobs).

183. Abortion bans have this effect. In the wake of *Dobbs*, "nearly 66,000 fewer abortions" were documented in a nine-month period "in states that banned abortion." SOC'Y OF FAM. PLAN., #WECOUNT REPORT 6 (2023), https://societyfp.org/wp-content/uploads/2023/06/WeCountReport_6.12.23.pdf [https://perma.cc/H2AP-NJLC].

184. *See* EMILY MARTIN ET AL., NAT'L WOMEN'S L. CTR. & A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 10 (2013), https://nwlc.org/wp-content/uploads/2015/10/pregnant_workers.pdf [https://perma.cc/EJX6-QKVU] (documenting how pregnancy discrimination, especially job loss, can "propel families into poverty" by eliminating income and health insurance coverage at a crucial time); TURNAWAY STUDY, *supra* note 4, at 3 ("[B]eing denied a wanted abortion results in economic insecurity for women and their families, and an almost four-fold increase in odds that household income will fall below the Federal Poverty Level.").

185. *See* MARTIN ET AL., *supra* note 184, at 12 ("Pregnant workers denied even minor workplace accommodations may be at risk of complications such as preterm birth, low birth weight, pregnancy-induced hypertension and preeclampsia, miscarriage, and congenital anomalies."); TURNAWAY STUDY, *supra* note 4, at 2–3 (citing studies showing that women denied abortions have worse mental and physical health outcomes in both the short and long term).

186. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990).

187. *See id.* at 588–90 (explaining how attempting to generalize about all women invariably brackets issues of race, class, and sexual orientation, and thus fragments the experience of multiply oppressed people and treats the experience of the most privileged white women as universal).

188. *See* ROBERTS, *supra* note 34, at 152–78.

keep their families intact.[189] Courts can also attend to how stereotypes have different material effects across groups. Lax pregnancy discrimination protections, for example, especially harm immigrant women who are more likely to work low-paying, inflexible jobs.[190] And abortion bans harm women of color and transgender people disproportionately because they, among other things, face greater barriers to healthcare.[191] Courts can properly identify gendered conduct by attending to these particularized harms and the particularized social meanings they reflect.

In sum, identifying gendered conduct without relying on harmful essentialism is both possible and important. Regardless of gender identity's relationship to biology, society associates certain forms of conduct with certain forms of gender identity. Courts can identify these associations, and thus identify gendered conduct, through a holistic inquiry into social meaning. They can also do so by looking to the visible, material consequences of this social meaning. Where conduct regulations disparately harm people with a particular gender identity, the regulated conduct is likely a site where social understandings, or stereotypes, about gender are enforced.[192] Whether looking to social meaning itself or its consequences, courts both can and should attend to how stereotypes and their effects vary along other axes of identity, such as race, sexual orientation, and (dis)ability.

In short, conduct is gendered if (1) regulations burdening that conduct enforce social stereotypes about people or a subset of people with a particular gender identity, or (2) regulations burdening that conduct disparately harm people or a subset of people with a particular gender identity.

B. THE MECHANICS OF PROTECTING GENDERED CONDUCT

Expanded protections for conscientious conduct offer a model for how to protect gendered conduct. This is because equality protections for conscience and gender have historically been limited in similar ways. As in the First Amendment context,[193] Fourteenth Amendment gender equality jurisprudence has scrutinized facially neutral conduct regulations only where those regulations specifically aim to disfavor people with a particular gender identity.[194] Although gender equality doctrine has allowed some independent role for effects in triggering heightened scrutiny,[195] this role is narrow and increasingly

189. *See* Powell, *supra* note 12, at 1860, 1867–72 (documenting how "attitudes and presumptions about people with disabilities' sexuality and reproduction" have led to numerous regulations that limit disabled women's reproductive autonomy and equality, including laws permitting compulsory sterilization, guardianship, and policing of disabled motherhood).

190. *See* MARTIN ET AL., *supra* note 184, at 7 & 24 n.16.

191. Portuondo, *supra* note 64, at 1495 nn.1–2.

192. *See id.*

193. *See supra* notes 42–57 and accompanying text.

194. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (holding that facially neutral laws are subject to heightened scrutiny when they were passed "'because of,' not merely 'in spite of,'" their "adverse effects upon an identifiable group").

195. *See* Portuondo, *supra* note 64, at 1513–17 (explaining how equal protection doctrine has sometimes allowed effect alone to trigger heightened review, but only where laws have an exclusive or nearly exclusive effect on a gender group).

theoretical.[196] Just as a specific intent requirement permitted broad regulation of conscientious conduct under the First Amendment, this specific intent rule continues to permit broad regulation of gendered conduct under the Equal Protection Clause.[197] *Dobbs*, for example, relied on this specific intent rule to dismiss the possibility that abortion regulations implicate gender equality.[198]

As explained in Part I, recent First Amendment jurisprudence has shown that there are at least two mechanisms for overcoming the limitations of this specific intent rule. First, it is possible to rework this rule by expanding the definition of discriminatory intent to include laws that "devalue" or otherwise negatively affect conscientious conduct.[199] Second, it is possible to expand exceptions to this specific intent rule to permit a wide range of effects to trigger heightened scrutiny on their own.[200] The Supreme Court has deployed these mechanisms in tandem to develop powerful protections for conscientious conduct, all without explicitly overruling prior case law. The Court could do the same for gendered conduct.

To expand gendered conduct protections within existing doctrinal constraints, the Supreme Court could first expand the definition of discriminatory intent under the Fourteenth Amendment. Rather than requiring that laws be motivated by animus to satisfy this intent rule, the Court could deem laws presumptively invalid if they devalue gendered conduct. Explicitly singling out gendered conduct, such as abortion, for burdensome regulation would most clearly evidence such devaluation.[201] But a facially neutral law's disparate effect on gendered conduct, such as an employment discrimination law's routine failure to protect pregnancy, could also evidence devaluation.[202] There are some seeming doctrinal hurdles to expanding equal protection's discriminatory intent rule in this manner. The same hurdles, however, also appeared to preclude the Court from expanding the

196. *Dobbs* suggested that even laws that affect "only one" gender group do not trigger heightened scrutiny, appearing to eliminate any standalone role for effects in triggering heightened review. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022).

197. Portuondo, *supra* note 64, at 1496 & n.10 (collecting sources that demonstrate how this specific intent rule makes it "virtually impossible to challenge facially neutral laws on . . . equal protection grounds").

198. *Dobbs*, 597 U.S. at 236 (holding that abortion regulations do not trigger heightened scrutiny because they are not a "mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other" (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)) (alteration in original)).

199. *See supra* Section I.B.

200. *See supra* Section I.B.

201. In the free exercise context, the Supreme Court has held that laws that explicitly single out religious conduct for differential treatment violate the new devaluation-based triggering rule. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 18 (2020) (per curiam) (holding that COVID-19 public health regulations were subject to strict scrutiny because they explicitly singled out religious conduct for differential treatment); *South Bay II*, 141 S. Ct. 716, 717–18 (2021) (statement of Gorsuch, J.) (suggesting that strict scrutiny was warranted because a law's text "openly imposed more stringent regulations on religious institutions than on many businesses" and the state "even assign[ed] places of worship their own row" in a spreadsheet detailing the regulations).

202. *Cf.* Tandon v. Newsom, 593 U.S. 61, 63 (2021) (per curiam) (holding that a facially neutral law was subject to heightened scrutiny because its effect was to "treat[] some comparable secular activities more favorably than at-home religious exercise").

definition of discriminatory purpose in the free exercise context.[203] If these obstacles did not stop the Court when it came to conscientious conduct protections, they should not prevent similar expanded protections for gendered conduct.[204]

In addition to liberalizing its definition of discriminatory intent, the Supreme Court could expand an exception to it. The Court could deem laws that burden gendered conduct, but not comparable non-gendered conduct, presumptively unconstitutional. The Court has acknowledged how such a "most-favored-nation" approach to gendered conduct might work.[205] Specifically, the Court has described an approach to pregnancy discrimination that would require employers to provide the same accommodations for "disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work."[206] The Court explicitly described this as a "most-favored-nation" rule.[207] Though the Supreme Court did not adopt this approach, it illustrates how a most-favored-nation rule could apply to gendered conduct. The Supreme Court could bootstrap such a most-favored-nation rule to a longstanding, albeit historically limited, thread of equal protection doctrine that permits heightened scrutiny based on a law's effects alone.[208] Such a move would be no different than the Supreme Court's bootstrapping of the most-favored-nation rule to the longstanding, but historically limited, general applicability thread of free exercise doctrine.[209]

C. THE THEORY OF PROTECTING GENDERED CONDUCT

The fact that it is possible to identify and protect gendered conduct, however, does not necessarily mean that courts should. This Section addresses this point, arguing that recent First Amendment doctrine provides normative support for expanding gendered conduct protections. Better protections for gendered conduct would advance the same equality and liberty values that justify expanded conscientious conduct protections.

Expanded gendered conduct protections would, as an initial matter, advance the same equality values that justify expanded conscientious conduct protections. As explained in Section I.C, expanded protections for conscientious conduct advance the theory that laws can be discriminatory even if they do not specifically

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203. *See* Portuondo, *supra* note 64, at 1553–54 (explaining these hurdles as the Court grappling with its prior definition of "a lack of neutrality as requiring something akin to malice, or a desire to harm religious interests" in both equal protection and free exercise contexts).

204. *See id.* at 1553 ("By avoiding [doctrinal] hurdle[s] without explicitly overruling existing free exercise precedent, the Court's recent free exercise jurisprudence offers a model for avoiding the same hurdle in the equal protection context without requiring any explicit changes to equal protection law.").

205. Young v. United Parcel Serv., Inc., 575 U.S. 206, 221 (2015).

206. *Id.* at 220 (quoting Brief for Petitioner at 23, *Young*, 575 U.S. 206).

207. *Id.* at 221.

208. *See* Portuondo, *supra* note 64, at 1555–56 (describing a longstanding "covert classification" rule that allows effects alone to trigger heightened scrutiny in the equal protection context).

209. *See id.* (explaining how the Court has bootstrapped the most-favored-nation rule onto existing free exercise doctrine by using analytical maneuvers that would work just as effectively in the equal protection context).

aim to disfavor protected forms of conduct or identity.[210] This insight supports expanded gendered conduct protections. Equal protection scholars have long argued that laws can discriminate based on gender without a specific intent to do so.[211] Such discrimination often takes the form of devaluation of the interests of people with a given gender identity.[212] Abortion regulations exemplify this devaluation. Though states urge that abortion regulations are a neutral means to protect potential life, states are highly selective in enforcing this interest.[213] States that restrict abortion to protect life, for example, are the least likely to embrace other life-promoting policies,[214] such as adequate funding for prenatal care, support for expectant parents, and access to contraception.[215] Lawmakers are willing to protect potential life, that is, only insofar as they believe women will bear the costs of doing so.[216] In this way, abortion laws devalue women's interests. That devaluation, in its simplest form, circumscribes liberty in a way that is antithetical to liberal ideals that underwrite the Supreme Court's First Amendment liberty jurisprudence. Expanded gendered conduct protections would guard against this devaluation.

One might wonder, however, whether gendered conduct protections would guard against the same kind of devaluation as conscientious conduct protections. As noted above, recent First Amendment doctrine guards against the devaluation of individual liberty interests.[217] This doctrine demands equal respect for individuals' "liberty of conscience," which is a liberty interest in developing and acting on conscientious beliefs free from undue government interference. This liberty interest does not emerge from the importance of religious beliefs specifically, but from the liberal ideal that individuals have a right to autonomy and self-determination in important aspects of their identity. One could argue that gendered conduct protections would not guard against such devaluation because, simply put, gendered conduct does not implicate individual liberty in the same way.

Both the test for identifying gendered conduct and some threads of feminist theory might offer support for this view. Unlike the test for conscientious conduct, which focuses on plaintiffs' subjective views of what their conscientious identities require, the test for gendered conduct looks to objective social beliefs to link gender identity and conduct. This focus on external, rather than internal,

210. *See supra* notes 115–17 and accompanying text.

211. *See* Portuondo, *supra* note 64, at 1539–47 (summarizing scholarship discussing discrimination on the basis of sex, race, and religion that is not motivated by specific discriminatory intent).

212. *See id*.

213. *See* Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207, 209 (2018).

214. Ibis Reprod. Health & Ctr. for Reprod. Rts., *Evaluating Abortion Restrictions and Supportive Policy Across the United States*, EVALUATING PRIORITIES, https://evaluatingpriorities.org/ [https://perma.cc/7ETG-4RNN] (last visited Mar. 9, 2025) (providing data showing that states with more restrictive abortion policies tend to have fewer supportive policies in place for women and families).

215. Siegel, *supra* note 213, at 207–09 (setting out numerous policies that would protect potential life beyond restricting abortion, and explaining why these policies would likely be more effective than abortion restrictions).

216. *Id*. at 222–23 (arguing that abortion regulations that "ask[] women to sacrifice their lives, health, families, resources, and careers for the care of children in ways that the rest of the community will not" reflect lawmakers' desire to "control[] women's choices" alone).

217. *See supra* Section I.B.

beliefs about gender may suggest that gendered conduct is a social imposition, not an expression of individual autonomy. Some strands of feminist theory, which focus on gender as an objective feature of our social world rather than a subjective feature of our psyche, bolster this view. These feminists argue that gender is less important as a feature of subjectivity than as a tool that creates and sustains social hierarchies.[218] This perspective might suggest that gendered conduct protections are important, not because they promote individual autonomy but because they combat gender-based oppression and subordination.[219]

Gendered conduct's basis in external social meaning, however, only enhances gendered conduct protections' power to promote individual liberty. While ideas about gender are often oppressive and limit individual autonomy, these limitations create unique opportunities for self-construction.[220] The fact that gender stereotypes are hard to defy means that defying gender stereotypes is a powerful act of autonomy and self-determination. Gendered conduct—defined by the presence of such stereotypes—offers an ideal vehicle for this kind of subversion.[221] Take pregnancy. As noted above, a host of gender stereotypes attach to pregnancy.[222] This means that people can assert their autonomy by being pregnant in ways that resist these stereotypes. Women who become pregnant, for example, can resist the stereotype that motherhood is their sole destiny by working while pregnant,[223] continuing to work after pregnancy,[224] or terminating a pregnancy.[225]

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218. Dominance theory, for example, asserts that gender is best understood as a tool that enforces both men's supremacy and women's subordination. *See* MACKINNON, *supra* note 180, at 40 ("Gender is . . . a question of power, specifically of male supremacy and female subordination."); *see also* KATHLEEN LENNON & RACHEL ALSOP, GENDER THEORY IN TROUBLED TIMES 71–95 (2020) (offering a high-level summary of such materialist theories of feminism).

219. This would suggest that protecting gendered conduct would be an extension of an anti-subordination approach to sex equality, which posits that laws should be subject to heightened review only when they subordinate gender groups. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–08 (1986).

220. Judith Butler, for example, argues that the recognition that gender is socially constructed does not eliminate the possibility of agency, but instead clarifies how that agency can be expressed. *See* BUTLER, *supra* note 165, at 143. Specifically, agency is located within the possibility of engaging in conduct that is likely to subvert, disrupt, or even displace the powerful ideas that construct gender in the first instance. *See id.* at 145–47. Black feminist theorists, too, have argued that women can find autonomy in the face of gender oppression by "transcend[ing]" it and "turn[ing] existing relations of domination to their own ends." Harris, *supra* note 186, at 614–15. This is best illustrated by "the legacy of Black women who have survived and transcended conditions of oppression." ROBERTS, *supra* note 34, at 303.

221. *See* BUTLER, *supra* note 165, at 147 ("[P]recisely those practices of repetition that constitute [gender] identity . . . present the immanent possibility of contesting them.").

222. *See supra* notes 169–73 and accompanying text.

223. *See* Reginald A. Byron & Vincent J. Roscigno, *Relational Power, Legitimation, and Pregnancy Discrimination*, 28 GENDER & SOC'Y 435, 439 (2014) (explaining how pregnant women and new mothers experience employment discrimination precisely because they defy the "longstanding patriarchal view that women cannot be both good mothers and good workers").

224. *See id.*

225. *See* Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 442 (2013) (arguing that much of abortion stigma emerges from the fact that abortion is "conduct that defies deeply rooted beliefs about women's social and biological roles").

Trans men can resist the stereotype that pregnancy and motherhood are inseparable by being pregnant and parenting as men.[226] The strong gender stereotypes that attach to pregnancy, in short, make pregnancy an ideal site to assert individual autonomy by contesting these stereotypes. Gendered conduct protections would promote individual liberty by protecting these sites of contestation.

Gendered conduct protections have special potential to promote autonomy and self-determination for people with multiply marginalized identities. As an initial matter, gendered conduct regulations more significantly and frequently devalue multiply marginalized people's autonomy interests. Black women's reproductive conduct, for example, has been subject to especially pervasive and harsh regulation from the time of slavery to the present.[227] This means that the law has and continues to uniquely burden and devalue Black women's autonomy to develop and live out their own sense of self, such as by depriving them of the liberty to decide whether, when, and how to mother.[228] Particularly harsh and pervasive limitations on multiply marginalized peoples' autonomy mean, moreover, that their resistance to gender stereotypes is an especially radical assertion of autonomy. Black women's decision to mother or not to mother despite intersecting stereotypes condemning both kinds of conduct, for example, represents an especially powerful form of self-construction.[229] Even mundane forms of gendered conduct become powerful expressions of autonomy for trans women of color, who face threats of discrimination, violence, and even death for engaging in them.[230] Protecting gendered conduct would guard such marginalized individuals' vital assertions of individual autonomy.

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226. In doing so, trans men undermine broader narratives that their bodies are not meant to reproduce, or that they do not exist at all. These narratives contribute to discriminatory policies that inhibit trans peoples' freedom to realize their own identity without facing legal sanction and violence. Strangio, *supra* note 155, at 241–44 (describing how stereotypes that bodies must be "coherently sexed" lead to discriminatory policies and staggering rates of violence against all trans people, but especially against trans women of color).

227. *See* ANGELA Y. DAVIS, WOMEN, RACE & CLASS 7, 219 (First Vintage Books ed. 1983) (1981) (tracing how enslaved women were treated as "breeders" whose "infant children could be sold away from them like calves from cows," and explaining how in modern times Black women, among other women of color, have been targeted by sterilization campaigns).

228. Black women have been deprived of both the right not to mother and the right to mother. Abortion regulations disproportionately compel unwanted Black motherhood. *See supra* note 10 and accompanying text. A whole host of regulations deprive Black women of the right to parent the children they desire, from a child welfare state that targets Black families, to family cap laws that punish Black childbearing, to environmental racism that imperils Black women's ability to bear children. *See* Mariela Olivares, *The Unpragmatic Family Law of Marginalized Families*, 136 HARV. L. REV. F. 363, 371–76 (2023); ROBERTS, *supra* note 34, at 211–13; Eva Hernandez-Simmons, *Why Environmental Justice Is Part of Reproductive Justice*, SIERRA CLUB (June 24, 2022), https://www.sierraclub.org/articles/2022/06/why-environmental-justice-part-reproductive-justice [https://perma.cc/94PC-7452] (explaining that Black women are more likely to experience a range of climate hazards that make pregnancy and fetal development riskier).

229. *See* Harris, *supra* note 186, at 613–14 (explaining that "[B]lack women have had to learn to construct themselves in a society that denied them full selves" through powerful acts of "creativity and joy"); ROBERTS, *supra* note 34, at 303 (describing how Black women's capacity to survive and transcend conditions of oppression "defies the denial of self-ownership inherent in slavery" and represents a powerful exercise of "will," "creativity," and "self-definition").

230. Trans women of color experience discrimination in housing, healthcare, employment, and education; high rates of physical and sexual violence; and staggering murder rates. *See* Kevin Jefferson

As these examples suggest, gendered conduct protections would not promote liberty at random. They would do so in a way that, by ensuring the equal liberty of those whose sense of self does not conform to gendered expectations, combats gender-based oppression. When the state limits individual freedom based on gender stereotypes, the state limits people's freedom based on beliefs about what their gender identity means.[231] Ideas about gender, in other words, become the justification for the unequal denial of liberty. Anti-LGBTQ+ legislation, for example, has historically conditioned the exercise of liberty—including the right to marry,[232] to sexual intimacy,[233] and to medical autonomy[234]—on conformity with gender stereotypes.[235] Reproductive regulations have done the same—penalizing only exercises of reproductive liberty that do not conform to gendered expectations.[236] Such gendered conduct regulations, which operate on the assumption that

et al., *Transgender Women of Color: Discrimination and Depression Symptoms*, 6 ETHNICITY & INEQS. HEALTH & SOC. CARE 121, 121–22 (2013).

231. Several scholars have characterized this kind of harm as a deprivation of "equal liberty" and argued that Fourteenth Amendment doctrine has long recognized this distinct harm. *See, e.g.*, Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1165 (2017) ("[G]overnmental stereotyping can deny individuals the equal liberty to create and express an identity free from predetermined roles and their attendant social meanings."); Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1922–33 (2021) (tracing how substantive due process decisions—which have long been the primary source of protections for gendered conduct—relied on both liberty and equality guarantees of the Constitution); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–49 (2011) (arguing that Fourteenth Amendment decisions have recognized "that constitutional equality and liberty claims are often intertwined").

232. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that laws prohibiting same-sex marriage violated both equality and liberty principles by denying same-sex couples the equal liberty to marry based on "disapproval of their relationships").

233. *See* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (concluding that laws that punished same-sex intimacy denied gay and lesbian people a fundamental liberty based on nothing better than judgments that their conduct was "immoral").

234. Seven states, for example, unequally deny Medicaid funding for gender-affirming care. *See* CHRISTY MALLORY & WILL TENTINDO, WILLIAMS INST., UCLA SCH. OF L., MEDICAID COVERAGE FOR GENDER-AFFIRMING CARE 4 (2022).

235. Although sexual orientation and gender are distinct, anti-LGBTQ+ laws punish gender nonconformity. For example, laws denying rights to gay, lesbian, or bisexual people punish these individuals for failing to conform to "heterosexually defined gender norms . . . related to our stereotypes about the proper roles of men and women," including that "'real' men should date women, and not other men" and that women should date men. Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring) (quoting Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). Anti-transgender laws punish individuals who fail to conform to their sex assigned at birth. *See* Erik Fredericksen, *Protecting Transgender Youth After* Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 YALE L.J. 1149, 1157 (2023) ("[A]ntitransgender discrimination punishes individuals for failing to conform to the stereotype of cisgender identity—that individuals' gender identities always conform to the sex assigned to them at birth."); *see also* Eyer, *Transgender Constitutional Law*, *supra* note 9, at 1440–42 (tracing some courts' endorsement of this argument). Both kinds of nonconformity threaten a whole host of gender stereotypes that enforce different gender roles for men and women. *See* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 827 (2014) ("A central aim of [anti-LGBTQ+] laws was to channel men and women into a single, normative family form: the heterosexual marital family.").

236. For those whose reproduction society values—usually wealthy, white, non-disabled women—this regulation often punishes the choice not to procreate or to make motherhood a defining identity. *See*

certain forms of conduct attach to certain forms of gender identity, devalue and selectively deny liberty to those whose sense of self does not conform to these expectations. Gendered conduct protections would promote autonomy by affording these individuals the equal liberty to develop and implement their own sense of identity free from expectations that their gender dictates certain behaviors.

In sum, protecting gendered conduct is not only possible but also important under the values articulated by recent First Amendment decisions. Gendered conduct protections, like conscientious conduct protections, would promote both liberty and equality by preventing the devaluation of individuals' identity-rooted autonomy interests. First, they would do so by facilitating conduct that, because it is a site of social expectations about gender, is an ideal site to assert individual autonomy by subverting these expectations. Second, they would do so by affording individuals the equal liberty to develop and implement their own sense of identity free from gender stereotypes about who they are or what they do. Accordingly, recent First Amendment cases support expanded gendered conduct protections as a matter of both doctrine and theory.

III. PROTECTING GENDERED LIBERTY

The explicit premises of First Amendment doctrine, it seems, cannot explain the Supreme Court's differential treatment of conscientious and gendered conduct. On the contrary, these premises are at odds with shrinking gendered conduct protections. This Part thus moves beyond the face of the doctrine to try to square the Court's growing hostility toward gendered conduct protections with its growing affinity for conscientious conduct protections. It begins by considering and rejecting two likely objections to expanding gendered conduct protections.

This Part then offers a better theory to explain the Supreme Court's inconsistent protection of conscientious and gendered conduct. This theory emerges from the observation that recent First and Fourteenth Amendment doctrines, taken together, interact with conduct regulations in a consistent and patterned way. Specifically, these doctrines ensure protections for conduct that enforces existing gender norms and actively undermine protections for conduct that resists gender norms. First and Fourteenth Amendment doctrines thus make sense and complement

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Siegel, *supra* note 146, at 327 (arguing that abortion restrictions seek to enforce women's roles as mothers alone); *see also* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2036 (2021) (documenting how the pro-life movement historically promoted white motherhood based on a desire to increase the native-born white population). For those whose reproduction society devalues—including poor, disabled, immigrant, Native, and non-white women—regulations often punish the choice to reproduce. *See* DAVIS, *supra* note 227, at 219–21 (documenting a long history of reproductive policies in the United States that have coerced Latina, Black, and Native American women to "become permanently infertile," while "white women enjoying prosperous economic conditions are urged, by the same forces, to reproduce themselves"); Olivares, *supra* note 228, at 371–76 (tracing how the state disproportionately punishes and regulates immigrant, Black, Latina, and poor mothers); Robyn M. Powell, *Legal Ableism: A Systematic Review of State Termination of Parental Rights Laws*, 101 WASH. U. L. REV. 423, 443–47 (2023) (tracing how the state disproportionately polices and terminates the parental rights of disabled parents).

each other under a deeply gendered theory of liberty. This gendered vision of liberty supports individuals' freedom to enforce gender norms and denies individuals' freedom to defy them.

A. THE POSSIBLE LIMITS OF LIBERTY

Even if the explicit premises of Supreme Court decisions cannot explain the Supreme Court's differential treatment of conscientious and gendered conduct, reasons beyond these decisions could justify this result. This Section, accordingly, addresses two likely objections to expanding gendered conduct protections. The first objection, likely to come from the political left, is that attempting to protect gendered conduct is misguided because it relies on liberty values that cannot protect marginalized gender groups. The second objection, likely to come from the political right, is that conservative constitutional methodologies, which draw the boundaries of liberty narrowly, do not support gendered conduct protections. Both objections boil down to a similar claim: liberty has its limits, and these limits counsel against embracing gendered conduct protections. This Section shows that these purported limits of liberty are illusory.

1. The Progressive Critique

One reason to be skeptical of gendered conduct protections emerges from longstanding progressive critiques of liberty-based rights. Feminist scholars have long criticized liberty frameworks as inadequate to achieve the ends of gender justice.[237] They point out that the usual notion of liberty in the United States as a negative right against government interference alone—rather than a positive entitlement[238]—means that liberty rights have historically protected only the most privileged.[239] A narrow guarantee of noninterference does little for individuals who, even absent such interference, lack the resources necessary to exercise a right. The right to abortion is illustrative. Although the liberty right to abortion recognized in *Roe* and *Casey* ostensibly protected all people's "right to choose" abortion,[240] it really only protected those with the means and social position to exercise that choice.[241] Those who could not afford or otherwise access abortion were simply

237. *See* Tracy E. Higgins, *Why Feminists Can't (or Shouldn't) Be Liberals*, 72 FORDHAM L. REV. 1629, 1629–34 (2004) (summarizing longstanding feminist critiques of liberal theory); *see also, e.g.*, ROBERTS, *supra* note 34, at 294–99 (noting that the historical understanding of liberty rights has been inadequate to protect Black, poor, and otherwise marginalized women); Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 453–61 (1992) (arguing that the historical understanding of liberty fails meaningfully to protect women).

238. *See* Leif Wenar, *Rights*, STANFORD ENCYCLOPEDIA OF PHIL. (Feb. 24, 2020), https://plato.stanford.edu/archives/spr2023/entries/rights [https://perma.cc/4QZ7-4NKK] ("The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to provision of some good or service.").

239. ROBERTS, *supra* note 34, at 294 ("The dominant view of liberty reserves most of its protection only for the most privileged members of society.").

240. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 870 (1992) (characterizing *Roe v. Wade* as recognizing the "right . . . to choose to have an abortion before viability" and reaffirming that holding).

241. *See* ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 99 (2015) (arguing that, under such a "choice" paradigm, "women are ascribed reproductive choices if they can afford them or if they are deemed legitimate choice-makers").

unprotected. The Supreme Court defended this result by asserting that liberty rights do not encompass an entitlement either to the funding necessary to exercise those rights[242] or to protection from laws that make exercising those rights more costly.[243] This unwillingness to recognize how social and economic realities constrain individual choice meant that the right to abortion failed to protect marginalized groups and arguably legitimized broader reproductive inequality.[244] Liberty frameworks' potential to tolerate, and even produce, such inequalities could be a reason to eschew liberty-based gendered conduct protections.

The historical inadequacy of liberty-based rights to protect marginalized groups, however, is not a reason to reject gendered conduct protections. Instead, it is a reason to ensure that gendered conduct protections promote a broader vision of liberty. First, the usual notion of liberty as a negative right is a historical contingency, not a theoretical implication. As Dorothy Roberts has argued, recognizing the deep flaws in historical approaches to liberty does not entail abandoning liberty values entirely.[245] To the contrary, abandoning liberty would sacrifice liberty frameworks' unique power to promote individual autonomy and self-definition, particularly for multiply marginalized people.[246] Roberts suggests that advocates should instead push for a broader theory of liberty that is both positive—i.e., includes a right to material and social support in exercising that liberty—and focused on equality values.[247] As noted above, gendered conduct protections already meet the latter criterion by incorporating equality values.[248] Gendered conduct protections thus need only embrace a positive theory of liberty to avoid the drawbacks of liberty-based rights past. Specifically, gendered conduct protections should extend to protect people from both affirmative government actions—such as abortion bans—and from omissions or a lack of government support—such as failures to fund or otherwise support abortion access.

A positive vision of liberty is not just a theoretical possibility but is an emerging feature of First Amendment jurisprudence. Much as in the context of gender, the Supreme Court has long treated conscientious liberty as a negative right. It previously opined, for example, that a right to religious schooling does not include a right to funding for such schooling.[249] Recent First Amendment case

242. Harris v. McRae, 448 U.S. 297, 317–18 (1980) ("[T]he liberty protected by the Due Process Clause . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

243. *Casey*, 505 U.S. at 873 (blessing laws that make it more difficult or expensive to obtain an abortion because "not every law which makes a right more difficult to exercise is, *ipso facto,* an infringement of that right").

244. *See* Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1409 (2009) (arguing that the right to abortion had the effect of "legitimating the profoundly inadequate social welfare net and hence the excessive economic burdens placed on poor women and men who decide to parent").

245. ROBERTS, *supra* note 34, at 302.

246. *See id.*; *see also supra* notes 221–30 and accompanying text.

247. *See* ROBERTS, *supra* note 34, at 309.

248. *See supra* notes 202–16 and accompanying text.

249. *See* Harris v. McRae, 448 U.S. 297, 318 (1980) ("It cannot be that because government may not . . . prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to . . . send their children to

law, however, has walked back this negative approach to religious liberty. In *Carson ex rel. O.C. v. Makin*, for example, the Supreme Court held that Maine could not deny tuition assistance for private religious schooling where it provided tuition assistance for private nonreligious schooling.[250] Though the Court pitched *Carson* as an equality decision,[251] the case necessarily relied on a positive theory of liberty: the denial of funding for religious schooling only counts as discrimination against a baseline that construes the denial of government funding as a cognizable harm.[252] The Supreme Court has similarly embraced a positive vision of conscientious liberty in the statutory context.[253] The Court could similarly shift to a positive-rights baseline in gendered conduct cases. It could hold, for example, that denying Medicaid funds for gendered conduct, such as hormone therapy for gender dysphoria, while granting Medicaid funds for non-gendered conduct, such as hormone therapy for other medical conditions, is discriminatory.[254] In this way, gendered conduct protections, like conscientious conduct protections, could deploy the logic of equality to advance a positive vision of liberty. In doing so, gendered conduct protections would promote the liberty of everyone, not just the most privileged.

2. The Conservative Critique

The political and legal right, by contrast, might object that the scope of constitutional liberty, properly understood, is not broad enough to encompass the liberty implicated by gendered conduct. Under this view, the scope of liberty is not defined by an abstract assessment of what promotes autonomy and self-determination but is narrowly constrained by interpretive methodologies such as textualism, originalism, and history and tradition approaches. These conservative constitutional methodologies, one might urge, simply do not recognize gender-

private schools." (citations omitted)); Locke v. Davey, 540 U.S. 712, 715 (2004) (holding that excluding those pursuing a religious postsecondary degree "from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment").

250. 596 U.S. 767, 781 (2022).

251. *See id.* at 779–80.

252. *See Locke*, 540 U.S. at 726 (Scalia, J., dissenting) (arguing that the denial of funding to religious institutions is discriminatory because, "[w]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured"). *Compare Carson*, 596 U.S. at 780 (holding that denying benefits for religious schooling alone is discriminatory because it "'penalizes the free exercise' of religion" (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017))), *with Harris*, 448 U.S. at 315–17 (explaining that a federal funding program that "subsidize[s] medically necessary services generally, but not certain medically necessary abortions," does not burden the right to abortion because it "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy").

253. In *Burwell v. Hobby Lobby Stores, Inc.*, for example, the Supreme Court insisted that statutory religious liberty protections under the Religious Freedom Restoration Act "may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." 573 U.S. 682, 730 (2014).

254. *Cf.* Dekker v. Weida, 679 F. Supp. 3d. 1271, 1299 (N.D. Fla. 2023) (holding that denying Medicaid coverage to children who need puberty blockers as part of their gender-affirming care but providing coverage to children who need puberty blockers for other conditions violated the Equal Protection Clause).

related liberty interests, but could countenance conscience protections for certain religious or moral conduct.

Recent substantive due process doctrine, the historical home for gender-related liberty protections,[255] illustrates this reasoning. In that context, the Supreme Court has asserted that the proper test to identify constitutionally protected liberties is to ask which ones are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[256] According to the Supreme Court, this test leads to the inevitable conclusion that there is no liberty right to abortion, regardless of whether abortion promotes autonomy in a broader sense.[257] One might suggest that other forms of gendered conduct must similarly go unprotected, not because they do not protect autonomy but because they also fail such narrow tests of liberty.[258]

Gendered conduct protections, however, need not satisfy any constitutional liberty test at all to warrant protection. As explained above, constitutional equality doctrine and theory independently justify gendered conduct protections.[259] Like conscientious conduct protections, gendered conduct protections ensure individuals' equal liberty to develop and implement important aspects of their identity. While gendered conduct protections promote a form of equality that relies on liberty interests, this theory of equality is legitimate regardless of whether liberty jurisprudence separately protects those interests.

Recent First Amendment doctrine, which has extended equality protections to otherwise unprotected liberty interests, confirms this point. In the free exercise context, for example, the Supreme Court has coupled its adoption of broad new equal liberty protections for religious conduct with an insistence that it need not overrule case law rejecting liberty protections for religious conduct.[260] Gendered conduct protections are similarly warranted, regardless of whether they protect a liberty interest that is independently recognized under conservative approaches to constitutional interpretation.

One might urge that conscientious conduct protections are nevertheless more legitimate because conservative constitutional methodologies could justify standalone conscientious liberty protections. In other words, although the Supreme

255. The Supreme Court has located numerous liberty rights that protect gendered conduct in substantive due process doctrine, a body of law that elaborates the Fourteenth Amendment's guarantee of "liberty." U.S. CONST. amend. XIV, § 1. These rights include, among others, the right to abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), same-sex intimacy, *Lawrence v. Texas*, 539 U.S. 558 (2003), and same-sex marriage, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

256. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

257. *See id.* at 255–56.

258. *Cf. id.* at 332–34 (Thomas, J., concurring) (suggesting that the Court "should reconsider all of [its] substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*" because they applied an overbroad test to determine the scope of individual liberty).

259. *See supra* notes 193–209 and accompanying text.

260. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (applying the newly expanded religious equality doctrine while explicitly declining to overrule *Employment Division v. Smith*).

Court has not yet deployed textualism, originalism, or history and tradition approaches to endorse a freestanding right to conscientious liberty, it could do so. Justice Alito's concurrence in *Fulton v. City of Philadelphia* offers a preview of such reasoning. In that concurrence, Justice Alito, joined by Justices Thomas and Gorsuch, argued that the Constitution's text, original meaning, and history support a freestanding right to religious liberty.[261] This might suggest that conscientious conduct protections advance constitutionally grounded liberty rights in a way that gendered conduct protections would not.

These conservative approaches to constitutional interpretation, however, are too indeterminate to provide a principled basis to distinguish conscientious liberty from gender-related liberty. Numerous scholars have critiqued textualism, originalism, and history and tradition approaches on these grounds, urging that these methodologies do not constrain judicial discretion and instead permit judges to implement their own value judgments about the proper scope of rights.[262] The fact that one can use these methodologies to reject a freestanding right to religious liberty illustrates the point. Take the text of the Free Exercise Clause: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[263] While this text can be read to support a right to religious exemptions, it can just as easily be read to only prohibit purposeful religious discrimination.[264] Originalism and history and tradition approaches offer no more definitive support for conscientious liberty. Notwithstanding some Justices' assertions to the contrary, there is strong historical evidence suggesting that the First Amendment was originally understood to protect only against purposeful discrimination.[265]

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261. *Id.* at 563–94 (Alito, J., concurring).

262. *See, e.g.*, Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 620 (2021) (arguing that originalism and textualism "as employed by the courts in contested cases rarely produce[] determinate answers and thus chiefly serve[] to obscure value judgments"); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1342 (2020) ("[T]extual canons do not *constrain* or *prevent* the Justices from importing their own normative preferences . . . ."); Siegel, *supra* note 3, at 1183 (arguing that "claims for the constraining force of originalism are 'dead wrong'" because "[a] judge's turn to the historical record can just as easily disguise judicial discretion as constrain it," allowing judges to "employ the historical record covertly to express values that" those judges "do[] not wish to acknowledge as [their] own" (emphasis omitted)); John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 NYU J.L. & LIBERTY 172, 194 (2009) (arguing that a history and tradition approach to constitutional interpretation "does a poor job of eliminating moral-political judgments" because, among other things, "judges are free to 'cherry-pick' from history to support their preconceived opinions" and "judges have discretion in characterizing the relevant tradition").

263. U.S. CONST. amend. I.

264. *See* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917 (1992) (relying on historical evidence and originalist methodologies to conclude that eighteenth-century "Americans did not . . . authorize or acknowledge a general constitutional right of religious exemption from civil laws"); James M. Oleske, Jr., *Free Exercise Uncertainty: Original Meaning? History and Tradition? Pragmatic Nuance?*, 70 WAYNE L. REV. 137, 163 (2024) (arguing that plenty of evidence in the pre-1963 historical record suggests that the First Amendment is best understood as protecting against purposeful discrimination).

265. *See* Oleske, *supra* note 264, at 155–56, 169 (detailing how originalist and history and tradition approaches similarly support interpreting the First Amendment to protect only against purposeful religious discrimination).

That reasonable minds can reach opposite conclusions about the scope of conscientious liberty under these methodologies suggests that they are not determinate. Instead, they require judicial value judgments about what the scope of liberty should be. This is perhaps best illustrated by Justice Alito's contradictory approach to historical evidence in *Fulton* and *Dobbs*. In *Fulton*, Justice Alito relied heavily on legislatures' historical allowance of religious exemptions to urge that religious exemptions are required under the First Amendment's original meaning and historical tradition.[266] To do so, he explicitly rejected the argument that such historical permissiveness illustrated "only what the Constitution permits, not what it requires."[267] In *Dobbs*, however, Justice Alito drew exactly the contrary inference. He urged that evidence of historical permissiveness toward pre-viability abortions was irrelevant because it only showed what the Constitution permits, not what it requires.[268]

The indeterminacy of these (typically) politically conservative methodologies is not just noteworthy in its own right. More important is how it undermines the claim that historical pedigree explains the differing treatment of conscientious and gendered conduct.[269] As analyzed in the next Section, value judgments about the scope of liberty, not some objective conservative constitutional methodology, offer a better explanation for the Supreme Court's embrace of conscientious liberty and hostility towards gender-related liberty.

B. THE GENDERED LIMITS OF LIBERTY

Where purportedly neutral limitations on the scope of liberty run out, a gendered theory of liberty provides an explanation for current liberty doctrine. This explanation emerges from the observation that First and Fourteenth Amendment jurisprudence work in tandem to impose unique burdens on certain forms of gendered conduct. The Supreme Court has not only denied judicial protection to gendered conduct in general under the Fourteenth Amendment but also interpreted the First Amendment to bar statutory protections for certain forms of gendered conduct. This pattern is exemplified by recent First Amendment decisions invalidating LGBTQ+ antidiscrimination laws on the ground that they burden conscientious conduct. This Section explores this patterned approach, showing how First and Fourteenth Amendment doctrines work together to uniquely undermine

266. *See Fulton*, 593 U.S. at 582–85 (Alito, J., concurring).

267. *Id.* at 584.

268. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 217 (2022) ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so."). The Supreme Court has been similarly inconsistent in the inferences it is willing to draw from a lack of historical regulation in the gun rights context, where the Court has treated a lack of historical precedent for some gun regulations as a reason to declare those regulations unconstitutional. *See* Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797, 815 (2023).

269. *See* Murray, *supra* note 33, at 857 (arguing that the Roberts Court's use of history is not best understood as a "careful excavation of empirical truths," but "instead [as] an expedition in which facts and sources will be cherry-picked and prioritized to serve a particular outcome—as it must be if it is to succeed in shrinking the constitutional landscape of women's rights").

individuals' freedom to engage in gender-nonconforming conduct. This pattern reveals the deeply gendered theory of liberty that best explains these doctrines.

303 Creative LLC v. Elenis[270] illustrates how First and Fourteenth Amendment doctrines work together to actively frustrate gendered conduct protections. As described in Part I, the Supreme Court in *303 Creative* held that Colorado could not apply a public accommodations law to require a wedding-website designer to serve LGBTQ+ couples.[271] This antidiscrimination law provided precisely the kind of gendered conduct protections that the Court has read out of the Constitution. The statute, specifically, forbids discrimination "because of . . . sex, sexual orientation, [and] gender identity."[272] Although arguably phrased in terms of status discrimination, this law is broad enough to protect many forms of gendered conduct.[273] Among other things, the law prohibits vendors from discriminating against conduct that disrupts gender stereotypes—discrimination that necessarily occurs "because of" gender identity.[274] In the case of *303 Creative*, for example, the plaintiff submitted that the law injured her by preventing her from disfavoring conduct—having a same-sex wedding—that defied the stereotype that "marriage should be reserved to unions between one man and one woman."[275] Although *303 Creative* recognized that gender identity and sexual orientation antidiscrimination laws are generally legitimate, it deployed First Amendment doctrine to substantially narrow their permissible scope. Specifically, the Supreme Court insisted that such laws may not be applied in a way that requires individuals to engage in certain conduct that contradicts their conscientious beliefs.[276]

Gendered conduct protections, it seems, can only extend as far as corresponding conscientious conduct protections permit. *Fulton v. City of Philadelphia* reached a similar conclusion, urging that the Free Exercise Clause forbade applying an LGBTQ+ antidiscrimination law in a manner that burdened conscientious conduct.[277] Though neither *303 Creative* nor *Fulton* expressly held that gendered conduct protections must invariably yield to claims of conscience, for reasons

270. 600 U.S. 570 (2023).

271. *Id.* at 602–03.

272. COLO. REV. STAT. § 24-34-601(2)(a). The statute also protects "gender expression." *Id.* Gender expression also meets the gendered-conduct test because its regulation—whether through prohibition or a lack of protection—is likely to reflect and enforce gender stereotypes.

273. Scholars have long argued that the distinction between conduct and status discrimination is illusory. *See, e.g.*, Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2088 (2017) (arguing that the status–conduct distinction is artificial and that "antidiscrimination provisions that reference these 'statuses' should be understood to necessarily incorporate protection for 'conduct'"). This Article contributes to this literature by offering a theory of when certain forms of conduct are linked to gender status in relevant ways.

274. *See* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1665–70 (2021) (explaining that laws based on gender stereotypes violate a but-for theory of sex discrimination because "in most instances when individuals or groups are subjected to adverse stereotype-based actions, those stereotypes would not have been applied, 'but for' protected class status").

275. 600 U.S. at 580.

276. *See id.* at 603.

277. 593 U.S. 522, 542–43 (2021).

described in Part I, these decisions' holdings will likely have this effect over time.[278] Even taken at face value, *Fulton* and *303 Creative* impose serious limits on states' power to protect gendered conduct through antidiscrimination law by exempting many people from their ambit.[279]

The Supreme Court's holdings in *303 Creative* and *Fulton* will almost certainly limit other forms of gendered conduct protections, too. The 2016 case, *Stormans, Inc. v. Wiesman*, provides evidence.[280] In *Stormans*, the Supreme Court was presented with a free exercise challenge to Washington state pharmacy regulations that required pharmacies to stock and deliver a representative assortment of drugs.[281] These regulations were designed, among other things, to ensure timely access to emergency contraception, a highly time-sensitive pregnancy prevention drug.[282] The law protected conduct that satisfies both prongs of the gendered conduct test: the use of emergency contraception both disparately benefits women and defies stereotypes about their sexuality. Although the Supreme Court declined to grant certiorari in the case, the Court would almost certainly invalidate the regulations under First Amendment law today. Indeed, three dissenting Justices argued that the law was unconstitutional because—applying an early version of the most-favored-nation rule[283]—it devalued the interests of religious pharmacists who objected to dispensing emergency contraception.[284] This strongly suggests that this law would fail the most-favored-nation test that now commands majority support in free exercise cases.

These cases illustrate that the Supreme Court has not merely eroded constitutional protections for gendered conduct in recent years but has also actively undermined other institutions' power to protect this conduct. It has done so by creating a First Amendment right to object to certain forms of gendered conduct. As the above examples illustrate, this right has been disproportionately wielded against those who engage in gender-nonconforming conduct—whether it be marrying a same-sex partner, avoiding pregnancy, or doing something else that defies gender stereotypes. This pattern is in line with courts' recent willingness, both before and after *303 Creative* and *Fulton*, to deploy statutory protections for conscientious conduct to invalidate a whole range of protections for gender-nonconforming conduct.[285] This includes cases invalidating or granting crippling exemptions to

278. *See supra* Section I.B.

279. *See Fulton*, 593 U.S. at 542; *303 Creative*, 600 U.S. at 603. *Fulton* forbade a state from protecting LGBTQ+ foster parents from discrimination, and *303 Creative* forbade a state from protecting LGBTQ+ people from discrimination whenever they seek expressive services.

280. 579 U.S. 942 (2016).

281. *Id.* at 946–47 (Alito, J., dissenting from denial of certiorari).

282. *Id.* at 944.

283. Various scholars have identified the *Stormans* dissent as one of the earliest applications of the most-favored-nation rule. *See, e.g.*, Portuondo, *supra* note 64, at 1522; Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1095 (2022); Tebbe, *supra* note 15, at 2412.

284. *Stormans*, 579 U.S. at 942, 949–50 (Alito, J., dissenting from denial of certiorari) (arguing that a law that required pharmacies to stock and deliver emergency contraception devalued religious objections by providing secular, but not religious, exemptions).

285. This trend has been most obvious in litigation under civil religious exemption laws, such as the Religious Freedom Restoration Act ("RFRA"), which allow statutory exemptions from laws that

laws that facilitate access to contraception,[286] ensure access to drugs that prevent the transmission of HIV,[287] provide antidiscrimination protections to pregnant people,[288] and support access to gender-affirming care.[289] If past is prologue, the Supreme Court will likely deploy expanded First Amendment law to enforce such private objections to gender-nonconforming conduct—this time under the banner of the Constitution.

Such targeted disfavoring of laws that protect gender-nonconforming conduct is not a natural consequence of taking conscience seriously. This Article has already shown that the values that underlie expanded conscientious conduct protections support Fourteenth Amendment protections for gender-nonconforming conduct, too.[290] More telling, conscientious conduct doctrine on its own should be producing broader protections for gender-nonconforming conduct. As explained above, the historical record is not so one-sided.[291] And given the diversity of individual conscientious beliefs, consistent application of newly robust conscientious conduct protections would seem to inevitably require narrowing at least some laws that punish gender-nonconforming conduct. Elizabeth Sepper has shown, for example, that many women's sincere religious and moral convictions entitle them to conscientious exemptions from abortion bans under current First Amendment law.[292] Yet, the Supreme Court has never deployed conscientious conduct protections to narrow abortion laws[293] or any other law that burdens gender nonconformity.[294] To the contrary, the Supreme Court has deemed the claim that women's moral autonomy entitles

substantially burden religious exercise. *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2552–65 (2015) (arguing that a web of exemptions in civil law have allowed religious conservatives to use courts to enforce their beliefs about gender and sexuality).

286. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692 (2014) (holding that for-profit religious employers were entitled to an exemption from a law requiring them to provide their employees with health insurance that covered contraception).

287. Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 652–55 (N.D. Tex. 2022) (holding that the Affordable Care Act's mandate requiring health insurance policies to cover PrEP drugs to prevent HIV infection violated religious plaintiff's rights under RFRA).

288. Crisitello v. St. Theresa Sch., 299 A.3d 781, 799 (N.J. 2023) (applying a state religious exemption to conclude that a religious school did not violate a state pregnancy antidiscrimination law when it fired an unmarried pregnant teacher).

289. Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 691–96 (N.D. Tex. 2016) (granting a nationwide injunction prohibiting the federal government from enforcing portions of the Affordable Care Act designed to ensure access to gender-affirming care and abortion based on the claim that the law violated some religious plaintiffs' rights under RFRA).

290. *See supra* Section II.C.

291. *See supra* Section III.A.2.

292. Sepper, *supra* note 15, at 193–95. Others have agreed. *See* sources cited *supra* note 23.

293. And there is little reason to think it will. Schwartzman & Schragger, *supra* note 15, at 2323–29 (arguing that the Supreme Court is unlikely to accept a free exercise claim for abortion, even though doctrine supports such a claim).

294. One of the only compelled expressive conduct challenges to fail at the Supreme Court was a case where the plaintiffs objected to hosting military recruiters on campuses because Congress adopted anti-LGBTQ+ military policies. Rumsfeld v. FAIR, 547 U.S. 47, 56 (2006).

them to abortion access "[im]plausible"[295] and hinted that conscience-based claims to other forms of gendered conduct are equally laughable.[296] Such dismissive language reflects a Supreme Court that has treated conscience as the near-exclusive domain of those who would enforce, not undermine, historically dominant cultural norms.[297]

The Supreme Court's dismissiveness of the very possibility that gender-nonconforming conduct implicates conscience points to a deeper judgment at the heart of First and Fourteenth Amendment jurisprudence. A sentence from *303 Creative* succinctly captures what this judgment is. Explaining why the religious plaintiff should be exempt from the LGBTQ+ antidiscrimination law at issue, the *303 Creative* Court asserted: "When a state public accommodations law and the Constitution collide, there can be no question which must prevail."[298] That passage explains why gendered conduct has not had the meteoric rise of comparable religious conduct better than any purportedly neutral interpretive methodology. It embodies the Supreme Court's value judgment that the very concept of constitutional liberty excludes gender-nonconforming conduct.[299] Public accommodations laws only unquestionably fall to the Constitution if gender-nonconforming conduct has nothing to do with the Constitution at all. And the Constitution only obviously protects religious objectors if disfavoring gender-nonconforming conduct is a purely liberatory act. In this way, First and Fourteenth Amendment jurisprudence work together to enforce a deeply gendered concept of liberty. This gendered liberty recognizes the enforcement of gender norms as a fundamental freedom and denies that defiance of such gender norms has anything to do with freedom at all.

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295. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 255 (2022).

296. *Id.* at 257 ("[A]ttempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to . . . prostitution, and the like.").

297. *See* Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 11 (2022) (noting that "the Court's free exercise cases have made it easier for conservative Christian groups to succeed on religious discrimination claims than for other, more minority religions to do so," a trend that "reflect[s] considerable sympathy and perhaps nostalgia for a not-so-distant past when white conservative Christians controlled the levers of political and social power"); Tebbe, *supra* note 15, at 2462 (arguing that recent free exercise doctrine "is favoring traditional religions at a historical moment when their social status is facing contestation"); *see also Rumsfeld*, 547 U.S. at 56 (rejecting the compelled speech challenge of a pro-LGBTQ+ organization).

298. 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023).

299. It is possible to read this passage as a mere restatement of the principle that the Constitution is supreme over ordinary federal and state laws. Both federal and state laws, however, can provide overlapping protections for rights also secured by the Constitution. *See* U.S. CONST. amend. XIV, § 5 (granting Congress the power to enforce the rights secured by Section 1 of the Fourteenth Amendment, including liberty and equality rights). Indeed, conservative Justices have argued that the scope of constitutional liberty protections is largely defined by how federal and state laws have protected those rights. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 578 (2021) (Alito, J., concurring) (noting that historical federal and state protections for religious liberty are important evidence of the present scope of free exercise protections). The Supreme Court's ready assumption that state public accommodations laws do not themselves embody constitutional principles thus reveals a flippancy about gender-related liberty and equality rights that would be unimaginable in the context of religious liberty and equality.

First and Fourteenth Amendment doctrines thus dovetail to enforce an artificially narrow theory of liberty that is deeply rooted in gender stereotypes. Fourteenth Amendment doctrine urges that the scope of liberty is not broad enough to encompass those who wish to defy gender stereotypes. First Amendment doctrine steps into the resulting vacuum to declare that those who wish to enforce gender stereotypes are both exercising a fundamental liberty and, conveniently, harming no one. The result is a theory of constitutional liberty that understands enforced conformity with gender norms as advancing human freedom and understands those who defy gender norms as undermining it.

This gendered liberty leaves individuals who engage in gender-nonconforming conduct uniquely vulnerable to both public and private regulation. They may not seek protection from government action that deploys stereotypes to deny them the equal liberty to develop and implement their own sense of identity. Nor may they shelter under democratic protections that guard this fundamental liberty. This skewed result is not an inevitable consequence of some neutral theory of liberty. It is the result of a Supreme Court that has affirmatively and artificially subordinated the autonomy and self-determination of those who would defy gender stereotypes to that of those who wish to enforce those stereotypes. It is the result, in short, of a Supreme Court that has committed itself to enforcing gender conformity.

CONCLUSION

Despite what recent Supreme Court precedent might suggest, liberty is not inherently gendered. Individuals have real and important liberty interests in developing and implementing their own sense of identity free from expectations that gender dictates who they are or what they do. They have liberty interests in constructing themselves in ways that both rely on and subvert these gendered expectations. These liberty interests are comparable to those the Court has characterized as essential under the First Amendment. First Amendment doctrine, moreover, illustrates that constitutional liberty doctrine poses no obstacle to protecting these liberty interests. To the contrary, recently expanded conscientious conduct protections provide a model for expanding such protections in a manner that comports with existing Fourteenth Amendment doctrine. Adopting such protections would not require essentializing individuals with particular gender identities but would instead recognize that certain stereotypes can attach to and affect individuals differently depending on their unique, often intersectional, gender identity. Though feminists have rightly critiqued liberty protections of the past as too narrow to provide meaningful protections, gender-related liberty protections need not suffer from these flaws.

The purpose of this Article, however, is not to rehabilitate or advocate for liberty as the ideal theory for achieving the ends of gender justice. Indeed, this Article shows how any purportedly neutral constitutional value, including liberty, can be deployed to undermine the ends of gendered justice. Recognizing how this purportedly neutral constitutional value functions to launder value judgments about gender nonconformity, however, is not meant to suggest that gender justice

advocates' appeals to such values would be foolish or pointless. On the contrary, appeals to such values offer a mechanism to invert the Supreme Court's preferred narratives about whom liberty protects: conservative religious objectors alone. Gender-nonconforming individuals' appeals to liberty necessarily disrupt this narrative by asserting that liberty includes them, too. Though the Court may be unwilling to listen, these appeals represent a vital form of resistance that can both speak to other political actors and dignify the claims of those whose humanity is too often dismissed by legal institutions. This resistance becomes more important each day that the Supreme Court deploys First Amendment doctrine to falsely assert that liberty is defined by the subordination of men, women, and non-binary people who refuse to conform.