COMMENT

WE’RE ALL BORN NAKED AND THE REST IS SPEECH: GENDER EXPRESSION AND THE FIRST AMENDMENT

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As the antitransgender moral panic reaches a fever pitch, transgender civil rights are becoming increasingly fragile. A potential legal defense to these attacks lies within the First Amendment: if gender expression, or the way humans communicate their gender identity, is understood to be expressive conduct, it may receive protections under the Free Speech Clause. Using the framework of Spence v. Washington, this Comment argues that gender expression is a form of speech deserving of First Amendment protection. First, a speaker can use gender expression to share information about their identity. And second, an audience is likely to understand the speaker’s general message due to the nature of human communication. The implications of this doctrine extend beyond clothing and accessories, encompassing a spectrum of elements such as naming, hairstyle, gender transition, and bathroom use, offering a comprehensive approach to safeguarding transgender individuals’ expressive rights.

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INTRODUCTION

Barely two months after one of the deadliest years for transgender Americans,1 far-right commentator Michael Knowles boldly proclaimed from

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a Conservative Political Action Conference stage that “transgenderism must
be eradicated from public life entirely.” He is not alone in this view: over the
last decade, the amount of antitransgender legislation has exploded, with each
subsequent year since 2018 being the highest on record for proposed bills
restricting transgender people’s civil rights. It seems that being transgender
in the United States is becoming more and more dangerous with each passing
day.

The damage of this collective movement cannot be overstated. As of 2023,
146,300 transgender youth have either lost access or are at risk of losing access
to gender-affirming care, and 86% of transgender youth express that
antitransgender legislation harms their mental health. This injustice is not
unique to youth. After Missouri Attorney General Andrew Bailey announced
emergency rules that largely banned gender-affirming care in the state
regardless of age, transgender adults received notice that they would no longer
be able to receive the gender-affirming care they depended upon and
began fleeing the state for their safety. Broadly, the transgender moral panic
is rapidly deteriorating the civil rights of transgender, gender-

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6 See @EliErlick, TWITTER (Apr. 14, 2023, 2:32 PM), https://twitter.com/EliErlick/status/164694453273339298 [https://perma.cc/57CX-7EAZ] (describing a transgender patient in her thirties who had been receiving gender-affirming care for over a decade whose doctor was no longer able to prescribe gender-affirming care due to Missouri’s emergency rule); Annelise Hanshaw, Transgender Residents Are Leaving Missouri to Escape a ‘Horrifying’ Loss of Health Care Rights, NPR (Apr. 25, 2023, 3:00 AM), https://www.kcur.org/health/2023-04-25/transgender-residents-are-leaving-missouri-to-escape-a-horrifying-loss-of-health-care-rights [https://perma.cc/D3PG-XC9U] (“Some LGBTQ Missourians say they need to move away from their home state in order to safeguard their access to medicine.”).
nonconforming, and gender-diverse people while also jeopardizing their ability to engage in everyday life as equal American citizens.7

To combat antitransgender legislation, LGBTQ+ civil-rights organizations largely bring Equal Protection Clause claims.8 But this strategy is less than certain—litigators must navigate the unclear classifications and levels of scrutiny of transgender identity.9 Even when diligently argued, the success of this approach remains unsettled as cases continue to be litigated and appealed.10 But if antitransgender laws were proven to violate an enumerated right, litigants would be freed from the Equal Protection problem; instead, discriminatory laws would simply be held to a straightforward strict-scrutiny standard.11 This solution may lie within the confines of the First Amendment.12

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7 See Christopher Pepin-Neff & Aaron Cohen, President Trump’s Transgender Moral Panic, 42 POLY STUD. 646, 657 (2021) (arguing that President Trump’s antitransgender tweets were “the vehicle to deliver a moral panic that made transgender Americans deviants outside of society” and that this message subverted the rights and freedoms of transgender people).

8 See, e.g., Brief of Plaintiff–Appellee Gavin Grimm at 29, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020) (No. 19-1952) (bringing an Equal Protection Clause claim against a school policy that banned a transgender student’s right to use the appropriate bathroom); Brief of Appellees Lindsay Hecox and Jane Doe at 25, Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023) (No. 20-35813, 20-35815) (arguing that a transgender sports ban violated the Equal Protection Clause); Brief of Plaintiffs–Appellees at 28-29, Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875) (stating that a transgender-healthcare ban violated the Equal Protection Clause).

9 See Katie R. Eyer, Transgender Constitutional Law, 171 U. PA. L. REV. 1405, 1424-45 (2023) (detailing how different courts designate transgender people under different levels of suspicion); see also Petition for Writ of Certiorari at 27-33, L.W. v. Skrmetti (2023) (arguing in part that the Supreme Court should grant a writ of certiorari to resolve a circuit split over whether banning gender-affirming care for youth receives heightened scrutiny).


11 See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in part and dissenting in part) (“Unquestionably we have held that a government practice or statute which restricts ‘fundamental rights’ . . . is to be subjected to ‘strict scrutiny . . .’ ”).

12 See United States v. O’Brien, 391 U.S. 367, 376-77 (1968) (creating a test to evaluate regulations restricting expressive conduct if certain elements of that conduct are determined to be protected under the First Amendment); see also Paisley Currah, Gender Pluralisms Under the Transgender Umbrella (“Perhaps gender nonconforming practices will be recognized as expressive activity worthy of constitutional protection at some moment in the future . . . .”), in TRANSGENDER RIGHTS 3, 20 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006); cf. Dara E. Purvis, Gender Stereotypes and Gender Identity in Public Schools, 54 U. RICH. L. REV. 927, 930 (2020) (“[A] reinvigorated First Amendment constitutional argument will provide an additional and distinct line of reasoning as to why transgender students should be allowed to wear clothing consistent with their gender identity.”).
The Court is a fierce defender of the Free Speech Clause, which protects expressive conduct. This category may include a key aspect of transgender identity: gender expression. Gender expression can be understood to be communicative because it shares messaging about identity. If accepted as speech, a gender-expression-as-speech framework could combat discriminatory dress codes, gender-affirming-care bans, and bathroom bills as all these restrictions impede the gender expression of transgender people in some way.

The gender-expression-as-speech concept is not entirely new to scholarship; other authors have approached this framework in the realm of public schools, sex-segregated bathrooms, government documents, and the government’s interest in gender regulations generally. However valuable these arguments are, this existing scholarship neglects detailed articulation about how gender expression is expressive conduct in the first place in favor of a dissection of the site of that expression. This gap is problematic; as transgender litigants begin to bring cases on this issue, courts reject

13 See United States v. O’Brien, 391 U.S. 367, 376 (1968) (finding expressive conduct to fall under the First Amendment realm of speech); see also cases cited infra note 41 (describing Supreme Court cases where the court defended free speech in various contexts).
14 Infra note 37.
15 See, e.g., TEX. DEPT AGRIC., DRESS CODE AND GROOMING POLICY 1 (2023) (requiring Texas Department of Agriculture employees to dress “in a manner consistent with their biological gender”).
17 See, e.g., S. 1100, 67th Leg., Reg. Sess. § 1 (Idaho 2023) (prohibiting transgender students from using public-school bathrooms that do not align with their biological sex).
18 See generally Danielle Weatherby, From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse, 39 N.Y.U. REV. L. & SOC. CHANGE 89 (2015) (arguing that transgender students have First Amendment protections over their gender identity); Laurel Grbach, Comment, Transgender Student Dress: Free Speech and Protected Expression in Public Schools, 22 TEMP. POL. & CIV. RTS. L. REV. 526 (2011) (outlining First Amendment jurisprudence that may protect transgender students’ gender expression in the classroom); Purvis, supra note 12 (analyzing messaging in student’s gender expression).
20 See generally Lexi Meyer, Note, License & (Gender) Registration, Please: A First Amendment Argument Against Compelled Driver’s License Gender Markers, 91 FORDHAM L. REV. 1983 (2023) (arguing that gender-marker-alteration prerequisites violate the First Amendment); Brooke Lowell, Note, You Must Present a Valid Form of (Gender) Identification: The Due Process and First Amendment Implications of Tennessee’s Birth Certificate Law, 28 WM. & MARY BILL OF RTS. J. 113 (2020) (finding that the First Amendment may be used to combat an antitransgender Tennessee birth-certificate law). See also Kingsly Alec McConnell, Comment, The Liberty Impact of Gender, 95 WASH. L. REV. 439, 466 (2020) (arguing in part that gender designations are protected expression of speech).
complaints that lack a thorough explanation of how gender expression is speech.22

The argument that gender expression is a form of protected speech demands detail. The topic is more nuanced than pure speech, and any expressive-conduct claim requires a clear legal framework. This Comment attempts to provide such a foundation by detailing how and why gender expression is speech through the lens of Spence v. Washington.23 In doing so, it will allow for expanded First Amendment litigation and scholarship.

This Comment proceeds in five parts. Part I establishes the definitions of transgender and gender expression. Part II provides a brief background to the First Amendment jurisprudence on expressive conduct and introduces the framing of the two-pronged test introduced in Spence.24 Part III and IV each use a Spence prong to situate gender expression within First Amendment doctrine as well as to present the complications and nuances of this approach. Part V outlines peripheral forms of gender expression that pose opportunities and challenges under First Amendment doctrine and concludes with future implications of a gender-expression-as-speech claim. The most natural fit between elements of gender expression and well-established First Amendment doctrine lies in conduct that is universally understood as communicative (for example, attire or pure speech), but other formats offer also offer unique opportunities—and challenges—to a Spence analysis.

Transgender people are under attack, and swift legal action is needed to protect their basic civil rights. By adhering to our most basic American value—that free speech is a protected right—litigators and academics may be able to protect the transgender community from the onslaught of legislation that attempts to make them second-class citizens.

I. DEFINING TRANSGENDER IDENTITIES AND GENDER EXPRESSION

Understanding the term “transgender” begins with a foundation of sex and gender. Although these two words are often conflated, modern western medicine understands the terms to be separate categorizations.25 Sex is “[a]n individual's biological status as male, female, or something else. Sex is assigned at birth and associated with physical attributes, such as anatomy and

22 See infra subsection III.C.I (listing cases rejecting a transgender litigant’s First Amendment gender-expression claim because of a lack of detail regarding why their gender expression is speech).
24 See id. at 410-11.
chromosomes.”26 In contrast, gender is “the cultural roles, behaviors, activities, and attributes expected of people based on their sex.”27 Gender is traditionally designated by sex at birth, which is assigned based on the appearance of the genitals: if a baby has a penis, they are male, and if they have a vagina, they are female. However, as established by numerous gender and sexuality scientists and scholars, medical sex alone cannot entirely determine gender,28 for gender itself is socially constructed. In other words, gender characteristics are determined by societal norms and change over time.29 Gender is generally understood to be determined by gender identity: “An individual’s sense of being a man, woman, boy, girl, genderqueer, nonbinary, etc. This identity is not necessarily visible to others.”30 In sum, while sex and gender can be connected, the terms are not interchangeable.

In the simplest of terms, the word “transgender” encompasses all people identifying with a gender different than that assigned at birth.31 For example,
a transgender woman is a person who was born with a penis and was therefore assigned male at birth, but whose gender is female. By contrast, “cisgender” refers to people whose gender identity corresponds to their assigned sex at birth. Transgender people experience extensive violence and discrimination based on their identity, in part because some right-leaning groups reject the concept of gender identity differing from sex.

All people, including both cisgender and transgender people, have a gender identity that is conveyed through gender expression. No federal legislative legal definition of gender expression exists, but extra-legal actors and at least one city define the term. These definitions do not diverge from
one another and generally encompass gender expression to mean “how a person publicly presents their gender,” including outward appearances of dress, hair, and make-up. Attire is the most common method to express gender, but other forms of conduct that convey identity, such as chosen name and pronouns, may also fall under the definition’s umbrella. Broadly, gender expression is vital to transgender people’s well-being, and antitransgender restrictions on conveying gender identity pose a threat to community health.

II. THE FIRST AMENDMENT’S FREE SPEECH CLAUSE AND EXPRESSIVE CONDUCT

While the term gender expression certainly seems to indicate some type of expressive activity, how does this conduct fit into First Amendment doctrine? Generally, the First Amendment protects “freedom of speech.” The Supreme Court requires that this right be interpreted broadly to protect diverse forms of self-expression. The Court’s mandate extends First

37 Ontario Hum. Rts. Comm’n, Human Rights in Ontario: Gender Identity and Gender Expression (2014) [hereinafter Ontario]; see also NYC Comm’n on Hum. Rts., Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102 (2019) (“Gender expression” is the representation of gender as expressed through one’s name, pronouns, clothing, hairstyle, behavior, voice, or similar characteristics. Gender expression is not the same as sexual orientation or gender identity. Terms associated with gender expression include, but are not limited to, androgynous, butch, female/woman/feminine, femme, gender non-conforming, male/man/masculine, or non-binary.”); HRC Found., Sexual Orientation and Gender Identity Definitions, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/9QKE-85D4] (last visited Oct. 1, 2023) (defining gender expression as the “[e]xternal appearance of one’s gender identity, usually expressed through behavior, clothing, body characteristics or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine”); Glossary of Terms: Transgender, GLAAD Media Reference Guide 11TH EDITION, https://www.glaad.org/reference/trans-terms [https://perma.cc/8C8B-8K6P] (last visited Oct. 1, 2023) (“Gender Expression [is the] external manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, voice, and/or behavior.”).

38 See Ontario, supra note 37 (“A person’s chosen name and pronoun are also common ways of expressing gender.”); see also infra Part V.


40 U.S. CONST. amend. I.

Amendment protections beyond solely pure speech to include expressive conduct, or behavior intended to convey a message. Expression conduct deserves First Amendment protections because it is "sufficiently imbued with elements of communication." As this Comment argues, expressive conduct encompasses gender expression.

The Spence test, named from the Supreme Court case Spence v. Washington, determines whether a form of expressive conduct is indeed expressive enough to require First Amendment protection. The test has two prongs asking whether (1) a speaker attempted to communicate specific message and (2) an audience would likely understand the message. If both are so, the expressive conduct receives constitutional protections. The communicated message is not required to be "narrow" or "succinctly articulable" as a condition of constitutional protection. Rather, the message must be "delivered by conduct that is intended to be communicative" and "be understood by the viewer to be communicative." The pivotal question of this Comment is whether gender expression falls within the scope of expressive conduct under the First Amendment. If so, legislation that attempts to curtail a transgender person's gender expression may be subject to a form of heightened scrutiny as an infringement on the fundamental right of free speech. Spence's doctrinal analysis, by fleshing out
the nuances of expressive conduct, provides an optimal tool for creating a detailed reasoning of how and why gender expression is protected speech.\textsuperscript{50} As a universally recognized form of gender expression, attire will largely guide this analysis.\textsuperscript{51}

III. \textit{Spence} Test Prong I: Communication Gender Expression

The first prong of the \textit{Spence} test asks whether a speaker attempted to communicate a message through nonverbal conduct.\textsuperscript{52} In the context of gender expression, this messaging occurs most commonly via attire (but appears in other forms as well).\textsuperscript{53} Dress is an almost glaringly obvious example of nonverbal communicative messaging, both culturally and legally. It is “never neutral and meaningless”; it carries cultural significance and communicates aspects of identity.\textsuperscript{54} This Section will develop this point in three parts: first, by detailing the doctrine and judicial reasoning underlying why gender expression generally is communicative under the first prong of \textit{Spence}; next, by analyzing why some courts find transgender gender expression specifically to be communicative; and finally, by analyzing the nuances and complications inherent in this argument.

A. General Gender-Expression Communication and the Courts

As noted previously, gender expression is a universal behavior not exclusive to transgender people.\textsuperscript{55} The Supreme Court has ruled in many cases that tools of gender expression—such as clothing—carry First

\textsuperscript{50} See \textit{Spence}, 418 U.S at 410-11 (creating the \textit{Spence} test); see also \textit{Vuz v. DCSS III, Inc.}, Case No. 3:20-cv-00246-GPC-AGS, 2020 WL 7240169, at *5-6 (S.D. Cal. Dec. 9, 2020) (using the \textit{Spence} test to determine if gender expression is protected expression under the First Amendment); \textit{Zalewska v. Cnty. of Sullivan}, 316 F.3d 314, 320 (2d Cir. 2003) (“[T]here may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection.”).

\textsuperscript{51} See supra note 37 (listing sources where gender expression is commonly defined through dress).

\textsuperscript{52} \textit{Spence}, 418 U.S at 410-11.

\textsuperscript{53} See supra note 37 (listing sources where gender expression is commonly defined through dress).

\textsuperscript{54} Janet Ainsworth, \textit{What's Wrong with Pink Pearls and Cornrow Braids? Employee Dress Codes and the Semiotic Performance of Race and Gender in the Workplace}, in \textit{Law, Culture, and Visual Studies} 241, 244-45 (Anne Wagner & Richard K. Sherwin eds., 2014); see also \textit{Canady v. Bossier Par. Sch. Bd.}, 240 F.3d 437, 449-40 (5th Cir. 2001) (noting that an individual’s choice of attire can legally constitute speech and invoke First Amendment protections); Kosbie, supra note 21, at 195 (“Like burning a flag, gender nonconformity communicates ideas from one person to another. In particular, gender nonconformity communicates core elements of one’s identity and is related to the free speech values of autonomy and self-realization.”).

\textsuperscript{55} See supra note 35 and accompanying text.
Amendment weight. For example, in *Cohen v. California*, Robert Cohen was convicted of violating state law for wearing a jacket with the message “Fuck the Draft” printed on it. The Supreme Court overturned the conviction, holding that Cohen’s expression—via wearing a jacket with a message—was protected speech that expressed his negative feelings about the Vietnam War. While this case was predominantly concerned with the pure speech of the message rather than the expressiveness of the jacket itself or the jacket as a tool of gender expression, it *did* establish that clothing can communicate a message through pure speech.

Various federal courts have upheld iterations of this notion. The Fifth Circuit supports the idea that clothing can communicate a message, stating that “an individual’s choice of attire . . . may be endowed with sufficient levels of intentional expression to elicit First Amendment shelter” because “[c]lothing may . . . symbolize ethnic heritage, religious beliefs, and political and social views.” For example, the Northern District of Mississippi held that a policy banning women from wearing tuxedos to the prom “falls squarely within the purview of the First Amendment” because a gay student intended to express her identity through this outfit. The tuxedo lacked any pure-speech elements but, by being worn by a woman, communicated a message that the student was gay. The Ninth Circuit has noted that clothing can receive some First Amendment protections because it communicates aspects of identity.

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57 Id. at 26.
58 Id. at 18.
59 Canady, 240 F.3d at 440; see also Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 878-80 (7th Cir. 2011) (holding school district’s act of forbidding high school students from wearing t-shirts saying “Be Happy, Not Gay” violated the First Amendment).
61 Id. (“[The plaintiff] has been openly gay since eighth grade and she intended to communicate a message by wearing a tuxedo . . . ”).
62 Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 428 nn.21-22 (9th Cir. 2008) (citing Canady and Spence for the principles that wearing clothing with expressive messages qualifies as expressive conduct protected by the First Amendment). Of course, this precedent does not suggest that *all* clothing is inherently communicative; courts demand a specific message communicated by the clothing, not simply “vague and attenuated notion[,] of expression.” Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 390 (6th Cir. 2005); see also Vuz v. DCSS III, Inc., Case No. 3:20-cv-00246-GPC-AGS, 2020 WL 7240369, at *5 (S.D. Cal. Dec. 8, 2020) (stating that the plaintiff’s previous motion failed to plead sufficient facts to prove their gender identity was expressive conduct “beyond the mere act of existing”). Nevertheless, it is crucial to acknowledge that attire frequently serves as a direct and obvious means of communicating identity that goes beyond the score of “vague.” Clothing choices can be powerful conduits for expressing aspects of personal identity, affiliations, or cultural associations. See *infra* Section IV.A (explain how clothing communicates messages). While the legal standard demands specificity, the inherent nature of clothing as a form of self-expression often allows for clear and unmistakable messages related to identity, even if they may not align with conventional verbal or written communication. See *infra* Section IV.A.
Accessories may lack pure speech but can also be communicative.\textsuperscript{63} For example, accessories are heavily gendered, meaning that donning a particular object may be an explicit expression of femininity or masculinity.\textsuperscript{64} They can also communicate protest: In \textit{Tinker v. Des Moines Independent Community School District}, public-school students were suspended for wearing armbands to school to object to the Vietnam War.\textsuperscript{65} The Court held that their free-speech rights were violated because school officials censored their silent political speech expressed solely through the accessory.\textsuperscript{66} Although the armbands lacked pure-speech elements, the students attempted to communicate a message of protest by wearing them—making the accessory a form of speech.\textsuperscript{67}

While these cases establish judicial receptiveness to the idea that attire, a tool of gender expression, conveys speech, these cases do not establish jurisprudence that all gender expression is inherently communicative. Indeed, they articulate only particular instances under very specific circumstances where dress is speech. Additional analytical steps are needed to establish the universally communicative nature of clothing and accessories. Fortunately, some lower courts have addressed a version of this analysis when addressing the question of transgender gender expression as speech.

B. \textit{Transgender Gender Expression and the Courts}

Although the Supreme Court has not definitively ruled on whether transgender gender expression is considered communicative, numerous lower courts have already established this connection. In \textit{Monegain v. Virginia Dep't of Motor Vehicles}, the Eastern District of Virginia held that a transgender person’s feminine attire inherently communicated feminine identity.\textsuperscript{68} The court reasoned that the expression was similar to \textit{Kastl v. Maricopa County Community College District}, where the court found that a transgender woman’s

\begin{itemize}
\item An accessory is an item “which contributes to the overall effect” of an outfit but is of “secondary importance.” VALERIE CUMMING, C.W. CUNNINGTON & P.E. CUNNINGTON, THE DICTIONARY OF FASHION HISTORY 1 (2nd ed. 2017). This category includes, but is not limited to, hats, shoes, ties, gloves, mittens, jewelry, scarves, socks, bags, canes, fans, and umbrellas. \textit{Id.}
\item See, e.g., Lynne Pettinger, \textit{Gendered Work Meets Gendered Goods: Selling and Service in Clothing Retail}, 12 GENDER, WORK & ORG. 460, 466-67 (2005) (describing how the meaning of objects used in attire are steeped in gender expectations and, in particular, are tied to femininity).
\item \textit{Id.} at 513-14.
\item \textit{Id.} at 513-14; see \textit{also Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist.}, 489 F. Supp. 2d 139, 144 (N.D.N.Y. 2006) (holding that a student’s red, white, and blue necklace, worn in support of troops serving in Iraq, was expressive conduct that conveyed a message).
\item 491 F. Supp. 3d 117, 135-36 (E.D. Va. 2020).
\end{itemize}
“attire may be understood as an expression of her change in gender identity.” By changing from a masculine- to feminine-coded style of dress, the woman nonverbally communicated to others that her gender was female, or at least not male. The court understood the cultural cues embedded in her gender expression to be a form of communication.

In Vuz v. DCSS III, Inc., an incarcerated transgender woman was housed in a men’s jail and forced to wear men’s clothing. The Southern District of California found that she alleged sufficient facts to support her claim that her feminine presentation was intended to express her feminine gender identity, which was impeded by the police officer’s and jail’s actions. The plaintiff argued that her appearance “convey[ed] the message of her feminine gender identity, contrary to any masculine gender identity that may be forced upon her, by wearing women's apparel, styling herself in a feminine manner, undergoing cosmetic surgeries to feminize her appearance, and maintaining feminine mannerisms.” The court found this reasoning compelling because transitioning and aligning oneself with gendered traits is an attempt by transgender people to communicate their identity to others. The Superior Court of Massachusetts applied similar reasoning to a transgender student who brought a First Amendment claim in Doe ex rel. Doe v. Yunits because she was barred from wearing clothing that aligned with her gender identity in school: “Plaintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender.” However, the court did not articulate why doing so is speech beyond alluding to Spence and the fact that symbolic actions can be expression.

These cases indicate judicial openness to the idea that general gender expression is communicative. By understanding gendered attire as a way to

70 Id. at 135 (“Monegain’s decision to begin presenting as female, and resulting speech, was . . . a thoughtful ultimate expression of her gender identity to society.”).
72 Id. at *5-6.
73 Id. at *5.
74 Id. at *16-17.
76 Id. at *3 (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974)).
77 The reasoning of these courts is not universally accepted. See Renee v. Neal, 483 F. Supp. 3d 606, 613-15 (N.D. Ind. 2020) (rejecting a First Amendment claim from an incarcerated...
communicate identity, courts have found that gender expression is speech. However, these specific cases pose the problem that gender expression is only considered communicative when a transgender person changes their gender presentation, suggesting that, beyond the individual’s attire, the shift in presentation also plays a role in communicating the message. Regardless of the specific facts of a case, a comprehensive reading reveals an underlying thread that attire can perhaps be universally communicative due to the inherent messaging tied to it. For example, someone donning a dress and heels expresses a different gender identity than a person in a suit, regardless of their assigned gender at birth.

In summary, the current First Amendment doctrine demands a communicative message, a requirement that the gender-expression-as-speech argument fulfills because attire choice expresses gender identity. In fact, transgender gender expression may carry more weight than that of its cisgender counterpart due to the urgency of being understood as the correct gender. Unlike cisgender people who may not consciously craft their attire to express their gender, transgender people often dress in ways that deliberately aim to indicate to others a specific gender identity.78

C. Complications with Gender Expression as Speech Under Spence Prong I

While the current doctrine certainly establishes that gender expression can be communicative, the idea is not necessarily straightforward. Several distinctions complicate a reading of gender expression communicativeness under Spence.

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78 Cf. Weatherby, supra note 18, at 121 (“Where the stakes are so high, and the desire to be understood and accepted so critical to their well-being, transgender students’ need to communicate a strong message through their behavior and self-expression is undeniable.”).
1. The Court’s Lack of Findings on Gender Expression as Speech

The courts’ lack of articulated legal analysis on gender expression as speech poses a problem. While this Comment has addressed why some courts believe gender expression is communicative, the courts in the vast majority of the referenced transgender-specific cases did not analyze why gender expression is inherently communicative but instead stated the notion as fact.79 The courts did not draw a line to establish when gender expression is communicative or not, nor did they establish what gender expression is beyond the scope of the facts in front of them.80 While scientists and legal academics have argued that gender expression is communicative,81 one of the most important players—the bench—has refrained from providing thorough reasoning.

This missing legal analysis may grow from the seeds of failed gender-expression-as-speech claims. In numerous cases, courts have thrown out complaints when transgender plaintiffs did not explain why their gender expression deserved First Amendment protections, and the courts refused to generate an answer themselves.82 It appears that lower courts have punted thorough analysis to the litigators—a trend indicating a need for advocates to explicitly state how gender expression clearly expresses gender identity. As this Comment argues, the tool to fill this gap lies in a Spence analysis.

2. Attempts (or Lack Thereof) to Communicate a Message

Another complicating factor to the success of a First Amendment claim is the Spence test’s requirement that plaintiffs intend to communicate a specific message.83 Unlike pure speech, gender expression does not exist only to

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79 See, e.g., Vuz, 2020 WL 7240369, at *5-6 (analyzing how gender expression is used to convey messages to others, but not how it does so, nor how future courts should analyze gender expression as communicative); Yunits, 2000 WL 33162199, at *3 (failing to explain how dress specifically communicates gender).

80 See supra note 79.

81 See infra note 158 (detailing a scientific study which found in part that children understand gender expression contains identity messaging); supra note 18-22 (citing legal academia that references gender expression being expressive).


express a message. In fact, it may not serve this purpose at all, meaning that the wearer did not attempt to communicate a message through attire. For example, some people who cross-dress wear clothing not to communicate to others that they wish they were a different sex but rather to feel attractive. Additionally, drag performers may dress in certain clothing only because it is their job to do so. In either case, an audience may interpret their dress to communicate a gender identity that does not necessarily exist, indicating that attire can communicate a message about gender regardless of whether the wearer intended to share said message.

So, should the first prong of the Spence test be met only when someone explicitly states they attempted to communicate a message through dress, or also when the court assumes that is what a person attempted to do? Case law suggests that either option may receive First Amendment protection, as the doctrine does not require a speaker's specific intent but rather conduct “sufficiently imbued with elements of communication.”

Legal scholars also disregard a requirement for specific intent. For example, John Greenman argues that people often communicate ideas they do not actively think about or feel: “[T]o be communicative, an act doesn’t need to express a state of mind that the actor is truly experiencing. Consider a nude dancer. Her free-speech rights don’t disappear if she is thinking about

84 People who cross-dress wear clothing that is typically worn by another gender. Most people who cross-dress are comfortable with their assigned sex at birth and do not identify as transgender. Understanding Transgender People, Gender Identity and Gender Expression, AM. PSYCH. ASS’N (June 6, 2023), https://www.apa.org/topics/lgbtq/transgender-people-gender-identity-gender-expression [https://perma.cc/L559-ZzYC] [hereinafter APA]; David Simón Martret & Blanca Galindo, Cross-Dressers Talk About Their First Time Wearing Women’s Clothes, VICE (Feb. 28, 2017, 6:00 AM), https://www.vice.com/en/article/kbk4ev/cross-dressers-talk-about-how-wearing-womens-clothing-keeps-them-sane [https://perma.cc/P7YS-SLGV] (interviewing a person who cross-dresses who says it makes him feel “sexy and feminine”). But see APA, supra note 84 (“Cross-dressing is a form of gender expression and is not necessarily tied to erotic activity.”).


86 An example occurred in February 2023 when the live-streaming company Twitch banned self-described femboy (a man expressing themselves through feminine dress) and cisgender male gaming streamer Finnster from their platform for fixing his bra on a stream, as doing so violated the company’s policy against “prolonged touching of female presenting breasts.” FiNN5TER (@FiNN5TER), TWITTER (Feb. 8, 2023, 6:11 PM), https://twitter.com/FiNN5TER/status/1623459462202765316 [https://perma.cc/384N-7PZE]. Finnster expressed frustration because “[a]s a man, touching your chest can now be bannable depending on how feminine Twitch sees you . . . .” Id. While he made no explicit attempts to claim his breasts were female-presenting, Twitch interpreted his gender expression to communicate just that.

the drive home while dancing."  

Jeffrey Kosbie applied this reasoning specifically to gender-nonconforming people by stating that “[g]ender itself is a message. Even if a trans woman or man understands their gender entirely in non-expressive terms, their gender nonconformity is still communicative.”  

Therefore, a transgender person does not need to constantly attempt to communicate a message through their gender expression for it to be protected speech. If it contains elements of communication, then it should receive protections.

An alternative argument arises from the fact that clothing imparts information beyond mere gender identity that could receive First Amendment protection. For example, while gender-nonconforming attire from a person who cross-dresses or a drag performer may not communicate their gender identity, it can share other key messages—namely, as an act of protest against the gender binary and gender roles.  

Regardless of the explicit reasoning behind their attire, these speakers would not publicly dress in a gender-nonconforming way if they placed value in gender-conforming presentation.

3. The Danger of Inherently Expressive Identity

The idea that gender expression is communicative, while potentially successful as a litigation strategy, poses a problematic issue for future LGBTQ+ advocacy: it assumes that, simply by existing in their gender expression, transgender and gender-nonconforming people are inherently expressive.

The Court first put forth this idea in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, where they found an LGBTQ+ group’s participation in a parade to be communicative: “[T]he presence of the organized [LGBTQ+] group’s marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . . .”  

This concept was expanded in *Boy Scouts of America v. Dale*. The Boy Scouts resisted the reinstatement of openly gay

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89 Kosbie, supra note 21, at 209.

90 Id. at 206 (“Gender nonconformity . . . communicates opposition to the gender binary.”); cf. id. at 207-08 (“Gender nonconformity, however, should be protected because it is communicative, even if someone does not have this specific intent.”).


Assistant Scoutmaster James Dale because his mere existence as a gay man infringed upon the Boy Scouts’ First Amendment-protected messaging that scouting is “morally straight” and “clean.” The Court agreed. The Court’s opinion made no argument that Dale explicitly spoke against the Boy Scouts’ messaging; rather, it was his mere presence as a gay man challenged it. This line of reasoning remains very much alive: the appellants in 303 Creative LLC v. Elenis used this case law to argue for their right to discriminate against same-sex couples.

This Comment argues in part that gender-expression messaging occurs even when a person does not attempt to share a message. Yet this same argument cost James Dale his position and dignity. As summarized by Justice Stevens in his dissent, the majority found that “Dale’s mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality—even if Dale has no intention of doing so.” This formulation of an LGBTQ+ person as a subject that inherently carries expression can be harmful. As Justice Stevens noted, to single out gay people for special First Amendment treatment denotes the group with a “constitutionally prescribed symbol of inferiority.” Under this logic, transgender people could also be constitutionally inferior if their identity is inherently expressive.

Perhaps transgender identity, like Dale’s gay Scoutmaster, is “simply so different” to make it inherently expressive. Some queer theorists posit that the LGBTQ+ community is fundamentally distinct from heterosexual cisgender people, and liberation cannot occur until the nuances of all

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93 Id. (describing how the Boy Scouts viewed homosexuality as inconsistent with this messaging).
94 Id. at 653 (“Dale’s presence in the Boy Scouts would . . . force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”).
95 See Appellants’ Opening Brief at 32, 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021) (No. 19-11413) (using Hurley and Dale to argue that making wedding websites for gay couples would show an "unqualified social acceptance of gays and lesbians").
96 Dale, 530 U.S. at 692 (Stevens, J., dissenting).
97 See, e.g., Anna Quindlen, The Right to Be Ordinary, NEWSWEEK (Sept. 11, 2000, 8:00 PM), https://www.newsweek.com/right-be-ordinary-159541 [http://perma.cc/S8PV-6T5M] (arguing in response to Dale that gay people are now "ordinary" in the American mind and setting them apart due to identity is discriminatory).
98 Dale, 530 U.S. at 696 (“The only apparent explanation for the majority’s holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual’s—should be singled out for special First Amendment treatment.”).
99 For example, if legislation establishes that a LGBTQ+ person’s existence is inherently sexual, and that the State has the right to exclude the sexual from public, then LGBTQ+ people can be excluded from public space. See, e.g., S. 3, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) (creating language that would consider drag performances sexual, therefore giving the state the ability to ban them in many contexts).
100 Dale, 530 U.S. at 696.
identities are recognized.\textsuperscript{101} Similarly, Professor Nancy Knauer argues that an approach that ignores the difference of LGBTQ+ from straight cisgender people erases the multivalent nature of identity and oppression.\textsuperscript{102} Specific to Dale, while some argue that one gay Scoutmaster’s existence could not entirely erase the Boy Scouts’ message, Knauer points out that:

Dale’s mere presence as an openly gay man is remarkable in a way that the mere presence of a heterosexual Scoutmaster or a Scoutmaster who is a member of a minority group is not. Not only does it disrupt the hetero–homo binary, but it sends a message that Dale, at a minimum, is not ashamed by his sexual orientation and does not consider homosexuality to be immoral.\textsuperscript{103}

While Knauer concedes this framework in Dale harmed gay Americans, it is also simply the “the political reality of the openly gay individual.”\textsuperscript{104} Knauer’s argument is compelling. Although transgender people may reject the idea that their identity is somehow inherently communicative and that they simply want to exist as people, this is simply not the current “political reality.”\textsuperscript{105} Despite increased acceptance of transgender people, their presence expresses a message in almost any venue.\textsuperscript{106} Indeed, even as transgender identity becomes normalized, it will still be considered communicative under Dale.\textsuperscript{107}

However, Knauer’s framework does not tidy up the Dale problem. Indeed, under this argument, almost any identity can be expressive in different contexts. For example, a female Scoutmaster may also communicate a

\textsuperscript{101} See, e.g., ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 61-64 (1996) (stating that the categorization and normalization of LGBTQ+ identity erases the realities of intersectional identity).


\textsuperscript{103} Id.

\textsuperscript{104} Id. at 1071, 1073.

\textsuperscript{105} Id. at 1073; see supra notes 33–34 (describing current discrimination against transgender people); cf. Knauer, supra note 102, at 1071 (“It certainly seems unfair that Dale’s mere presence in a Scoutmaster’s uniform sends a message, but, at least for now, it does. Attempts to deny this reality and ignore the past regulation of same-sex desire in the United States negate the very reasons for anti-discrimination protection . . . .”).


\textsuperscript{107} See Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000) (declaring that gay identity is still communicative regardless of increased social acceptance).
message about the Boy Scout’s values. This understanding overconstitutionalizes everyday behavior: if any person can be expressive simply for existing, where are legal lines drawn? There are no easy answers. The legal relationship between expression and identity must be made significantly clearer to provide coherent pathways forward.

IV. Spence Test Prong II: Understanding Gender-Expression Messaging

The second prong of the Spence test asks whether an audience would likely understand the speaker’s communicated message. In Spence, the Court noted several factors that contributed to an audience understanding a message, such as the situation in which the symbol appeared and the surrounding historical context, but outlined no specific bright-line rule to determine understanding. This Part will outline how human nature compels understanding of gender expression through the lens of Spence, the unique nature of transgender identity that emphasizes this understanding, and the complications of this approach.

A. How Gender Messaging is Understood

Demonstrating that a person has understood the message communicated by gender expression is not a challenging hurdle to overcome under the framework of Spence, particularly in the current historic moment of fixation on transgender people. Gender expression contains broad elements of communication and can be understood by the majority of people in a shared culture. Many Americans are aware that transgender people exist and present their bodies in specific ways to convey identity.

Scholars and scientists have established that human beings look to elements of gender expression to understand others’ identities. From the age

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110 See id. at 410 ("A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant’s point at the time that he made it."); id. at 411 ("[I]n the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.").
112 Cf. id.
of three, humans are able to apply gender labels and do so largely through “observable characteristics such as hairstyle and clothing.” This understanding of others’ dress develops as we learn societal signals:

[C]lothing is our first social interface. Clothing functions as an important and necessary social tool that interfaces our bodies with society. Through clothing we inform others of our personal and collective affinities. Clothing can signal many aspects of a person’s social identity including socio-economic status, gender, religion, and occupation. Doctors, nurses, soldiers, police and military men, postmen, judges, priests [...] are all identified and called upon by their attire.114

Law professor Bennett Capers makes a similar point:

For thousands of years human beings have communicated with one another first in the language of dress. Long before I am near enough to talk to you on the street, in a meeting, or at a party, you announce your sex, age and class to me through what you are wearing—and very possibly give me important information (or misinformation) as to your occupation, origin, personality, opinions, tastes, sexual desires, and current mood. I may not be able to put what I observe into words, but I register the information unconsciously; and you simultaneously do the same for me. By the time we meet and converse we have already spoken to each other in an older and more universal tongue.115

Not only are humans inclined to look to forms of gender expression to learn information, but also the cues provided by said expression silently communicate information.116 For example, the heart rate of anxious 1L students on their first day of law school will increase when a man wearing a suit and tie walks into the classroom; even before introductions are uttered, the student knows, based on the message sent from the gendered professional

115 Bennett Capers, Cross Dressing and the Criminal, 20 YALE J.L. & HUMAN. 1, 6 (2008); see also Ainsworth, supra note 54 at 244-45 (“When a coded signal of identity is displayed through dress and appearance, observers react based on what they infer about that person on the basis of their appearance.”).
116 Of course, the specific cues will vary based on culture and point in time. See, e.g., Standing TALL: The Curious History of Men in Heels, BATA SHOE MUSEUM TORONTO (2017), https://artsandculture.google.com/story/AgVRZR_j5AhrlA [https://perma.cc/387H-76PQ] (detailing the changing relationship between high-heeled shoes and masculinity based on culture and time period).
attire, that this mysterious stranger is their new professor. The Court accepts this concept as well. In Tinker, a school district censored students’ speech precisely because they understood the black armbands’ communicated message: opposition to the Vietnam war.

B. Understanding Transgender Gender Messaging

While courts are much less articulate as to the second prong of the Spence test as it pertains to transgender people, the universal behavior of reading gender expression suggests that passing this prong of the test is uncomplicated. An audience is just as likely to understand the messaging sent by a transgender person’s gender expression as they would by a cisgender person. But it is perhaps the furious uproar around transgender people itself that demonstrates an understanding of gender-expression messaging.

Massive cultural responses to transgender people coming out demonstrates a shared comprehension of their new gender identity. Transgender people are both celebrated and disparaged for their gender expression and their general message that they wish to be understood as a different gender than that assigned at birth. The Massachusetts Superior Court applied this in Doe v. Yunits, holding that “[t]he school’s vehement response and some students’ hostile reactions [to a transgender student’s gender expression] are proof of the fact that the plaintiff’s message clearly has been received.” The transgender student’s classmates were “well aware” of the message she sent through her gender expression.

The argument for an audience’s understanding of gender expression plainly adheres to the reasoning laid out in Spence. First, different forms of gender expression fall entirely within the context of a transgender person’s body: a dress is a relatively meaningless object when hanging in a closet, but

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117 Cf. Arthur M. Schlesinger, Jr., A LIFE IN THE TWENTIETH CENTURY: INNOCENT BEGINNINGS, 1917-1950, at 157 (2000) (“I discover that I if I buy my suits at Brooks Brothers and look like a banker; [a young Harvard instructor said], “it is much easier to get Harvard students to believe what I am telling them.””). Of course, other indicators, such as age, may suggest this person’s profession beyond their attire. But even a young professor, who could be mistaken for a student if dressed in jeans and a t-shirt, will be understood by their students as a teacher if they enter a room in formal dress.


119 For example, when actor Elliott Page came out as transgender in 2020, he described the response as “big” and said, “In terms of the actual quality of the response, it was what I expected: love and support from many people and hatred and cruelty and vitriol from so many others.” The Euphoria of Elliot Page, ESQUIRE (June 1, 2022), https://www.esquire.com/entertainment/tv/a40011366 [https://perma.cc/D75S-87J8].


121 Id.

it suddenly takes on new meaning once donned on the body of a transgender woman, even as compared to on the body of a cisgender woman. Furthermore, the current perception of and familiarity with transgender people in America demonstrates that almost anyone would grasp that when a transgender woman wears a dress it is precisely because she wants the world to understand she is a woman.\textsuperscript{123}

C. Complications with Gender Expression as Speech Under Spence Prong II

This prong is complicated by the fact that gender expression is not always accurately understood by an audience, especially because many transgender and gender-nonconforming people do not present themselves in specific binary categories of male or female.\textsuperscript{124} Gender-benders purposefully subvert gender-binary expectations—for example, a person who chooses to wear a dress while also having a beard.\textsuperscript{125} Gender play is not limited to transgender and gender-nonconforming people, as Western culture is generally moving beyond gendered clothing, accessories, hairstyles, and other aspects of gender presentation.\textsuperscript{126} In fact, sales of products labeled as “genderless, gender-neutral or unisex” surged by 109\% in 2021, and 56\% of Gen Z consumers shop “outside their assigned gendered area.”\textsuperscript{127}

This gender ambiguity begs the question: if an audience does not accurately understand the specific message someone is trying to communicate through their gender expression, can it still meet the second prong under Spence? The answer is yes: the courts have never required such specificity from messages to receive First Amendment protections. The Supreme Court

\textsuperscript{123} Of course, this is a reductive way of looking at gender and binary fashion. Not every transgender person communicates gender through stereotypically gendered clothing. See infra notes 126–27 (describing the popularity of gender-neutral and gender-bending fashion choices).

\textsuperscript{124} See, e.g., Hannah Rossiter, \textit{She’s Always a Woman: Butch Lesbian Trans Women in the Lesbian Community}, 20 J. LESBIAN STUD. 88, 89–91 (describing the growing number of transgender women who identify as butch); Anna L. Corwin, \textit{Emerging Genders: Semiotic Agency and the Performance of Gender Among Genderqueer Individuals}, 11 GENDER & LANGUAGE 255, 256 (2017) (exploring the ways that genderqueer people perform their gender, especially as “genderqueer individuals experience and perform non-normative genders and yet inhabit a world dominated by a gender binary system”).


reasoned in Hurley that the exact meaning of different parts of the parade did not need to be clear to an audience, as long as the overall theme was clear: “a private speaker does not forfeit constitutional protection simply by . . . failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”

Applied to gender-nonconforming people, this analysis suggests that the specific message a person attempts to share through their gender expression need not be understood, as long as a general message of gender diversity is received.

Simply put, gender expression falls squarely within Hurley’s framework because of its generally communicative nature. Even if a specific message (e.g., “my gender is non-binary”) is not received, audiences of gender-nonconforming expression are bound to understand such dress as a rejection of traditional gender roles because, while by no means rare, dressing outside of an assigned gender is still not the norm in American culture.

Jeffrey Kosbie offers the following example illustrating this point:

A passenger on a passing cruise ship who happened to see the trans man on shore might take him to be a man but not realize he is expressing a message of gender nonconformity. In that case, the trans man’s appearance communicated his gender identity: “I am a man.” On the other hand, the passenger might understand the trans man to be transgender and communicating a message of gender nonconformity. In either case, gender nonconformity is communicative.

Gender expression passes the second prong of Spence: while specific gender messaging may be unclear to an audience, humans are generally inclined to derive themes from gender expression and are therefore likely to understand broad messages communicated via attire.

V. FURTHER APPLICATIONS OF GENDER EXPRESSION AS A FIRST AMENDMENT CLAIM

This Comment has established how gender expression through attire falls within First Amendment doctrine. But less overt areas of gender expression also pose opportunities and challenges for Spence analysis. The remainder of this Comment will analyze the likelihood of success for these other forms of
gender expression through the lens of *Spence*, including pure speech, appearance beyond dress, and transgender-specific conduct.

**A. Gender Expression with Pure Speech**

Gender expression that uses pure speech to communicate gender identity will receive straightforward First Amendment protection. This category can include, but is not limited to, text appearing on attire (such as graphic t-shirts, pins, buttons, and hats) that communicates gender identity. These items may communicate by listing a preferred pronoun or declaring one’s gender.\(^1\)

Generally, a claim based on suppression of pure speech is likely to succeed because the Court is straightforward in its protection of pure speech and disapproval of content-based regulations.\(^2\) Protecting free and pure speech is at the very core of the First Amendment.\(^3\) The examples above clearly satisfy both *Spence* prongs because gender expression clearly communicates a message through text and a literate viewer understands a message is communicated.\(^4\)

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2 See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content . . . .”); see also Wollschlaeger v. Governor, 848 F.3d 1293, 1300 (11th Cir. 2017) (“[C]ertain First Amendment principles can be applied with reasonable consistency, and one of them is that . . . [c]ontent-based regulations [of speech] are presumptively invalid.”) (quoting R.A.V. v. City of Paul, 505 U.S. 377, 382 (1992)).


4 See, e.g., Talley v. California, 362 U.S. 60, 64-65 (1960) (extolling the virtues of the written word and assigning it First Amendment protections). If an audience does not understand the specific message in pure speech of gender expression, perhaps by being confused at the meaning of specific language, this speech would still receive protection under *Hurley* because they are still likely to understand a general message of gender diversity. See supra Section IV.C.; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 569 (1995) (declining to require understanding of a specific message for it to receive First Amendment protections); see, e.g., *The Young Turks, WATCH: Herschel Walker Asks “What The Heck Is A Pronoun?*, YOUTUBE (Dec. 5, 2022), https://www.youtube.com/watch?v=iSt4sRfY8AY [https://perma.cc/YX9Q-66A2] (depicting former Senate candidate Herschel Walker asking “what the heck is a pronoun?” in the context of a discussion of transgender rights, implying he understands that pronouns are related to gender identity).
While there is no inherent right to safeguard an individual’s choice to wear (or not wear) particular clothing, the majority of jurisdictions afford protection to forms of pure speech expressed through clothing.\textsuperscript{135}

B. Gender Expression Through Physical Appearance

This Comment has argued that gender expression through dress is certainly speech receptive of First Amendment protections. But clothing and accessories are not the only way transgender people use their physical appearances to send messages. Transgender people also send messages about their gender identity through hairstyle and gender-affirming care.

1. Hairstyle

Unlike through clothing or accessories, gender expression through hairstyle alone is unlikely to pass the \textit{Spence} test. It can perhaps satisfy the first prong, as hair (or lack thereof) has the potential to be communicative. For example, covering hair can express religious beliefs and nontraditional hair colors may indicate rebellion.\textsuperscript{136} But whether that message will be received poses a challenge.

More than other forms of gender expression, hair style has evolved to become somewhat less gendered more widely.\textsuperscript{137} In Western culture, conventional understanding has long associated femininity with long hair and masculinity with short hair.\textsuperscript{138} However, such categorizations are not

\textsuperscript{135} Cf. \textit{Tinker}, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); see also \textit{Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 879-80} (7th Cir. 2011) (holding school district’s act of forbidding high school students from wearing “Be Happy, Not Gay” t-shirts violated his First Amendment rights, but also noting that the school could regulate clothing for profanity).


\textsuperscript{138} See, e.g., Merrill Fabry, \textit{Now You Know: How Did Long Hair Become a Thing for Women?}, TIME (June 16, 2016, 5:00 PM), https://time.com/4348252/history-long-hair [https://perma.cc/YF8J-DPWJ] (describing how gendered hair length has existed since the ancient Greeks); Gizella Bakay-Korsós, \textit{The Long-Hair Effect}, REV. PSYCH., 1999, at 37 (presenting research findings that young children understand the difference between men and women to be the length of their hair); 1 \textit{Corinthians} 11:14-15 (King James) ("Doth not even nature itself teach you, that, if a man have
universally applicable. While certain gendered assumptions persist regarding the length of one’s hair, the contemporary landscape boasts a myriad of individuals challenging these norms: women confidently sport crewcuts and men proudly wear their hair long, underscoring the evolving and diverse nature of contemporary gender expression.139 If a transgender person only expressed their gender identity through hair, an audience will be unlikely to receive the message of their gender. The First Circuit explicitly stated that hairstyle alone is not sufficiently communicative to receive First Amendment protections.140 For example, a transgender man who dresses in feminine clothing, does not receive gender-affirming care, and does not bind his chest will likely still be called “ma’am,” despite having short hair. Hair as a particular signal is simply not strong enough for an audience to understand its intended message. Hurley does not require that an audience understand the specific message of gender identity that hairstyle communicates, but on its own, hair cannot establish gender messaging without other markers.141 If the transgender man cut his hair short but also wore masculine clothing, an audience would understand a message of masculinity, regardless of whether they specifically understood him to be a butch woman, cisgender man, or transgender man. Therefore, hairstyle alone is not sufficient to pass the Spence test but can perhaps clear the hurdle in combination with other markers.

2. Gender-Affirming Care

Gender-affirming care—the medical treatment that alters transgender people’s physical appearance to align with their gender identity142—may be

139 Furthermore, people in these groups may have a feminine or masculine gender expression in line with their hairstyle, but it is not uncommon for feminine women to have short hair and masculine men to have long hair. See, e.g., Jordan Crucilloa, Human Pillar of Masculinity Jason Momoa to Star in Reboot of The Crow, VULTURE (Aug. 10, 2016), https://www.vulture.com/2016/08/jason-momoa-to-star-in-update-of-the-crow.html [https://perma.cc/ZgFF-KHAT] (calling Jason Momoa, a man with shoulder-length hair, the “[h]uman [p]illar of [m]asculinity”).

140 Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970) (“[W]e reject the notion that plaintiff’s hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment.”).

141 See supra note 128 and accompanying text.

142 See Gender Incongruence and Transgender Health in the ICD, WORLD HEALTH ORG., https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd [https://perma.cc/MYB8-UMKX] (last visited Sept. 30, 2023) (“Gender-affirmative health care can include any single or combination of a number of social, psychological, behavioural or medical (including hormonal treatment or surgery) interventions designed to support and affirm an individual’s gender identity.”).
understood to be a form of gender expression because it allows a transgender person to convey their identity more fully; by receiving care, such as feminizing or masculinizing hormone therapy, their body expresses their gender identity.\textsuperscript{143} However, communicating gender through only the physical body poses First Amendment challenges.

Under \textit{Spence}, gender-affirming care easily passes the first prong: the choice to alter one's appearance is \textit{precisely} because of a desire to communicate to others that they are a particular gender.\textsuperscript{144} But the second prong's requirements complicate the issue because an audience may not understand biological characteristics to be communicating a message. Biological traits are not typically selected, so an audience would not know to even \textit{look} for a message, much less comprehend it. For example, a stranger on the street would not understand that a transgender person pursued gender transition to communicate their gender identity—they would only see a man or woman. The person would perceive the message—that a person is a man or woman—but would not understand it was a \textit{message} at all. If an audience does not know someone is transgender and using gender-affirming care, the messaging likely fails the \textit{Spence} test's second prong.

But there may be limited First Amendment applications for familiar relationships because family, friends, and community members of a transgender person will understand their changing body to communicate gender identity. For example, in \textit{Monegain}, a supervisor discriminated against a transgender employee after she received gender-confirmation surgery because he understood her bodily change to communicate information about her identity.\textsuperscript{145} \textit{Monegain} underscores the complex interplay between constitutional rights and personal relationships, as the First Amendment's application may be constrained in scenarios where intimate connections lead individuals to attribute specific communicative meanings to a transgender person's physical transformation.


\textsuperscript{144} Of course, some transgender people who use gender-affirming care may not do so to wholly transition but to change only some aspects of their appearance to align with their identity. See \textit{Microdosing (Low Dose) Testosterone HRT}, FOLX (Apr. 26, 2021), https://www.folxhealth.com/library/microdosing-low-dose-testosterone-hormone-replacement-therapy-hrt-explained-by-folx/ [https://perma.cc/5ZWW-XJKE] (describing how microdosing testosterone may be used to gain only subtle bodily changes).

C. Gender Expression Through Other Methods

1. Chosen Name

Selecting a new name is an important rite of passage for many transgender people, and many do so because it will better align with their gender and personal identity.\(^{146}\) In this way, a chosen name is an aspect of gender expression because it communicates one’s innermost identity.\(^{147}\) For example, if a transgender woman changes her name to Audrey, or any other historically feminine name, she does so in part to express to others that she is a woman.

Generally, there can be no doubt that names are communicative: they convey culture, familial ties, religious values, and gender identity.\(^{148}\) Audiences can discern their message in numerous contexts, but perhaps no more significantly than gender. One study demonstrated that humans assume a person’s sex based on their name only.\(^{149}\) If a friend tells you they will later introduce you to their co-worker Jim, you implicitly expect to later meet a man.

Therefore, a transgender person’s name choice may potentially receive Spence protections. As Eighth Circuit Judge Arnold stated in his dissent in Henne v. Wright, a case regarding the right of a parent to select a surname for her child, “What I call myself . . . is an aspect of speech. When the State [restricts this right] . . . my freedom of expression, both oral and written, is lessened.”\(^{150}\) This message also holds true for transgender people whose

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\(^{146}\) See Using a Preferred/Chosen Name, U. BUFFALO, https://www.buffalo.edu/equity/obtaining-assistance/lgbtq-information-and-support/Rightsandprotections-transgendercommunity/PreferredChosenName.html [https://perma.cc/7F5H-V7Z4] (last visited Sept. 30, 2023) (“For some individuals, including many in our transgender community, an alternative name is their chosen name and an essential part of their identity.”); Erin Paterson, “It Was a Line in the Sand for Everyone, Including Myself”: One Vogue Writer Reflects on Changing Their Name After Identifying as Trans, VOGUE (July 17, 2021), https://www.vogue.co.uk/arts-and-lifestyle/article/choosing-name-trans [https://perma.cc/C5KL-BLQG] (“[My previous name] felt mired in years of gender dysphoria and confusion . . . . [I] felt essential that I renamed myself.”).

\(^{147}\) See ONTARIO, supra note 37 (defining gender expression to include a person’s chosen name).

\(^{148}\) See, e.g., Yoﬁ Tirosh, A Name of One’s Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights, 33 HARV. L. & GENDER 247, 255-57 (2010) (arguing in part that names play a role in one’s personhood and expression, as well as communicate to the world aspects of one’s character); Kif Augustine-Adams, The Beginning of Wisdom Is to Call Things by Their Right Names, 7 S. CAL. REV. L. & WOMEN’S STUD. 1, 1 (1997) (“Naming practices reflect conceptions of individuality, equality, family and community that are fundamental to identity.”).

\(^{149}\) See Joseph Kasof, Sex Bias in the Naming of Stimulus Persons, 113 PSYCH. BULL. 140, 140 (1993) (describing multiple studies on sex discrimination that convey stimulus persons’ sex solely through sex-typed names).

\(^{150}\) Henne v. Wright, 904 F.3d 1208, 1216 (8th Cir. 1996) (Arnold, J., dissenting). Of course, the State can limit name choices but does so mostly to protect newborn children from absurd names. See Carlton F.W. Larson, Naming Baby: The Constitutional Dimensions of Parental Naming Rights, 80
freedom of expression is lessened if the State regulates their ability to change their names.  

2. Bathroom Use

Entering sex-segregated physical spaces, most notably bathrooms, is the furthest extension of gender expression that this Comment will address. Bathroom use is not commonly cited in institutional definitions of gender expression at all. For similar reasons, this conduct poses a significant challenge under Spence: how can universal biological functions be considered expressive, much less speech?

Some scholars argue that using a bathroom is a clear type of gender expression because doing so communicates a message about identity:

[A]n individual's conduct in using a restroom designated as either “male” or “female” expresses that individual's belief that she belongs in that designated category of persons. By choosing to enter a facility labeled for a specific gender group, that individual is effectively stating her association with that gender. Although no words may ever be uttered, there is a strong mental association between the designation affixed to a restroom door and the fact that only those individuals identifying with that designation would enter and use that facility. Therefore, since a transgender [person's] selection of a particular restroom is "sufficiently imbued with elements of communication," the conduct is expressive and sends a particularized message about [their] gender identity.

Kosbie makes a similar argument:

To use the terms of social construction theories, we have learned that men use one set of restrooms and women use another set of restrooms. Social norms ascribe gender meaning to restroom choice . . . . [I]f a transgender woman uses the women's restroom, others will likely either think she is a woman, or challenge her restroom choice because they think she appears too masculine. When a trans woman uses the women's restroom, she communicates her femininity even if she passes, and especially if she does: if

GEO. WASH. L. REV. 159, 195 (2011) ("Common sense tells us that a child named 'Ghoul Nipple' or 'Toilet Queen,' for example, will likely have a difficult time on the schoolhouse playground.").

151 See id. at 181 (arguing that if laws restricting naming rights impact free expression, they are subject to strict scrutiny review); cf. Lowell, supra note 21, at 1161-62 (saying that Tennessee’s law forbidding gender marker changes is not exempt from the First Amendment because gender marker changes are expressive).

152 See sources cited supra note 37 (omitting access to sex-segregated spaces, such as bathrooms, from definitions of gender expression).

153 Weatherby, supra note 18, at 122 (citing Texas v. Johnson, 491 U.S. 397, 404 (1989)).
no one questions her, then she has successfully communicated that she is a woman. But even if she is challenged, her restroom choice communicates a message of gender identity.154

Scholars have also specifically analyzed bathroom use under Spence: Professor Timothy Zick argues that this conduct passes the test because (1) bathroom use is an act of self-definition for a transgender person to communicate their identity and (2) any negative reactions to a transgender person using a specific bathroom show that audience members “understand—indeed, strongly reject—the [transgender person’s] statement of gender nonconformity.”155 Through this framework, it appears that accessing a sex-segregated bathroom is expressive enough to warrant some First Amendment protections.

While these arguments theoretically establish that using a gendered bathroom communicates a message, they perhaps go too far beyond the bounds of what is universally legally considered gender expression. Almost no case law exists in which a transgender person raises a First Amendment right, rather than or in conjunction with an Equal Protection claim, to use a specific bathroom.156 Perhaps transgender bathroom use is analogous to nude dancing. In City of Erie v. Pap’s A.M., the Supreme Court held that nudity itself is not inherently expressive but that nude erotic dancing is expressive because the movement shares a message.157 While bathroom use may not be inherently expressive due to its universal nature, a transgender person’s choice of bathroom may be expressive because it involves the deliberate communication of gender identity. Under this framework, bathroom use may, like nude dancing, fall at least within the “outer ambit of the First Amendment’s protection.”158

Yet this argument, along with the arguments by Kosbie, Weatherby, and Zick, neglects the Dale problem. Designating the universal action of using the bathroom as expressive when a transgender person does it throws open the door to all behavior conducted by a transgender person being labeled as expressive. This can lead to legal discrimination and threatens to constitutionalize the most basic of behaviors.159

Perhaps instead a transgender person using the bathroom is like O’Brien’s burning of a draft card, Johnson’s lighting a flag on fire, or Tinker’s wearing of

154 Kosbie, supra note 21, at 206.
155 Zick, supra note 19, at 978-79.
156 Kastl v. Maricopa County Community College District is one of the only cases that directly address this issue. No. Civ. 02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. June 2, 2004). But the bathroom issue was largely tied to her attire. Id. at *9.
158 Id.
an armband: conduct that does not implicitly mean anything, but when placed within a cultural and historical context—whether that be the Vietnam war or the transgender moral panic—suddenly takes on a flavor of speech that compels First Amendment protections. The Spence Court itself questioned how a moment in time may add to or detract from an audience's interpretation of expressive conduct. This conduct poses both opportunities and challenges for the First Amendment under Spence.

D. Next Steps for Gender Expression as Speech

This Comment aims to fill the gaps in current First Amendment scholarship by articulating how and why gender expression can be understood as communicative and in what contexts. But a free-speech analysis does not end with Spence: the actual litigation strategy against antitransgender legislation based on Spence depends entirely on a regulation's language and framing, whether it targets conduct or expression, and whether its text specifically targets transgender people.

For example, a regulation's text will dictate whether an argument must utilize strict-scrutiny analysis or the O'Brien test. First Amendment doctrine typically requires strict-scrutiny analysis for content-based regulations, but some forms of expressive conduct receive the less stringent review of O'Brien. But Spence renders the O'Brien test “inapplicable” for expressive conduct if the government interest fueling the regulation is directly related to the expression itself. Many antitransgender regulations may fall within Spence's exception because of a governmental interest directly related to gender expression. But as antitransgender laws become more extensive, legislators may draft content-based language that claims to be content-neutral, requiring O'Brien analysis.


161 See United States v. O'Brien, 391 U.S. 367, 376-80 (1968) (creating a test that uses a standard less than strict scrutiny to determine whether limitations to nonspeech elements of speech are constitutional); Texas v. Johnson, 491 U.S. 397, 406 (1988) (“The government generally has a freer hand in restricting expressive conduct than it does in restricting the written or spoken word.”).

162 See, e.g., City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1471-72 (2012) (citing Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)) (stating that content-based regulations of speech are subject to strict-scrutiny analysis); United States v. Grace, 461 U.S. 171, 177 (1983) (“[A]n absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling government interest.”).

163 Spence, 418 U.S. at 414 n.8 (1974) (clarifying that the O'Brien test is “inapplicable” when the government interest is directly related to the expression in the context of the nonspeech conduct).

A gender-expression-as-speech argument under *Spence* will support both strict scrutiny and *O'Brien* arguments. Bills that ban gender-affirming care,\(^{165}\) policies that forbid transgender people from changing their names or gender markers,\(^{166}\) and restrictions on sex-segregated spaces\(^{167}\) all limit transgender people’s speech through their gender expression, making the regulation related to the suppression of speech and a violation of both scrutiny analyses.\(^{168}\) Even if legislation appears unrelated to expression on its face— perhaps instead facially concerned with safety or attempting to limit fraud— the current transgender moral panic suggests that legislators are in actuality focused on suppressing transgender identity.\(^{169}\)

Future litigation should expound on this theory to apply it within the context of the legislation at hand. For example, it will need to contend with the site specificity of antitransgender regulation. Strict scrutiny is typically only used in the context of a public forum or private property. Other fora, such as public schools, government workplaces, prisons, and public property outside the public forum, require unique analysis and that go beyond the scope of this Comment.\(^{170}\) The substance of the regulation, including whether it limits speech or conduct, must also be considered. But a comprehensive solution to this problem may lie in bringing a viewpoint-discrimination complaint, as this argument can consider the broader problem of constitutionally forbidden government ideology in a regulation beyond the narrow scope of an *O'Brien* analysis.\(^{171}\)

criminalizes those who knowingly stay inside a bathroom with a child of the opposite biological sex without explicitly naming transgender people as potential perpetrators).


\(^{168}\) See United States v. *O'Brien*, 391 U.S. 367, 376-80 (1968) (requiring that a government interest be unrelated to the suppression of speech to be permissible under the First Amendment).


\(^{170}\) For examples of work outside this Comment’s scope, see *supra* notes 18–22 (listing legal scholarship that analyze gender expression as speech within different fora).

Any of these preceding arguments must begin by explaining why a form of gender expression is deserving of First Amendment protections in the first place.\textsuperscript{172} While the Court does not require a \textit{Spence} analysis to establish what constitutes expressive conduct, the current legal system demands a framework that explicitly dictates why gender expression is expressive conduct—a standard that a \textit{Spence} analysis can clearly accommodate.\textsuperscript{173} This Comment aims to establish this necessary foundation by explaining how gender expression is indeed expressive conduct, therefore supporting future First Amendment litigation strategies.\textsuperscript{174}

\textbf{CONCLUSION}

As antitransgender legislation intensifies, First Amendment arguments offer tools to combat discrimination. Through the lens of \textit{Spence}, litigators can answer the courts’ calls for detailed explanation by articulating that gender expression intentionally communicates messages that audiences readily understand. While other scholars have approached this topic, the conversations so far have overlooked information that the courts demand: the specifics of how and why gender expression is speech. By establishing this framework, this Comment aims to bolster previous arguments and support future First Amendment interpretation.

The future safety and dignity of transgender people demands an aggressive fight to vindicate civil liberties and enumerated rights. By understanding gender expression as speech, litigators may find the weapons they need for the battle.

\textsuperscript{172} See supra subsection III.C.1 (explaining how judges reject unclear gender-expression-as-speech arguments).


\textsuperscript{174} For maximum effectiveness, these legal arguments should operate within the context of administrative safety for transgender people, rather than attempt to bolster antidiscrimination law. See generally DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2015) (arguing that legal movements that bolster transgender people through equality laws and hate crime laws are ineffective and that the movements must instead address the administrative violence that transgender people experience).