

DRAG QUEENS, THE FIRST AMENDMENT, AND EXPRESSIVE HARMS

INTRODUCTION

When this Note speaks of drag, it will speak of joy. It will speak of brunch servers,¹ preschool teachers,² construction workers,³ opera singers,⁴ academics, and lawyers (yes, lawyers⁵) transforming from Clark Kent into Beyoncé.⁶ It will speak of children who have been scolded and bullied for their differences being celebrated for the very qualities that made them stand out.⁷ It will speak of the friends of this Note’s author — their humor, their talent, and their generosity.

The joy of drag is, unsurprisingly, under attack. A flurry of states, counties, and cities have passed laws seeking to stop the spread of these glamorous, liberating, and persuasive performances. These attacks have been couched in homophobic language that portrays drag performers as sexual deviants — or, worse, “groomers.” In just a short span of time, anti-drag regulations have generated legal, emotional, physical, and economic harms to drag performers and the LGBTQ+ community.

Luckily, a constitutional amendment ratified by men in makeup⁸ wearing wigs⁹ prevents the passage of laws that aim to suppress drag

¹ See, e.g., Bettina Makalintal, *How to Be a Good Drag Brunch Guest*, EATER (June 9, 2023, 11:55 AM), <https://www.eater.com/23755328/drag-brunch-etiquette-tipping-guide-how-to> [<https://perma.cc/9L57-EGTW>].

² See, e.g., Adhara Bull, “I’m a Drag Queen Who Taught in Preschool — I’m Not a Groomer,” NEWSWEEK (May 16, 2023, 8:05 AM), <https://www.newsweek.com/im-drag-queen-anti-drag-bill-usa-tennessee-lgbtq-1799676> [<https://perma.cc/EQS9-935K>].

³ See, e.g., Sandra Song, *Loosey LaDuca Wants to Build Bridges*, PAPER (Mar. 28, 2023), <https://www.papermag.com/loosey-laduca-drag-race> [<https://perma.cc/NP4C-5RHD>].

⁴ See, e.g., Saskia Maxwell Keller, *Monét X Change Makes Opera Debut in The Daughter of the Regiment*, OUT (Dec. 20, 2022, 11:49 AM), <https://www.out.com/drag/2022/12/20/monet-x-change-opera-debut> [<https://perma.cc/8UYA-MXFH>].

⁵ See, e.g., Joe Rosato Jr., *Corporate Attorney by Day, Drag Queen by Night — Behind the Mirror with Dextra DeNovo*, NBC BAY AREA (June 20, 2023 5:55 PM), <https://www.nbcbayarea.com/news/local/corporate-attorney-by-day-drag-queen-by-night/3256089> [<https://perma.cc/6HPH-LZ3C>].

⁶ See, e.g., Verity Stevenson, *The Drag Queen Who Brought Beyoncé’s Lemonade to Toronto*, TORONTO STAR (June 11, 2016), https://www.thestar.com/entertainment/music/the-drag-queen-who-brought-beyonc-s-lemonade-to-toronto/article_1922f9ee-8c83-54b9-9301-f28ed5bd842a.html [<https://perma.cc/K36N-U6E7>].

⁷ See generally TREVOR PROJECT, *Bullying and Suicide Risk Among LGBTQ Youth* (Oct. 14, 2021), <https://www.thetrevorproject.org/research-briefs/bullying-and-suicide-risk-among-lgbtq-youth> [<https://perma.cc/JQ77-DZVF>].

⁸ *Make-Up*, SMITHSONIAN INST., <https://www.si.edu/spotlight/health-hygiene-and-beauty/make-up> [<https://perma.cc/934Y-7XUJ>] (“In eighteenth century America, both men and women of the upper classes wore make-up.”).

⁹ Chance Seales & K.B. Mensah, *The Male Beginnings of “Feminine” Fashion*, SCRIPPS NEWS (July 26, 2019, 11:04 AM), <https://scrippsnews.com/stories/the-male-beginnings-of-feminine-fashion> [<https://perma.cc/QED8-LES7>] (“Wigs, silk stockings? Fashionable with the Founding Fathers in the 18th century.”).

performances.¹⁰ Some academics, such as Professor Catharine MacKinnon, have decried the First Amendment as having “morphed from a vaunted entitlement of structurally unequal groups to have their say, to expose their inequality, and to seek equal rights, to a claim by dominant groups to impose and exploit their hegemony.”¹¹ However, in its protection of drag performers, the First Amendment demonstrates that its most valiant *doctrinal* aims still persist — but its practical impact might be lacking. Even after anti-drag regulation is declared unconstitutional, its primary harms persevere: speech remains chilled, social norms remain altered, and drag remains unduly politicized. And bullish legislators have accomplished this feat with the passage of bills that “most legal commentators, and really anybody with even a passing understanding of how the First Amendment works,” would have deemed unconstitutional.¹²

This Note proceeds as follows. Part I describes the history of drag, highlighting the centuries-long trajectory of the art form in order to elucidate its expressive and political nature. Part II describes recent attempts to restrict drag performances and situates them within a history of anti-cross-dressing laws and anti-LGBTQ+ rhetoric. Part III surveys the protections afforded by the First Amendment to drag performers, arguing that the vast majority of anti-drag laws are unconstitutional. Part IV utilizes an expressive law framework to unpack distinct harms generated by anti-drag legislation and argues that these harms are not adequately remedied by judicial decisions overturning statutes. While anti-LGBTQ+ sentiment will not be eradicated by the elimination of anti-drag laws, attacking these regulations protects the emotional and financial interests of some of society’s most marginalized members.

I. THE HISTORY OF DRAG: FROM CENTER STAGE, TO THE SHADOWS, AND BACK AGAIN

Before William Dorsey Swann was (perhaps) the world’s first drag queen — he was enslaved.¹³ A newly emancipated Swann threw lavish dance parties in Washington, D.C., where he and his closest friends would don women’s dresses, corsets, bustles, long hose, and slippers —

¹⁰ See Neal Broverman, *Washington’s Wigs: Historic Drag Gets Callout on Times Square*, OUT (July 5, 2023, 12:58 AM), <https://www.out.com/drag/historic-drag-billboard> [<https://perma.cc/FMH6-KK8M>] (describing advertisement in Times Square reading “The Declaration of Independence was written by men in wigs, heels & tights”).

¹¹ Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1224 (2020).

¹² Elie Mystal, *The Right’s War on Drag Is Flagrantly Unconstitutional*, THE NATION (June 6, 2023), <https://www.thenation.com/article/society/drag-bans-are-not-constitutional> [<https://perma.cc/2A9A-6HKR>].

¹³ Channing Gerard Joseph, *The First Drag Queen Was a Former Slave*, THE NATION (Jan. 31, 2020), <https://www.thenation.com/article/society/drag-queen-slave-ball> [<https://perma.cc/8FHE-M24M>].

as the *Washington Critic* put it, “everything that goes to make a female’s dress complete.”¹⁴ In 1896, Swann’s fêtes suffered a brief intermission when he was convicted for “keeping a disorderly house” (in less genteel terms, running a brothel).¹⁵ Undeterred, Swann continued throwing parties for “his secretive all-male family” despite multiple run-ins with the D.C. police.¹⁶ Against a backdrop of rigid nineteenth-century attitudes toward gender, “Swann and his house of butlers, coachmen, and cooks — the first Americans to regularly hold cross-dressing balls and the first to fight for the right to do so — arguably laid the foundations of contemporary queer celebration and protest.”¹⁷ Not only a queen of drag, Swann was a queen of liberation, joy, and compassion.

Swann exists in a long line of artists who have used drag to challenge social mores, free themselves from rigid expectations of gender, and build community among fellow queer and transgender individuals. This Part examines this history of drag and describes its role in modern society.

A. Drag’s Beginnings

Long before the first drag *queen* came the first drag *performances*. Typically, a drag performance is defined as one in which “the intent is an undoing of gender norms through doing (or dressing) the part of the opposite sex.”¹⁸ However, modern drag performers often enhance characteristics of their own gender to convey similar messages.¹⁹ The practice of drag is both storied and universal: cultures across the globe have applauded the performances of cross-dressing men.²⁰ In Elizabethan theatre, the term “to boy” meant “to play a female role on the stage irrespective of the actor’s real age.”²¹ And in Japan, the *onnagata* perfected the art of female impersonation — famed performer Yoshizawa Ayame wrote to aspiring boys: “You cannot be a good *onnagata* unless you are like a woman in daily life.”²² These earliest drag performances

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Colin Edward Carman, *Drag Queen*, ENCYCLOPEDIA BRITANNICA (Jan. 25, 2024), <https://www.britannica.com/topic/drag-queen> [https://perma.cc/Q4VX-GLNG].

¹⁹ See, e.g., Queer News, “*Drag Race UK*” Makes Her-Story with First Bio Queen Contestant, HOTSPOTS! (Aug. 23, 2021), <https://hotspotsmagazine.com/2021/08/23/drag-race-uk-makes-her-story-with-first-bio-queen-contestant> [https://perma.cc/8LFD-VYDK].

²⁰ Ben Rimalower, *From Ancient Greece to Angry Inch, Take a Look at the History of Drag in Theatre*, PLAYBILL (Aug. 15, 2015), <https://playbill.com/article/from-ancient-greece-to-angry-inch-take-a-look-at-the-history-of-drag-in-theatre-com-357650> [https://perma.cc/VDD8-MWSG].

²¹ ROGER BAKER, DRAG: A HISTORY OF FEMALE IMPERSONATION IN THE PERFORMING ARTS 36 (1994).

²² *Id.* at 70.

were largely driven by prohibitions against women performing in public.²³

However, some historians argue that the literal roots of modern drag are more recent than the ancient stage.²⁴ The first known usage of the term “drag” was in 1860s Victorian England, where Ernest Boulton described his cross-dressing act as “drag.”²⁵ And during the same period in the United States, drag performers “starred in racist minstrel shows, during which mostly white actors wore blackface to portray racial stereotypes of African Americans.”²⁶ The racist caricatures soon gave way to portrayals of “glamorous white women with thin waists and elegant makeup.”²⁷ Julian Eltinge, one of these performers known for his lady-like appearance, “launched the *Eltinge Magazine*, dispensing beauty and fashion tips to his adoring female fans.”²⁸

While Eltinge was celebrated on stages across the nation, Black and Latinx individuals of the nineteenth century cultivated a tradition of drag culture that is still alive today.²⁹ Swann, as discussed in the opening of this section, began hosting drag balls as early as 1882.³⁰ And in Harlem, the first recorded drag ball occurred in 1869 in the Hamilton Lodge.³¹ The practice continued, and these galas flourished amidst the Harlem Renaissance.³² Regretfully, few records exist from the earliest drag balls, “because participating in them was extremely risky due to gender and social stigmas.”³³ At one point, the moral reform organization known as the Committee of Fourteen issued a report describing the balls as a “scene filled with ‘phenomenal’ ‘male perverts’ in expensive frocks and wigs, looking like women.”³⁴

²³ *Id.* at 65.

²⁴ Emily Martin, *From Police Raids to Pop Culture: The Early History of Modern Drag*, NAT'L GEOGRAPHIC (June 2, 2023), <https://www.nationalgeographic.com/history/article/drag-queen-drag-balls-early-history-pop-culture> [<https://perma.cc/67JQ-AM3J>].

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ SIMON DOONAN, *DRAG: THE COMPLETE STORY* 18 (2019).

²⁹ Martin, *supra* note 24.

³⁰ Joseph, *supra* note 13.

³¹ Oliver Stabbe, *Queens and Queers: The Rise of Drag Ball Culture in the 1920s*, NAT'L MUSEUM AM. HIST. (Apr. 11, 2016), <https://americanhistory.si.edu/blog/queens-and-queers-rise-drag-ball-culture-1920s> [<https://perma.cc/2B4R-9ZAT>]; see also *The Legendary Hamilton Lodge Ball Home at the Rockland Palace Dance Hall in Harlem 1920's*, HARLEM WORLD (June 28, 2021), <https://www.harlemworldmagazine.com/the-legendary-hamilton-lodge-ball-home-at-the-rockland-palace-dance-hall-in-harlem> [<https://perma.cc/D4QX-NP39>] (explaining that “Hamilton Lodge, also known as Rockland Palace . . . housed . . . most notably, the Drag Ball, an oft-overlooked piece of Harlem history”).

³² Stabbe, *supra* note 31.

³³ Martin, *supra* note 24.

³⁴ Stabbe, *supra* note 31. The alleged perversity of cross-dressing has been central to modern conflicts surrounding drag. See *infra* section II.B, pp. 1477–79.

The famed drag balls of Harlem continue until the modern day, and were featured in the 1990 documentary *Paris Is Burning*.³⁵ Even outside of New York, modern drag performers draw heavily from the traditions of the Harlem balls.³⁶ The popular dance style of “vogue” — a “type of improvisational dance inspired by the poses of models in fashion magazines” — originated in the Harlem ballroom scene.³⁷ And modern drag performers often build families reminiscent of the kinship structure of New York ballroom³⁸ — “drag mothers” who care for and instruct their “drag daughters” or “drag sons” on the ways of the trade.³⁹

B. Modern Drag

Today, drag queens have infected the cultural zeitgeist — influencing television, fashion, and even politics. In 2009, the television series *RuPaul’s Drag Race* premiered and firmly cemented drag performances on the national stage.⁴⁰ Although drag has been featured in American pop culture for decades (such as in the movies *Kinky Boots*, *Tootsie*, and *Mrs. Doubtfire*), “[n]othing about the inner lives of queens has hit critical mass quite like ‘Drag Race.’”⁴¹ Several hundred episodes later, *RuPaul’s Drag Race* has become widely popular, and has introduced new generations and demographics to the joy of drag.⁴²

While modern queens can be categorized into diverse taxonomies — such as “glamour” queens,⁴³ “comedy” queens⁴⁴ and “art” queens⁴⁵ — lip-syncing is “*de rigueur* in drag today.”⁴⁶ In lip-sync performances, drag performers select iconic sound clips (from songs, movie scenes, or reality television) and craft outfits, dances, and acting that lift the lyrics

³⁵ Martin, *supra* note 24.

³⁶ Thaddeus Morgan, *How 19th-Century Drag Balls Evolved into House Balls, Birthplace of Voguing*, HISTORY (Sept. 7, 2023), <https://www.history.com/news/drag-balls-house-ballroom-voguing> [<https://perma.cc/8RQC-RS64>].

³⁷ *Id.*

³⁸ *See id.*

³⁹ Emma Williams, *The Definition of Drag Has Expanded — And So Has the Demand for Performances*, TEX. STANDARD (June 30, 2022, 1:52 PM), <https://www.texasstandard.org/stories/the-definition-of-drag-has-expanded-and-so-has-the-demand-for-performances> [<https://perma.cc/9QWY-YH6P>].

⁴⁰ Maria Elena Fernandez, *Behind the Rise of RuPaul’s Drag Race*, VULTURE (Aug. 22, 2017), <https://www.vulture.com/2017/08/behind-the-rise-of-rupauls-drag-race.html> [<https://perma.cc/9ZXE-PUU5>].

⁴¹ Jenna Wortham, *Is “RuPaul’s Drag Race” the Most Radical Show on TV?*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/magazine/is-rupauls-drag-race-the-most-radical-show-on-tv.html> [<https://perma.cc/Y6YC-D8LA>].

⁴² *See* Justin Kirkland, *How RuPaul’s Drag Race Became an Enduring National Phenomenon*, ESQUIRE (Mar. 2, 2023, 9:14 AM), <https://www.esquire.com/entertainment/a43145366/rupauls-drag-race-legacy> [<https://perma.cc/9A7D-F5MB>].

⁴³ *See* DOONAN, *supra* note 28, at 12–43.

⁴⁴ *Id.* at 136–61.

⁴⁵ *Id.* at 44–63.

⁴⁶ Nicole Pasulka, *Read My Lips*, SLATE (June 17, 2019, 5:28 PM), <https://slate.com/human-interest/2019/06/drag-lip-sync-history-queen-king-performance.html> [<https://perma.cc/3WW3-FXLC>].

to a highly stylized pitch.⁴⁷ Drag historian Professor Joe E. Jeffreys believes that lip-syncing has its origins in “the practice of young gays performing the songs of beloved divas and ingénues . . . in the privacy of a bedroom or basement.”⁴⁸ While the performance style made less money for performers than singing or comedy, it was “lower-tech and more accessible,” which helped lead to its widespread adoption following the 1960s.⁴⁹

Drag has always been about more than looking and dancing beautifully — like Swann and attendees of the early Harlem Balls, modern drag queens have been involved in both personal and political liberation for decades. Some view Swann’s 1896 petition to President Cleveland for a pardon as the first example of an American taking “specific legal and political steps to defend the queer community’s right to gather without the threat of criminalization, suppression, or police violence.”⁵⁰ At the Stonewall uprising, drag queens like Stormé DeLarverie⁵¹ played a central role in the foundations of the LGBTQ+ rights movement.⁵² Drag queens have run for⁵³ — and won — public office.⁵⁴ In 2023, drag queens and kings may perform proudly in bars, restaurants, parades and television, but the radical and political nature of drag has yet to cease.

II. THE HISTORY OF ANTI-DRAG LEGISLATIONS: A FAMILIAR TALE WITH NEW CHARACTERS

The ACLU has identified over 500 anti-LGBTQ+ bills introduced in state legislatures during their 2023 legislative sessions.⁵⁵ Of these bills, many target drag performances.⁵⁶ On March 2, 2023, Tennessee became the first state in the nation to pass a law with strict limitations on drag.⁵⁷ The Tennessee Adult Entertainment Act (AEA) extended the definition

⁴⁷ See, e.g., TheDragLover, *Sasha Colby — Angels and Men/Fierce*, YOUTUBE (Oct. 29, 2012), <https://www.youtube.com/watch?v=04yyoT021fE> [<https://perma.cc/9N8K-BMTX>].

⁴⁸ Pasulka, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ Joseph, *supra* note 13, at 25.

⁵¹ DOONAN, *supra* note 28, at 218.

⁵² 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2330 (2023) (Sotomayor, J., dissenting) (quoting JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 231 (1983)).

⁵³ See, e.g., Giulia Carbonaro, *Who Is Marti G. Cummings? Drag Artist Invited by Joe Biden to White House*, NEWSWEEK (Dec. 14, 2022, 4:25 PM), <https://www.newsweek.com/who-marti-g-cummings-drag-artist-biden-white-house-1766991> [<https://perma.cc/J4BX-5Y66>] (“In 2021, [Marti G. Cummings] ran for city council in New York City’s 7th district but ultimately lost the election.”).

⁵⁴ MAEBE FOR CONGRESS 2024, <https://maebegirlforcongress.org> [<https://perma.cc/5WSL-8TK3>] (“Upon [Maebe A. Girl’s] election in 2019, she became the first drag queen elected to public office in the United States.”).

⁵⁵ *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU (Feb. 2, 2024), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> [<https://perma.cc/SSP7-UX94>].

⁵⁶ See, e.g., TENN. CODE ANN. §§ 7-51-1401, 7-51-1407, 39-17-901 (2024).

⁵⁷ Adam Gabbatt, “*Subtle and Sinister*”: *Republicans’ Anti-drag Crusade Seen as Assault on LGBTQ+ Rights*, THE GUARDIAN (Sept. 19, 2023, 2:50 PM), <https://www.theguardian.com/world/2023/sep/19/us-states-attack-drag-shows-lgbtq-rights> [<https://perma.cc/LCU4-NHXN>].

of “[a]dult cabaret entertainment” to performances including “male or female impersonators” and prevented such performances on “public property” or in “a location where the adult cabaret entertainment could be viewed by a person who is not an adult.”⁵⁸

Many viewed the Tennessee AEA as an attack on queer and trans communities — a “subtle and sinister way to further criminalize just being trans.”⁵⁹ Unsurprisingly, the statute was challenged in court.⁶⁰ In *Friends of Georges, Inc. v. Mulroy*,⁶¹ Judge Parker of the Western District of Tennessee found Tennessee’s AEA unconstitutional after a full bench trial.⁶² However, the decision in *Friends of Georges* is not the last word on Tennessee’s drag law — the decision applied to only one county,⁶³ and other Tennessee officials have promised to continue enforcing the law.⁶⁴ Plus, Tennessee appealed the decision, purportedly “to ensure Tennessee’s laws continue to protect Tennessee’s kids.”⁶⁵ Notwithstanding the holding, anti-drag advocates are eager to use government authority to suppress the expression of drag performers.

As discussed in the opening of this Note, Tennessee is not alone in its hostility to drag performances. Other states — such as Florida⁶⁶ and Texas⁶⁷ — have followed suit and enacted anti-drag regulations. And, localities across the country have instituted ordinances or policies which restrict drag performance.⁶⁸ Regrettably, some public venues have even elected to stop renting out spaces to *any* groups in order to avoid having

⁵⁸ TENN. CODE ANN. §§ 7-51-1401(3)(A), -1407(c)(1) (2024).

⁵⁹ Marianna Bacallao, *Tennessee Becomes the First State to Pass a Ban on Public Drag Shows*, NPR (Mar. 2, 2023 7:41 PM), <https://www.npr.org/2023/03/02/1160784530/tennessee-ban-public-drag-shows-transgender-health-care-youth> [<https://perma.cc/NR3Y-DRGD>].

⁶⁰ See Emily Cochrane, *Judge Finds Tennessee Law Aimed at Restricting Drag Shows Unconstitutional*, N.Y. TIMES (June 3, 2023), <https://www.nytimes.com/2023/06/03/us/politics/tennessee-drag-ruling.html> [<https://perma.cc/KF79-JAG2>].

⁶¹ No. 23-cv-02163, 2023 WL 3790583 (W.D. Tenn. June 2, 2023).

⁶² *Id.* at *33.

⁶³ *Id.*

⁶⁴ Ella Wales, *Blount Co. DA Warns Group Against Violating Anti-drag Law that Was Ruled Unconstitutional*, ABC WATE (Aug. 30, 2023, 11:24 PM), <https://www.wate.com/news/blount-county-news/da-warns-group-against-violating-anti-drag-law-ruled-unconstitutional> [<https://perma.cc/3YA5-N53U>].

⁶⁵ *TN AG Skremetti Appeals the District Court Decision in Friends of George, Inc. v. Mulroy*, OFF. ATT’Y GEN. TENN. (June 30, 2023, 3:16 PM), <https://www.tn.gov/attorneygeneral/news/2023/6/30/pr23-23.html> [<https://perma.cc/4NQV-KW7P>].

⁶⁶ Brandon Girod, *What Is Florida’s New Drag Show Law, SB 1438? Breaking Down the Law’s Impact*, PENSACOLA NEWS J. (May 23, 2023, 8:27 AM), <https://www.pnj.com/story/news/politics/2023/05/23/what-is-florida-anti-drag-law-impact-2023/70246575007> [<https://perma.cc/44TD-S3KA>].

⁶⁷ Erin Russell, *Texas Governor Signs Anti-drag Bill Targeting All-Ages Performances into Law*, EATER AUSTIN (June 22, 2023, 12:07 PM), <https://austin.eater.com/2023/6/22/23742348/texas-anti-drag-bill-lgbtq-sb12-law-fines-all-ages-performances-minors> [<https://perma.cc/6HD8-EVV9>].

⁶⁸ *ACLU Sues a Tennessee City Over an Anti-drag Ordinance*, 10 NEWS (Oct. 9, 2023, 5:36 PM), <https://www.wbir.com/article/news/local/murfreesboro-aclu-lawsuit-over-drag-performance/51-6d8bc1b7-8829-4862-a570-afbe855f2839> [<https://perma.cc/B7VM-TPJU>].

to rent them to drag performers.⁶⁹ Debates over drag have infected communities across the country, subjecting an already marginalized group of individuals to a greater number of incidents of threat and violence.

This Part examines the modern trend of anti-drag legislation, situating it against a historical backdrop of anti-cross-dressing regulations and patterns of anti-LGBTQ+ rhetoric.

A. *Anti-cross-dressing Laws*

In the mid-nineteenth century, St. Louis, Missouri, passed one of the nation's first laws against public cross-dressing.⁷⁰ The ordinance made it a misdemeanor for any individual to “appear in any public place . . . in a dress not belonging to his or her sex.”⁷¹ Following in St. Louis's wake, “[o]ver forty U.S. cities passed similar laws before the end of the nineteenth century.”⁷² Government bodies adopted anti-cross-dressing ordinances amidst larger anti-vice campaigns targeting other morally controversial behavior such as prostitution and public drunkenness.⁷³ Although changing twentieth-century fashion norms made prosecution more difficult, the “intolerant laws remained on the books and were used as a flexible tool to harass masculine women and anyone identifying as transgender or gender non-conforming.”⁷⁴ For example, in New York, “butch lesbians” were arrested “for wearing less than three pieces of women's clothing, in violation of local law.”⁷⁵

While these laws may seem to regulate only clothing, anti-cross-dressing laws can be understood as “a central mechanism for policing a whole series of ‘belongings’ — not only the items of clothing that ‘belonged’ to a specific sex but also the types of people that ‘belonged’ in public space and the types of bodies that ‘belonged’ in the categories of man and woman.”⁷⁶ In San Francisco, “police used cross-dressing law to regulate multiple gender offenses, including those of feminist dress reformers, ‘fast young women’ who dressed as men for a night on the

⁶⁹ See, e.g., Sarah Bryant, “*Drag Queen Story Hour*” Officially Over in Leander After City Ends Library Room Rentals, KVUE (Aug. 16, 2019, 7:49 PM), <https://www.kvue.com/article/news/local/drag-queen-story-time-officially-over-after-leander-ends-library-room-rentals/269-7b8bc54c-6567-4e3a-b896-9888e3d1a96f> [<https://perma.cc/V654-VTKH>].

⁷⁰ Clare Sears, *This Isn't the First Time Conservatives Have Banned Cross-Dressing in America*, JACOBIN (Mar. 15, 2023), <https://jacobin.com/2023/03/cross-dressing-law-united-states-history-drag-bans> [<https://perma.cc/6PSS-86WS>].

⁷¹ *1864 Cross Dressing Ordinance*, ST. LOUIS LGBT HIST. PROJECT, <http://www.stlouislgbthistory.com/timeline/1800s/1864-cross-dressing-ordinance.html> [<https://perma.cc/T8F8-6zHT>] (quoting ST. LOUIS, MO., ORD. 5421 (1864)).

⁷² Sears, *supra* note 70.

⁷³ *Id.*

⁷⁴ DOONAN, *supra* note 28, at 208.

⁷⁵ CLARE SEARS, *ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO* 4 (2015).

⁷⁶ *Id.* at 6.

town, female impersonators, and people whose gender identification did not match their anatomy in legally acceptable ways.”⁷⁷ Thus, anti-cross-dressing laws are not only legal artifacts, they are also cultural ones — they embody the bigoted impulses of unchecked majorities. These laws mandated the seclusion of queer identities, and reinforced societal assumptions regarding the binary nature of gender.

Today’s modern anti-drag bills “have clear connections to earlier laws against public cross-dressing that swept the nation in the nineteenth century and terrorized queer and trans communities in the 1950s and 1960s.”⁷⁸ Like the anti-vice movements of our nation’s history, anti-drag legislation is part of a larger conservative movement that seeks to regulate hot-button cultural issues such as critical race theory, gender-affirming care, and diversity, equity and inclusion initiatives.⁷⁹ Anti-drag and anti-cross-dressing laws also serve interrelated aims: they encourage government-enforced concepts of gender; isolate queer ideas and expression into the margins of society; and subjugate queer individuals through government institutions.

B. Grooming Hysteria

According to the proponents of anti-drag legislation, these measures are not about oppressing drag queens, but rather, protecting children. As Arkansas State Senator Gary Stubblefield stated, “I can’t think of anything good that can come from taking children and putting them in front of a bunch of grown men who are dressed like women.”⁸⁰ Such statements are in accord with a larger right-wing trend of restricting children from experiencing LGBTQ+ ideas and individuals.

Casting pedophilic motives onto LGBTQ+ advocacy is “one of the oldest narratives in the homophobic playbook.”⁸¹ Conservatives have incorrectly wielded the term “grooming” — “which describes the actions an adult takes to make a child vulnerable to sexual abuse” — to “imply that the LGBTQ community, their allies, and liberals more generally are pedophiles or pedophile-enablers.”⁸² For example, Florida Governor Ron DeSantis’s press secretary described the controversial “Don’t Say

⁷⁷ *Id.* at 62.

⁷⁸ Sears, *supra* note 70.

⁷⁹ Irie Sentner, *Culture War Consumes Congress as Lawmakers Confront Spending Deadline*, POLITICO (July 25, 2023, 4:30 AM), <https://www.politico.com/news/2023/07/25/culture-wars-hit-house-spending-bills-00107816> [<https://perma.cc/D753-8CYN>].

⁸⁰ Brooke Migdon, *Arkansas House Strikes Drag Shows from Bill Restricting “Adult” Performances*, THE HILL (Feb. 7, 2023, 12:44 PM), <https://thehill.com/homenews/state-watch/3847352-arkansas-house-strikes-drag-shows-from-bill-restricting-adult-performances> [<https://perma.cc/3P83-XNAP>].

⁸¹ Aja Romano, *The Right’s Moral Panic over “Grooming” Invokes Age-Old Homophobia*, VOX (Apr. 21, 2022, 1:30 PM), <https://www.vox.com/culture/23025505/leftist-groomers-homophobia-satanic-panic-explained> [<https://perma.cc/3B5R-687S>].

⁸² *Id.*

Gay” bill⁸³ as “the Anti-Grooming Bill” and tweeted that “[i]f you’re against [it], you are probably a groomer or at least you don’t denounce the grooming of 4–8 year old children.”⁸⁴ The utilization of grooming rhetoric in this manner equates homosexuality with pedophilia, and therefore transforms homophobic acts into anti-pedophilic acts.

The intersection of grooming rhetoric and anti-drag sentiment is perhaps no more pronounced than in responses to Drag Story Hour — an organization that conducts events at libraries and community centers across the nation, seeking to “capture[] the imagination and play of the gender fluidity of childhood and give[] kids glamorous, positive, and unabashedly queer role models.”⁸⁵ Since its 2015 founding, Drag Story Hour has become both a “global phenomenon”⁸⁶ and a “flash point in the culture wars.”⁸⁷ In Ohio, “someone threw a Molotov cocktail at Community Church of Chesterland in the days before it hosted a Drag Queen Story Hour.”⁸⁸ In New York, protesters clashed with counter-protesters at a Drag Queen Story Hour hosted by New York Attorney General Letitia James⁸⁹ and others “descended on the home and the office of a gay member of the New York City Council . . . [,] vandalizing the walls with homophobic graffiti and attacking one of his neighbors, over his support for Drag Story Hour events at local libraries.”⁹⁰

Against a national backdrop of anti-LGBTQ+ sentiment, it is unsurprising that Drag Story Hour has been forced into the spotlight. Much of anti-LGBTQ+ violence can be understood “not in terms of individual hatred but as an extreme expression of American cultural stereotypes and expectations regarding male and female behavior.”⁹¹ When

⁸³ FLA. STAT. § 1001.42 (2022); see also Kiara Alfonseca, *Florida’s Controversial “Don’t Say Gay” Bill: What’s Inside the Proposed Law*, ABC NEWS (Mar. 23, 2022, 5:01 AM), <https://abcnews.go.com/US/floridas-controversial-dont-gay-bill-inside-proposed-law/story?id=83525901> [<https://perma.cc/PQ8E-XHH6>] (“The bill has caused a nationwide debate about LGBTQ content in education.”).

⁸⁴ Romano, *supra* note 81 (quoting Christina Pushaw (@ChristinaPushaw), TWITTER (Mar. 4, 2022, 6:33 PM), <https://twitter.com/ChristinaPushaw/status/1499890719691051008> [<https://perma.cc/4W3N-DH9X>]).

⁸⁵ *About*, DRAG STORY HOUR, <https://www.dragstoryhour.org/about> [<https://perma.cc/YNc9-CLLP>].

⁸⁶ *Id.*

⁸⁷ Cliff Pinckard, *Drag Story Hours Have Become a Flash Point in the Culture Wars: The Wake Up for Wednesday, July 19, 2023*, CLEVELAND.COM (July 19, 2023, 6:14 AM), <https://www.cleveland.com/metro/2023/07/drag-story-hours-have-become-a-flash-point-in-the-culture-wars-the-wake-up-for-wednesday-july-19-2023.html> [<https://perma.cc/J2S5-HN2M>].

⁸⁸ *Id.*

⁸⁹ Matt Lavietes, *Protesters Are Bloodied and Arrested at NYC Drag Story Hour*, NBC NEWS (Mar. 20, 2023, 12:24 PM), <https://www.nbcnews.com/nbc-out/out-news/protesters-bloodied-arrested-nyc-drag-story-hour-rcna75724> [<https://perma.cc/P7FS-AEAF>].

⁹⁰ Liam Stack, *Foes of Drag Queen Story Hours Invade New York Councilman’s Home*, N.Y. TIMES (Dec. 20, 2022), <https://www.nytimes.com/2022/12/20/nyregion/drag-queen-story-hours-protests-nyc.html> [<https://perma.cc/ZJJ6-3ET5>].

⁹¹ Karen Franklin, *Inside the Mind of People Who Hate Gays*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/assault/roots/franklin.html> [<https://perma.cc/5XNY-RFNS>].

protestors attend these events, they are often deputized and armed with anti-grooming rhetoric. For example, a Proud Boy who disrupted an event in California wore a shirt that read “Kill your local pedophile,” and in Texas, the group “Protect Texas Kids” chanted “groomers” outside of a family-friendly drag event.⁹² The anti-pedophilic narrative operates as a moral salve for homophobic behavior. In the minds of anti-drag protesters, the harms they inflict on drag performers and supporters are justified by the perceived protection of children.

Contrary to the rhetoric fielded by anti-drag advocates, there is a lack of evidence demonstrating that exposure to drag queens leads to undesirable results in children. And as psychotherapist Dr. Joe Kort writes: “As a longtime sex and gender therapist, I know that there is no substance to the argument that exposing anyone, including children, to the reality of people with a different sexual orientation or gender identity influences the children’s innate sexual orientation or gender identity.”⁹³ Instead, activities like Drag Story Hour introduce children to the idea that “all others, despite appearance or sexual orientation, are worthy of respect, and to a world that is not divided into ‘us’ and ‘others.’”⁹⁴

III. THE FIRST AMENDMENT AND DRAG: WHIG-MADE PROTECTIONS FOR MEN WEARING WIGS

In an interview with National Public Radio, Idaho drag queen Frida Nightz stated most aptly: “Drag performance — it’s just so powerful. And that’s probably why they fear it, you know.”⁹⁵ As Parts I and II suggest, drag is incredibly expressive, viewpoint-related conduct. Thus, it naturally follows that anti-drag regulations are primarily concerned with *suppressing* certain categories of expression and viewpoints.⁹⁶ These aims are precisely the kind of impermissible goals that the First Amendment forbids. Anti-drag bills seek to stop the spread of a specific

⁹² *What Is “Grooming?” The Truth Behind the Dangerous, Bigoted Lie Targeting the LGBTQ+ Community*, ANTI-DEFAMATION LEAGUE (Sept. 16, 2022), <https://www.adl.org/resources/blog/what-grooming-truth-behind-dangerous-bigoted-lie-targeting-lgbtq-community> [<https://perma.cc/XGZ9-RH2F>].

⁹³ Joe Kort, *Drag Queen Storytime for Children*, PSYCH. TODAY (Jan. 23, 2019), <https://www.psychologytoday.com/us/blog/understanding-the-erotic-code/201901/drag-queen-storytime-children> [<https://perma.cc/QW4L-LSD5>].

⁹⁴ *Id.*

⁹⁵ Kirk Siegler, *Why Lawmakers in Idaho Want to Ban Public Drag Shows*, NPR (Jan. 9, 2023, 5:13 AM), <https://www.npr.org/2023/01/09/1147787250/why-lawmakers-in-idaho-want-to-ban-public-drag-shows> [<https://perma.cc/EJ57-34Y5>].

⁹⁶ For the purposes of this Note, an anti-drag regulation is a law that seeks to prevent drag performers from performing in private venues or in public spaces merely on account of the fact that the performance is a “drag” performance. The First Amendment does not require that all drag performances exist beyond the reach of government regulation. *See generally* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 4–8 (1998). Instead, targeted regulations that seek to suppress drag and drag only are quite likely unconstitutional.

queer message — that gender is a construct, one that we are all able to take apart.⁹⁷

This Part proceeds as follows. First, it describes the First Amendment’s persuasion principle, which explains on an instinctual level *why* the First Amendment’s values are in direct opposition to the aims of anti-drag regulations. Second, the Part establishes that anti-drag regulations target expressive conduct and are primarily concerned with suppressing communication. Third, the Part argues that targeted suppression of drag performances runs afoul of the First Amendment. Although the unconstitutionality of anti-drag regulations might seem obvious — the conclusion has also been reached by a variety of district courts and in Professor Mark Satta’s article *Shantay Drag Stays: Anti-drag Laws Violate the First Amendment*⁹⁸ — this Part hopes to better situate the legal conversation within the historical and social contexts surrounding anti-drag regulations.

A. Drag Is Persuasion

Notoriously splintered, First Amendment doctrine requires a diverse taxonomy of tests to determine any statute’s constitutionality. However, Professor David A. Strauss’s influential article *Persuasion, Autonomy, and Freedom of Expression* posits that in all domains, the “government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful.”⁹⁹

In the realm of offensive speech, this persuasion principle is “fully consistent” with First Amendment doctrine.¹⁰⁰ Strauss claims that there are two different categories of offensive speech that governments often attempt to regulate: (1) speech that is offensive because “people . . . believe it will persuade some of those who hear it to do bad things” and (2) speech that is *intrinsically* offensive, “that is, offensive without regard to its persuasive effect on anyone” but is merely “distasteful (in the way that offensive sights, odors, or noises other than speech might be distasteful)” or alternatively, speech “that is so offensive that it can be said to inflict a psychic wound on the listener.”¹⁰¹ Under the persuasion principle, the First Amendment prohibits regulations targeting offensive speech of the former category, but prohibits regulations targeting the latter category only in limited circumstances — such as when a

⁹⁷ See, e.g., Mitch Ferrino, *Aja, Alexis Michelle, Peppermint & Sasha Velour — C.L.A.T. (Feat. DJ Mitch Ferrino) [Official Video]*, YOUTUBE (Apr. 21, 2017), <https://www.youtube.com/watch?v=r000PK7AXFE> [<https://perma.cc/X9H9-977Y>] (“Gender is a construct, tear it apart!” *Id.* at 1:04.).

⁹⁸ Mark Satta, *Shantay Drag Stays: Anti-drag Laws Violate the First Amendment*, 25 GEO. J. GENDER & L. (forthcoming), <https://ssrn.com/abstract=4514504> [<https://perma.cc/7Z4R-S6MT>].

⁹⁹ David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991).

¹⁰⁰ *Id.* at 341.

¹⁰¹ *Id.*

government's actions are pretextual, or when the effects of the offensive speech are potentially both intrinsically offensive and persuasive.¹⁰²

The persuasion principle explains, at an instinctual level, why regulations targeting drag are in violation of the First Amendment. In a pluralistic and divided nation, it is hardly surprising that drag — with its radical and political nature — is controversial. But, the controversy of drag has more to do with its communicative, *persuasive* impact than with an intrinsically offensive nature — drag is offensive to some because of their desire for a heterosexist society, that is, they are offended by drag because they believe it will “persuade some of those who hear it to do bad things.”¹⁰³ Drag artists challenge heterosexism, and in doing so, influence audiences to question norms around gender in their own lives. While liberal ideas of gender might be offensive to some, they are not intrinsically offensive.

B. *Drag Is Expressive*

The First Amendment's protections extend farther than just spoken words and written language — conduct deemed sufficiently “expressive” can also fall within the Constitution's ambit.¹⁰⁴ As discussed in Part I, the history of drag within our society demonstrates that drag performances likely meet this bar. In determining whether an act “possesses sufficient communicative elements to bring the First Amendment into play,” courts consider whether: (1) an “intent to convey a particularized message was present”; and (2) “the likelihood was great that the message would be understood by those who viewed it.”¹⁰⁵ Like the donning of black armbands to protest the Vietnam War,¹⁰⁶ the burning of American flags,¹⁰⁷ and the decision of African Americans to sit in all-white libraries during the civil rights movement,¹⁰⁸ the art of drag is controversial precisely because of the particular message it seeks to convey. When an individual sees a drag queen, they see a performer who is rebelling against heterosexist notions of gender — and it is this perceived message that makes drag objectionable to its opponents.

However, not all regulations that burden expressive conduct are subjected to the full force of the First Amendment: government regulations “unrelated to the suppression of free expression”¹⁰⁹ do not run afoul of the Constitution if they further merely a “sufficiently important

¹⁰² *Id.* at 342.

¹⁰³ *See id.* at 341. Perhaps, even the misapplication of the term “groomer” to drag advocates is indicative that conversations about drag are concerned with persuasion, and not intrinsic offense.

¹⁰⁴ *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

¹⁰⁵ *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam)).

¹⁰⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

¹⁰⁷ *Johnson*, 491 U.S. at 406.

¹⁰⁸ *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

¹⁰⁹ *Johnson*, 491 U.S. at 407 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

governmental interest.”¹¹⁰ As Part II sought to demonstrate, the history of anti-drag regulations suggests that they do not qualify for this lowered standard — anti-drag regulations are in fact *primarily* concerned with the suppression of pro-LGBTQ+ views and speech in front of children.¹¹¹ While a court “will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive,”¹¹² the lack of documented harms surrounding drag shows¹¹³ and the close, inseparable nature¹¹⁴ of the messages conveyed by drag (anti-heterosexism and the flexibility of gender) and the manner of expression (exaggerations of gender and cross-dressing) demonstrate that anti-drag regulations have more than an “incidental effect on the expressive element of the conduct.”¹¹⁵ Instead, banning drag must be understood as a “case[] in which banning the means of expression so interferes with the message that it essentially bans the message.”¹¹⁶

The above conclusions may seem hardly controversial — a Utah court stated that the city of St. George’s arguments to the contrary did “not merit discussion”¹¹⁷ and Texas’s attempt to field the “secondary effects” defense failed because “the plain language of [the state’s anti-drag regulation] and the legislative history shows the primary purpose of the

¹¹⁰ *Id.* (quoting *O’Brien*, 391 U.S. at 376).

¹¹¹ See *supra* section II.B, pp. 1477–79. In *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000), the Supreme Court applied this lower standard to review regulations of nude dancing because “the ordinance prohibiting public nudity is aimed at combating crime and other negative *secondary effects* caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed by this type of nude dancing.” *Id.* at 291 (emphasis added). While proponents of anti-drag legislation may attempt to avail themselves of *Pap’s*, the regulation of drag performance is likely distinguishable for two reasons. First, as described in Part II, anti-drag advocates have made clear that the aim in anti-drag bills is to *suppress* the messages about gender and sexuality that are conveyed by drag performers. See *supra* pp. 1477–78. Second, the lax standard applied in *Pap’s* arrived from the Court’s belief in the existence of “crime and the other deleterious effects caused by the presence of [nude dancing] establishment[s] in [a] neighborhood.” 529 U.S. at 293. Such a factual finding would be hard to support around drag as not all drag performances occur in nightclubs that could be plausibly alleged to draw unsavory behavior, and because “drag queens often wear more, not less, clothing than you’d see on a typical American woman of the 21st century, at a public beach or on network TV.” Jeff McMillan, *Analysis: Political Rhetoric, False Claims Obscure the History of Drag Performance*, PBS (Oct. 30, 2022, 9:30 AM), <https://www.pbs.org/newshour/politics/political-rhetoric-false-claims-obscure-the-history-of-drag-performance> [https://perma.cc/4RN7-E9B4].

¹¹² *Pap’s*, 529 U.S. at 292 (citing *O’Brien*, 391 U.S. at 383).

¹¹³ See Kort, *supra* note 93.

¹¹⁴ In *Pap’s*, the Court wrote “even if Erie’s public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. [Therefore, a]ny effect on the overall expression is *de minimis*.” 529 U.S. at 294. Unlike bans on full nudity and pro-erotic messages, anti-drag regulations fully suppress pro-drag messages in public spaces.

¹¹⁵ *Id.* at 293.

¹¹⁶ *Id.*

¹¹⁷ *S. Utah Drag Stars v. City of St. George*, No. 23-CV-00044, 2023 WL 4053395, at *20 (D. Utah June 16, 2023).

law is to” suppress certain topics and viewpoints.¹¹⁸ The history of drag performances and anti-drag regulations demonstrate that this particular culture war is one about speech and expression — the First Amendment’s protections are wholly applicable.

C. *The First Amendment’s Protections*

Once it becomes clear that the majority of drag constitutes expressive conduct, it naturally follows that targeted attempts to regulate the art form run afoul of the First Amendment. If legislators explicitly target drag performances, they can trigger strict scrutiny under the content-discrimination doctrine.¹¹⁹ Attempts to categorize drag as obscene and thus devoid of First Amendment protection¹²⁰ are likely to fail under current doctrine.¹²¹ And, the notion of persuading a court to recognize drag as a new unprotected category of speech is likely foreclosed.¹²² But,

¹¹⁸ *Woodlands Pride, Inc. v. Paxton*, No. H-23-2847, 2023 WL 6226113, at *17 n.98 (S.D. Tex. Sept. 26, 2023).

¹¹⁹ Content-based restrictions of speech are presumptively suspect under the First Amendment. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Thus, a law that targets speech “based on its communicative content . . . may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests.” *Id.* By singling out a particular category of expression — in this case, performances in which a performer exaggerates elements of gender — drag laws are “presumptively unconstitutional,” *see id.*, and subject to strict judicial scrutiny.

¹²⁰ Not all categories of speech are entitled to First Amendment protection, and this doctrinal exception may explain why legislators believe in the constitutionality of anti-drag laws. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court recognized the continued existence of “a few limited areas, which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” *Id.* at 382–83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Within these categories — like obscenity and libel — the government can regulate speech consistent with the First Amendment as long as the regulations do not limit “use based on hostility — or favoritism — towards the underlying message expressed.” *Id.* at 386. Thus, if drag were considered to be legally obscene, then courts would afford governments greater leeway in regulating drag performances.

¹²¹ Thankfully, states are not left unfettered to define the contours of obscenity to the whims of their legislatures — and attempts to label drag as obscene will likely fail in court. Obscenity is “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). As discussed in Part I, the vast majority of drag performances do not meet this rigorous standard — drag performers are typically clothed and dance, sing, and lip-sync in a manner that (while perhaps controversial) does not portray sexual conduct in a patently offensive way.

¹²² Anti-drag advocates might also argue that, even if drag is not obscene, it is still devoid of First Amendment protection as a new *unprotected category*. However, these arguments are likely foreclosed by precedent. For a court to allow a novel restriction on content, the government must present a “long (if heretofore unrecognized) tradition of proscription.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011). Thus, even in scenarios where there may be large majoritarian consensus regarding the social value of a category of speech, contemporary attitudes are insufficient to remove topics from First Amendment protection. As discussed in Part II, the nation does have a sordid (if, relatively unenforced) history of anti-cross-dressing regulations. However, it also has a long history of drag *performance* — vaudeville, theatre, and modern drag — that has persisted unregulated and has only recently been deemed “adult” or “obscene.” *See supra* Part I, pp. 1470–74. Additionally,

even if a regulation targets allegedly unprotected categories of drag performances, the statute must regulate the performances in a viewpoint-neutral way.¹²³ If a legislator attempts to avoid content or viewpoint discrimination by broad or vague drafting, they run the risk of creating a statute that violates the overbreadth¹²⁴ or void-for-vagueness¹²⁵ doctrines. Thus, a constitutionally permissible anti-drag regulation is almost impossible to imagine. Despite the impossibility of the task, a variety of states and communities have still attempted to suppress drag performances in a manner inconsistent with the First Amendment.

Of all the litigation attempts that have sought to set aside anti-drag regulations, drag queens have unanimously prevailed. As described in Part II, *Friends of Georges* found Tennessee’s drag ban unconstitutional under the First Amendment.¹²⁶ Among other flaws, the court found that Tennessee’s use of the term “male or female impersonators” discriminated “against the viewpoint of gender identity — particularly, those who wish to impersonate a gender that is different from the one with which they are born.”¹²⁷ In *Imperial Sovereign Court of Montana*

while there may be a history of anti-cross-dressing laws, this history is distinguishable from the targeted prevention of drag *performance*. While there may have been historic cross-dressing restrictions, First Amendment protections might nevertheless attach to depictions (or performances) of cross-dressing. A similar distinction was relied upon in *United States v. Stevens*, 559 U.S. 460 (2010), in which the Court rejected the argument that depictions of animal cruelty (such as so-called “crush videos”) are devoid of First Amendment protection as a new unprotected category. *Id.* at 468.

¹²³ The First Amendment has another firewall — viewpoint discrimination. If a defendant could convince a court that drag can be regulated as a category without triggering strict scrutiny, the government would still need to establish that they have regulated within this category in a manner that does not involve viewpoint discrimination. *See R.A.V.*, 505 U.S. at 383. The threat of viewpoint discrimination exists when the government uses a class of speech “like sexual speech that is not obscene but potentially harmful to minors — as a ‘vehicle for content discrimination unrelated to [its] distinctively proscribable content.’” *Friends of Georges, Inc. v. Mulroy*, No. 23-cv-02163, 2023 WL 3790583, at *21 (W.D. Tenn. June 2, 2023) (quoting *R.A.V.*, 505 U.S. at 383–84). Thus in singling out allegedly indecent drag performances from other, broader categories of indecent performances, governments have arguably committed viewpoint discrimination because of the inherent expressive and political nature of drag.

¹²⁴ Under the doctrine of overbreadth, a statute is facially unconstitutional if: (1) its overbreadth is “substantial” in “relation to the statute’s plainly legitimate sweep”; and (2) the law is not readily susceptible to a limiting construction. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 616 (1973). Thus, under the doctrine of overbreadth — even if the state can reasonably regulate *some* drag performances, a statute can still be unconstitutional if it prevents a substantial number of drag performances that do not implicate the legitimate concerns of the government. This “expansive remedy” exists “out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citing *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 634 (1980); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977); *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

¹²⁵ The void-for-vagueness doctrine imposes an obligation on governments to draft punitive laws in a manner that defines “the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *HM Florida-ORL, LLC v. Griffin*, No. 23-CV-950, 2023 WL 4157542, at *8 (M.D. Fla. June 23, 2023) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

¹²⁶ *Friends of Georges*, 2023 WL 3790583, at *1.

¹²⁷ *Id.* at *21.

v. Knudsen,¹²⁸ a federal court in Montana relied on *Friends of Georges* to temporarily block the enforcement of Montana’s drag law.¹²⁹ In *Southern Utah Drag Stars v. City of St. George*,¹³⁰ the United States District Court for the District of Utah relied upon the public forum doctrine to reverse the denial of a park permit for a drag show, writing that the First Amendment “ensures that all citizens, popular or not, majority or minority, conventional or unconventional, have access to public spaces for public expression.”¹³¹ In *HM Florida-ORL, LLC v. Griffin*,¹³² a court enjoined enforcement of Florida’s anti-drag regulation, writing that the “harm to [the] Plaintiff clearly outweighs any purported evils not covered by [existing] Florida law” because “existing obscenity laws provide [the state] with the necessary authority to protect children from any constitutionally unprotected obscene exhibitions or shows.”¹³³ And, most recently, in *Woodlands Pride, Inc. v. Paxton*,¹³⁴ a district judge set aside Texas’s anti-drag regulation, labeling it a violation of the content-¹³⁵ and viewpoint-neutrality doctrines,¹³⁶ the overbreadth doctrine,¹³⁷ and the vagueness doctrine.¹³⁸ However, these victories are not the last word on any of these statutes — subsequent appeals and litigation might keep drag performers in any jurisdiction from having a firm answer on the enforceability of anti-drag laws for years to come.

IV. THE UNREMEDIED EXPRESSIVE HARM OF ANTI-DRAG LAWS: IF DRAG SPEAKS, SO DO LAWS MADE ABOUT IT

Law influences behavior beyond the direct threat of legal sanction — like drag, *laws* speak too.¹³⁹ As discussed in the preceding Part, protecting drag performers likely requires no reinvention of First Amendment doctrines. However, even when anti-drag regulations are ultimately set aside by courts, drag performers still endure tangible harms from government actions. If one reframes debates about drag as debates over

¹²⁸ No. CV 23-50-BU, 2023 WL 4847007 (D. Mont. July 28, 2023).

¹²⁹ *Id.* at *8.

¹³⁰ No. 23-CV-00044, 2023 WL 4053395 (D. Utah June 16, 2023).

¹³¹ *Id.* at *1.

¹³² No. 23-CV-950, 2023 WL 4157542 (M.D. Fla. June 23, 2023).

¹³³ *Id.* at *9. In November 2023, the Supreme Court rejected a bid by Florida to allow enforcement of its anti-drag law, with Justices Kavanaugh and Barrett, in a statement respecting the denial of the application for stay, deeming the case an “imperfect vehicle” to decide the First Amendment complexities at the core of this debate. Ariane de Vogue & Devan Cole, *Supreme Court Says Florida Can’t Enforce Anti-drag Law*, CNN (Nov. 16, 2023, 7:55 PM), <https://www.cnn.com/2023/11/16/politics/supreme-court-rules-against-florida-anti-drag-law/index.html> [<https://perma.cc/HS6U-448N>].

¹³⁴ No. H-23-2847, 2023 WL 6226113 (S.D. Tex. Sept. 26, 2023).

¹³⁵ *Id.* at *16.

¹³⁶ *Id.* at *17.

¹³⁷ *Id.* at *19.

¹³⁸ *Id.* at *20.

¹³⁹ See generally Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60 (2017).

the government's ability to convey anti-drag messages, then the drag queens have already lost the battle — communities across the nation have communicated that they are committed to suppressing queer expression, and if it weren't for that meddling First Amendment, drag performers would not be welcome in public spaces.

This harm — a distinctly expressive one — is only marginally remedied by judicial decisions repealing the legal effect of anti-drag laws. This Part posits that anti-drag laws are primarily passed for their expressive effect, and judicial decisions holding the laws unconstitutional do little to remedy the expressive harms generated by the passage of these laws. The expressive effects of anti-drag laws change communal norms, alter behavior, and inflict psychological damage on LGBTQ+ individuals even without the threat of legal sanction.¹⁴⁰ Perhaps these harms are unavoidable in a constitutional framework that prizes democracy and local government.¹⁴¹ However, the harms generated by anti-drag laws demonstrate the importance of investing in extrajudicial safeguards for freedom of expression.

Expressive theories of law can be broken into a variety of categories that make a variety of claims — most importantly here, however, is law's interaction with social norms. Laws do more than create the threat of punishment — they alter or construct community beliefs around morality that lead to changes in behavior. In particular, Professor Richard H. McAdams puts forward an “attitudinal theory of expressive law” that posits that “law changes behavior by signaling the underlying attitudes of a community or society.”¹⁴² As an implication of this signaling, “those who observe the signal will update their prior beliefs about public attitudes in the direction of expecting more disapproval for behavior the law condemns.”¹⁴³ This behavioral effect is lucrative to ideological interest groups who “would prefer to constitute a majority but will settle for creating the appearance of being the majority.”¹⁴⁴ And, “on more contested matters, with no clear social consensus, law might be able to leverage its legitimacy to persuade members of the public to change their

¹⁴⁰ See Press Release, Am. Psych. Ass'n, Exposure to Homophobic Attitudes Linked to Higher Stress Levels Among Sexual Minorities (June 21, 2021), <https://www.apa.org/news/press/releases/2021/06/homophobic-attitudes-higher-stress> [<https://perma.cc/DC2S-26FU>].

¹⁴¹ See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 654 (1993) (“Constitutional courts adjudicate claims of right and challenges to government action that purportedly trench upon mandated institutional arrangements When government seeks to act, constituencies will object, claiming that the action violates established rights, or tramples on a constitutionally mandated structural arrangement. The Constitution's spacious text permits divergence on these questions. It provides a framework for constituencies to disagree and struggle over the document's meaning.”).

¹⁴² Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000).

¹⁴³ *Id.* at 372.

¹⁴⁴ *Id.* at 382.

moral view, thus affecting their behavior.¹⁴⁵ Thus, symbolic legislation, such as anti-drag or anti-cross-dressing laws that may have little *legal* effect, oftentimes is valuable to political actors for the expressive messages it contains. In this sense, the expressive power of law extends further than deterrence — law not only discourages people from performing a prohibited act, but also suggests to them that the act is viewed undesirably by the majority of the community.¹⁴⁶

Consider, for example, a community that decides to impose fines for bicyclists who travel outside of the bike lane. This law communicates three distinct, but overlapping, points of information: first, it instructs the community that *legislators* collectively believe that it is risky to cycle outside of the bike lane; second, it informs individuals what the rest of their *community* generally thinks about cycling and bike lanes; and third, if an individual was already cycling within the bike lane or encouraging others to do the same, it lets that individual know that they likely have the approval of their community.¹⁴⁷ These datapoints can create additional compliance with legal obligations even without the threat of sanction — thus, a cyclist might stay in the bike lane only to avoid feeling disapproval from their neighbors.¹⁴⁸ Assuming that “individuals are concerned with what most people approve, law serves as a signal for the judgment of most people, whose approval individuals seek.”¹⁴⁹ In this manner, law is an important tool in shaping the community norms that affect behavior in a given community.

Importantly, expressive theories of law “show their distinctive power in matters concerning expressive harms”¹⁵⁰ such as communicative harms. An individual suffers a communicative harm when “she is treated according to principles that *communicate* negative or inappropriate attitudes toward her — that is, when people treat her in ways that express these attitudes, with the intention of ‘sending a message’ to her regarding their attitudes.”¹⁵¹ While communicative harms are relevant in some areas of law, such as within the Equal Protection or Establishment Clause contexts, our existing legal frameworks quite often do not provide an avenue for litigants to claim an injury (or receive a remedy) for an expressive harm.¹⁵² Therefore, when a court sets aside

¹⁴⁵ RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 3 (2015).

¹⁴⁶ Nadler, *supra* note 139, at 71 (explaining that prohibited acts send powerful expressive messages when it comes from “what members of their relevant in-group think”).

¹⁴⁷ *See id.* at 64.

¹⁴⁸ *See id.*

¹⁴⁹ *Id.* at 71.

¹⁵⁰ Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000).

¹⁵¹ *Id.* at 1528.

¹⁵² *See* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1279–86 (2011) (explaining, for example, how certain harms and wrongs have little constitutional recourse).

a piece of legislation — say, for violating the First Amendment — the court’s decision removes the legal effect of the statute, but does not seriously abate the law’s conveyed social harms.

Applying an expressive theory of law to anti-drag regulations, a variety of conclusions can be drawn. *First*, anti-drag laws suggest to individuals that legislators believe that drag performances and deviations from heterosexism are risky. For example, consider Tennessee State Representative Mary Bentley’s statement: “This bill is not about whether drag is acceptable It’s about whether we should be exposing our children to sexually explicit behavior.”¹⁵³ Even those who did not directly hear Representative Bentley’s statement might come to the same conclusions about drag’s danger merely from the fact that legislators thought it necessary for regulation. *Second*, anti-drag laws suggest to community members who may be ambivalent about drag that they too should hold fear of the practice. As Memphis drag queen Bella DuBalle observed, “Business owners see the headlines and automatically assume they can’t continue, and that’s leaving many people jobless.”¹⁵⁴ *Third*, anti-drag legislation tells anti-drag advocates that they are doing the *right* thing. As discussed in Part II, there is a concerning overlap of vigilantism and anti-LGBTQ+ violence. Anti-drag advocates may believe that they are acting in accordance with the law when preventing a drag performance from occurring, even when a court decision has dictated the opposite conclusion.¹⁵⁵

The messages communicated by anti-drag laws inflict quintessential communicative harms against drag performers and members of the LGBTQ+ community. In this manner, they produce a similar effect to anti-cross-dressing regulations¹⁵⁶ and sodomy laws.¹⁵⁷ While many of these anti-LGBTQ+ laws remained on the books for a longer period than anti-drag regulations likely will, these statutes were rarely enforced but valued for the expressive messages contained within — expressive

¹⁵³ Migdon, *supra* note 80.

¹⁵⁴ Alexandra York, *I’ve Been a Drag Queen in Tennessee For 10 Years and Scared the “Drag Ban” Will Destroy My Career*, BUS. INSIDER (Apr. 3, 2023, 11:31 AM), <https://www.businessinsider.com/how-tennessees-drag-ban-law-could-hurt-performers-queens-businesses-2023-3> [<https://perma.cc/NYE5-XR6Y>].

¹⁵⁵ Cf. Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 234 (“Given legislative (mis)interpretation, Utah’s sodomy statute operates as a kind of generalized permission to the citizenry to hurt or kill homosexuals.”).

¹⁵⁶ See *supra* section II.A, pp. 1476–77.

¹⁵⁷ Similar harms have been documented from the existence of rarely enforced anti-sodomy laws. See generally Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643 (2001) (discussing how lesbian and gay individuals constructed their identities, relationships, and perceptions of public space before and after the abolition of anti-sodomy laws in South Africa).

messages that promote the existence of a heterosexist society.¹⁵⁸ In *Lawrence v. Texas*,¹⁵⁹ the Supreme Court explicitly contemplated these harms, writing: “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”¹⁶⁰ Matters of sexual and gender identity occur within a zone of privacy that is difficult for the government to regulate with traditional enforcement mechanisms.¹⁶¹ However, expressive laws can penetrate these zones of autonomy by coopting social pressure and community shame.¹⁶² Thus, it makes sense that the expressive function of law is often utilized to regulate gender and sexual identity.

The promulgation of heterosexist messages produces direct, tangible harm to queer and transgender communities. LGBTQ+ individuals “who encounter homophobic attitudes experience increases in heart rate, blood pressure and stress hormones, potentially putting them at risk for multiple health problems.”¹⁶³ And, for LGBTQ+ youth, the effects might even be more intense. Regrettably, research has demonstrated that LGBTQ+ children suffer from “high[er] levels of depression, self-harm, suicidal ideation, and suicide attempts” when they are not given safe places to explore their identities.¹⁶⁴ Some observers have explicitly noted that “[r]ecent homophobic and transphobic legislation may also contribute to increased mental health risks” for LGBTQ+ children.¹⁶⁵

After applying an attitudinal theory of expressive law, it becomes clear that there exists an inherent mismatch between the remedy currently afforded to litigants challenging anti-drag regulations and the harms they have suffered (and continue to suffer). The expressive harms created by anti-drag laws resemble the harms that ought to be prevented by the First Amendment: the speech of drag performers has been unconstitutionally chilled.¹⁶⁶ So even though all anti-drag laws might eventually lose all threats of enforceability, the echoing ripples of their effects on communities will likely persist.

Courts may be ill-equipped to address these expressive harms. To

¹⁵⁸ See, e.g., Kogan, *supra* note 155, at 233 (“Given how rarely sodomy statutes are enforced, our society exhibits little interest in implementing direct control over sexual activity in private bedrooms. Many who believe that sodomy laws should nonetheless remain on the books would simply not tolerate the police tactics that would be necessary to enforce such laws. . . . Rather, the purpose of sodomy statutes is to proclaim the message that society hates homosexuals, whoever that category happens to encompass and whatever those people happen to do in bed.”).

¹⁵⁹ 539 U.S. 558 (2003).

¹⁶⁰ *Id.* at 575.

¹⁶¹ See *id.*

¹⁶² See McAdams, *supra* note 142, at 368–69.

¹⁶³ See Press Release, Am. Psych. Ass’n, *supra* note 140.

¹⁶⁴ Romano, *supra* note 81.

¹⁶⁵ Juliann Garey, *Mental Health Challenges of LGBTQ+ Kids*, CHILD MIND INST. (July 10, 2023), <https://childmind.org/article/mental-health-challenges-of-lgbtq-kids> [<https://perma.cc/8DET-DSEX>].

¹⁶⁶ Cf. *supra* Part III, pp. 1479–85.

the extent that striking down an anti-drag regulation creates its own *positive* expressive effect, this effect may be minimal. The negative expressional effect of law is most pronounced at the local level “because most approval and disapproval occur[s] locally, where others observe us.”¹⁶⁷ Thus, while a judicial opinion might include ringing language that celebrates the values of drag and the First Amendment, such positive messages are unlikely to counteract the initial harms expressed in the original anti-drag piece of legislation.

While the First Amendment might not offer any unique protections against expressive harms, legislators can, and must, contemplate the morality of passing laws that are “[f]lagrantly [u]nconstitutional”¹⁶⁸ to send messages about marginalized groups. In a nation with judicially enforced constitutional minority protections,¹⁶⁹ legislators should not weaponize the expressive effects of law to promulgate messages of bigotry and intolerance. Perhaps such expectations are Pollyannaish, and instead, the rebellious speech of marginalized individuals and their allies is central to the art of social change. With the allowance of drag in public spaces, audiences at events like Drag Story Hour can see that drag is not about sexual perversion — it’s about *gender*.

CONCLUSION

The recent wave of anti-drag legislation is a frightening reminder of politicians’ willingness to bulldoze over the constitutional rights of marginalized groups when intolerance hijacks the political process. While anti-drag laws show the capacity of law to generate expressive harms, law also has the capacity to generate expressive *goods*. First, legal protections for LGBTQ+ individuals communicate messages of tolerance and acceptance.¹⁷⁰ Second, governments can take steps to send messages of inclusion to *all* communities by actively celebrating the values of freedom of expression. By providing and safeguarding public spaces for expression, citizens can understand the value of allowing events like Drag Story Hour, even if they themselves would never attend.

Protecting drag is about more than just protecting speech — it’s also about protecting the centuries-long legacy of an almost global art form, a history of political and social rebellion, and most importantly, members of the LGBTQ+ community who refuse to hide.

¹⁶⁷ McAdams, *supra* note 142, at 341.

¹⁶⁸ See Mystal, *supra* note 12.

¹⁶⁹ See Friedman, *supra* note 141, at 584 n.28, 654.

¹⁷⁰ For example, Professor Marie-Amélie George’s piece *Expressive Ends: Understanding Conversion Therapy Bans* explores how conversion therapy bans are prized by LGBTQ+ advocates for the positive messages they contain, even though the laws may have limited legal effect as most practices that resemble conversion therapy happen not in the medical system but rather in religious institutions. Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793 (2017). These advocates have “used the laws as an opportunity to promote movement norms that the bans implicate: immutability and child protection.” *Id.* at 798.