Freedom of *Unformed* Association*

The First Amendment freedom of association protects political associations from the chilling effects of required disclosures of their members' identities. Broadly, this freedom protects the ability to "join with others to further shared goals" as a critical part of the political process. As essential as these associations are, their formation has not been protected because the U.S. Supreme Court has required an association to show "actual harms" to its members in order to trigger freedom of association protection. This requirement has prevented the application of such protection to the stages of the associational process that occur before associations are formed. Thus, the spaces where members of dissident communities meet and congregate—in order to identify shared advocacy interests and form associations—have not been protected from the chilling effects of identity disclosure requirements.

This protection may now be possible under a new standard set by Americans for Prosperity Foundation v. Bonta *in 2021. By establishing a lower threshold—requiring only a "risk of a chilling effect" on the "ability to join with others to further shared goals"—in order to trigger freedom of association protection, the Court appears to have opened the door to protect preassociational activity. Such an expansion of the freedom of association may now protect the physical and virtual spaces where associations are formed.*

As states across the country consider "drag bans" and other measures that seek to place various new restrictions on the spaces where queer people gather, enforcement of these restrictions could result in the disclosure of patrons' identities. Supported by a review of a century of government suppression of queer association, this Comment argues that such disclosures could create a "risk of a chilling effect" on the formation of associations and thus may now be unconstitutional. As the constitutionality of new restrictions imposed on queer spaces is challenged, the freedom of association may offer a new avenue for protecting these spaces and their patrons.

INTRODUCTION

Gathering with other people is a universal part of the human experience. Sharing space is how we form community and bond with others. It is how we identify shared experiences and interests. Two people who know they share common interests and goals can advocate together for their mutual advancement. Importantly, political change is made when enough people "join with others to further shared goals."[1] The law refers to this collective political advocacy as *association*. In the United States, this political association is protected from government suppression by the First Amendment,[2] under what is known as the freedom of association.

In order to politically associate, communities must first find each other, and to do so they need physical space in which to congregate.[3] Many

1. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

2. U.S. CONST. amend. I.

3. Physical space is not the only place where people can gather and form these connections, but it has long been one of the primary places where people gather. The rise of social media and online spaces has expanded the ways in which humans can form connections. *See, e.g.*, Hollie Russon Gilman & Bridget Marquis, *Why Public Spaces Are Our Best Hope for Community and Democracy*, HILL (Oct. 31, 2022, 1:30 PM), https://thehill.com/opinion/energy-environment/3712437-why-public-spaces-are-

communities find space to form associations in their homes, religious congregations, workplaces, or other spaces that they regularly occupy. But many political interests are not shared or welcomed in these everyday spaces, and associations built around them cannot form until individuals can gather with like-minded others and identify these interests.[4]

The logic is simple—political groups excluded from identifying each other in certain spaces need their own public spaces to form social connections with each other. These social connections are vital for groups to identify common political interests and develop resulting associations.

Yet, as essential as this initial gathering and identifying of common interests is to the very *existence* of political association, American freedom of association does not protect the *formation* of these interests from government suppression.[5] Rather, the freedom of association only protects *existing* associations from suppression by government actions.[6] Communities with no space in which to form these associations in the first place are not yet protected by the freedom of association, but they could be under a recent decision from the U.S. Supreme Court in *Americans for Prosperity Foundation v. Bonta*.[7]

The queer[8] community in the United States is one such community that has required public meeting space to form associational interests. Fundamentally, connecting with other queer people and sharing experiences is

our-best-hope-for-community-and-democracy/ [https://perma.cc/X56E-5NBS]; *see also* Sakshi Venkatraman, *'Togetherness in a Virtual Space': LGBTQ Students Create Community Online*, NBC NEWS (Feb. 19, 2021, 9:42 AM), https://www.nbcnews.com/feature/nbc-out/togetherness-virtual-space-lgbtq-students-create-community-online-n1257543 [https://perma.cc/29GK-TSWJ].

4. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 988 (2011) ("Associations do not form spontaneously. Individuals seeking to form an association must be able to communicate their views and values to each other, to identify their commonality. They must also be able to recruit strangers to join with them, on the basis of common values.").

5. *See infra* Part II.

6. *See infra* Part II.

7. 141 S. Ct. 2373 (2021).

8. Queer is often conceptualized as a political identity formed in resistance to oppression of the LGBT community and all oppression. *See, e.g.*, Timothy W. Jones, *Reviled, Reclaimed and Respected: The History of the Word 'Queer,'* CONVERSATION (Jan. 18, 2023, 2:23 PM), https://theconversation.com/reviled-reclaimed-and-respected-the-history-of-the-word-queer-197533 [https://perma.cc/4JQZ-DC52]. This Comment focuses on the political, collective interests of LGBT people, and thus adopts queer as the primary term to refer to the LGBT community. In places, this Comment interchanges the term LGBT to refer mostly to individuals identifying as Lesbian, Gay, Bisexual, Transgender, and other identities. In other places, it adopts the same historical or legal terms used in referenced documents, such as "homosexuals," for clarity. For additional context on the use of the word queer, see Jacek Kornak, Queer as a Political Concept (2015) (Ph.D. thesis, University of Helsinki, Finland) (on file with the North Carolina Law Review), describing how, in the late 1980s, the term queer began being used "more commonly by homosexuals themselves as a specific alternative identification and a political statement" with the first uses being an "attempt to address the problem of violence against homosexual people." *Id.* at 50.

a central part of how queer people come to understand their own identities.[9] And, this gathering is a necessary precursor for queer people to form political interests and associations of their own.[10]

For more than a century, commercial bars and other liquor venues have provided essential public space for queer communities to form these bonds.[11] Such commercial spaces were a central part of early queer political development in the United States, providing public space to congregate and identify similarly interested individuals.[12]

Historians of queer politics agree that these commercial spaces, particularly their facilitation of public congregation, were integral to the

9. *See* DON CLARK, LOVING SOMEONE GAY 50 (2020) ("Loneliness is no longer a necessary part of gay identity. Paranoia is no longer the alternative to conformity. Gay people not only survive but thrive and grow strong in the struggle for integrity and freedom from oppression. They do so by increasing awareness and developing a sense of community."). In one often cited six-stage theory of sexual identity discovery, stage three involves increasing tolerance of homosexual self-image through significant quality contact with other homosexuals and immersion in homosexual subculture, and stage four involves validating the development of homosexual self-image through significant exposure to others. *See* Vivienne C. Cass, *Homosexual Identity Formation: A Theoretical Model*, 4 J. HOMOSEXUALITY 219, 229–32 (1979); Cynthia Closs, The Effects of Oppression on Queer Intimate Adolescent Attachment 16 (May 17, 2010) (Ph.D. dissertation, University of Pennsylvania) (on file with the North Carolina Law Review).

10. *See* Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 888 (2018) ("[C]ertain identities within a hegemonic cultural setting can, in and of themselves, take on a political expressive valiance."). Professor Skinner-Thompson cites numerous sources in support of this premise. *See id.* at 888 n.41 (citing Gay Law Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 905 (1997); Nancy J. Knauer, *"Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After* Boy Scouts of America v. Dale, 89 KY. L.J. 997, 1001 (2001).

11. Liquor venues are not the *only* spaces in which queer people can meet. There is an effort underway to reduce alcohol and substance abuse in the queer community and to refocus queer social organization around events and gatherings less focused on alcohol, particularly after a dramatic rise in substance use by gay and transgender people during the COVID-19 pandemic. *See, e.g.*, Finbarr Toesland, *Covid Crisis Is Exacerbating LGBTQ Alcohol Abuse, Studies Find*, NBC NEWS (Feb. 9, 2021, 9:53 AM), https://www.nbcnews.com/feature/nbc-out/covid-crisis-exacerbating-lgbtq-alcohol-abuse-studies-find-n1257008 [https://perma.cc/8FLE-EEG5] ("Several recent studies investigating how both social-distancing and lockdowns affected LGBTQ people found alcohol use sharply increased."); Finlay Games, *Queer Folks Are Creating Much-Needed Safe, Sober Spaces To Connect*, HEALTHLINE (Apr. 16, 2021), https://www.healthline.com/health/alcohol/queer-folks-are-creating-much-needed-safe-sober-spaces-to-connect [https://perma.cc/G4TV-2UJC] (highlighting the "increasing number of LGBTQ+ sober socials and queer-owned booze-free beverage companies popping up" as alternatives to alcohol-centered, queer venues); JEROME HUNT, WHY THE GAY AND TRANSGENDER POPULATION EXPERIENCES HIGHER RATES OF SUBSTANCE USE 1–2 (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_substance_abuse.pdf [https://perma.cc/S8TR-MGJC] (examining the "disproportionately high rates of substance use by gay and transgender people").

12. This is one reason alcohol still centers prominently in many modern LGBT social cultures, but, as mentioned, there is a growing movement to reduce the emphasis on alcohol and increase other types of social events in many LGBT spaces. *See* Games, *supra* note 11.

development of queer subculture[13] and political interests.[14] In fact, one of the earliest queer political interests was preserving those very public spaces—including liquor establishments—where the communities could gather.[15]

This is because, in reaction to the development of queer communities with political interests, governments have spent the past century targeting these public spaces with draconian restrictions.[16] Many laws, regulations, and ordinances aimed at suppressing the ability of queer people to form political associations targeted liquor establishments[17] as a means of limiting access to public space.[18] For example, one such City of Miami ordinance in the 1950s stripped the liquor license from any bar that allowed two or more homosexuals[19] inside at the same time, thus preventing even two homosexuals from meeting in public.[20] These commercial restrictions were designed to shut down queer

13. *See* CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 60, 298 n.25 (2017) [hereinafter BALL, THE FIRST AMENDMENT] (citing GARY L. ATKINS, GAY SEATTLE: STORIES OF EXILE AND BELONGING 55–67 (2003); GENNY BEEMYN, A QUEER CAPITAL: A HISTORY OF GAY LIFE IN WASHINGTON, D.C. 100–28 (2015); GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940, at 271–99 (1994); ST. SUKIE DE LA CROIX, CHICAGO WHISPERS: A HISTORY OF LGBT CHICAGO BEFORE STONEWALL 120–68 (2012); LILLIAN FADERMAN & STUART TIMMONS, GAY L.A.: A HISTORY OF SEXUAL OUTLAWS, POWER POLITICS, AND LIPSTICK LESBIANS 71–103 (2006); ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY 29–66 (1993); MARC STEIN, CITY OF SISTERLY AND BROTHERLY LOVES: LESBIAN AND GAY PHILADELPHIA, 1945–1972, at 49–83 (2000)).

14. *See supra* note 10 and accompanying text; *infra* Section III.D.

15. *See infra* Section III.D (describing court cases from the 1940s and 1950s challenging "status bans" that prohibited homosexuals from being present in bars).

16. *See infra* Section III.B.

17. Because the focus of this Comment is on liquor laws, less attention is given to other areas of queer life targeted by government harassment and intimidation, which included not only gay bars, but also gays wherever they may be found in public or private, including "music halls, cafes[,] . . . restaurants, private flats, public parks, streets, public toilets, the local YMCA lobby, theaters, public baths, and subways." William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880–1994*, 82 IOWA L. REV. 1007, 1080 (1997). For an example of local documentation of this national news, LAMBDA, a newsletter published by queer students at the University of North Carolina at Chapel Hill, republished a national story in 1979 documenting abuse of fire codes and ID laws by the Chicago Police Department to harass queer patrons. *Chicago Police Harass Gays*, LAMBDA, June 1979, at 11, https://newspapers.digitalnc.org/lccn/2015229387/1979-06-01/ed-1/seq-11/ [https://perma.cc/92XV-9K2Y].

18. *See infra* Section III.B. Indeed, many criminal codes and criminal investigative practices have specifically targeted the queer community's ability to freely associate in public without fear of reprisal for simply existing in a public space. *See* Shawn E. Fields, *The Elusiveness of Self-Defense for the Black Transgender Community*, 21 NEV. L.J. 975, 982–83 (2021) (summarizing the history of "masquerading" laws criminalizing "cross-dressing" and other gender nonconforming activities).

19. When specific historical or legal terms are used to describe LGBT people, this Comment adopts those terms for purposes of clarity. For additional information on the terminology used in this Comment, see *supra* note 8.

20. *See* Inman v. City of Miami, 197 So. 2d 50, 51 (Fla. Dist. Ct. App. 1967); Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 NOVA L. REV. 793, 795 (2000); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1572 (1993).

spaces, make them less accessible, or impose consequences on patrons and owners.[21] These types of restrictions made it more difficult for queer people to congregate,[22] imposing a burden on their ability to establish collective advocacy interests and "join with others to further shared goals."[23] Despite such efforts at suppression, commercial public spaces have nevertheless enabled vibrant queer communities of dissident identities to grow.[24]

Queer communities are just one example of the type of community that benefited from public, commercial space to identify common political interests from which political associations could form. Labor movements[25] and women's rights movements[26] are two other examples of political movements that benefited from external space to facilitate their organizing.[27] These and other political communities that benefit from public space in this way are similarly vulnerable to regulations designed to suppress the ability to congregate.

This Comment argues that regulations requiring the disclosure of individual identities to the government may now be unconstitutional when they inhibit one's ability to gather with others and *form* resulting associations. This is possible under a new, lower threshold—established by the Supreme Court in *Americans for Prosperity* in 2021—for evaluating violations of the freedom of association.[28] Plaintiffs in that case sued then California Attorney General Kamala Harris, challenging a California law that required nonprofits to file a disclosure reporting all of their donors to the Attorney General.[29] The Supreme Court sided with the donors, holding that in order to trigger the protection of

21. *See infra* Part III.

22. *See infra* Section III.B.

23. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

24. *See infra* Section III.A.

25. Aaron Cayer, *Striking Bodies: Aligning Public Spaces*, ARCHITECTURAL LEAGUE N.Y., https://archleague.org/article/striking-bodies/ [https://perma.cc/SWM4-5J3Q] (describing the role that external public space played to labor organizing in a mill town where most of the spaces available were owned by the mill itself).

26. A. FINN ENKE, FINDING THE MOVEMENT: SEXUALITY, CONTESTED SPACE, AND FEMINIST ACTIVISM 26 (2007) ("Feminism found itself in part through struggles such as [resisting a requirement that women enter a bar with a male escort]. Bars acted as mainstays of public space; whether conventionally heterosexual or queer, bars organized sociality, social status, and social norms. As such, they became key sites of women's activism around public space itself, and they therefore provide windows into the emergence of publicized feminist challenge.").

27. *See generally* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding a privately owned shopping center could not prevent students from soliciting on its property because it did not unreasonably intrude on the rights of property owners and it was within the state's power to guarantee an expansive free speech right).

28. *Ams. for Prosperity*, 141 S. Ct. at 2387. Critics have said that this case made it easier to provide "dark money" to political and social causes, including those that advance anti-LGBT causes and policies. *See* Ian Millhiser, *The Supreme Court Just Made Citizens United Even Worse*, VOX (July 1, 2021, 3:15 PM), https://www.vox.com/2021/7/1/22559318/supreme-court-americans-for-prosperity-bonta-citizens-united-john-roberts-donor-disclosure [https://perma.cc/ZR2N-JXC9].

29. *Ams. for Prosperity*, 141 S. Ct. at 2379–82.

First Amendment associational rights, "[t]he risk of a chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive.'"[30]

The Court now applies this new, lower threshold test for freedom of association protection, evaluating first whether a disclosure requirement creates the "risk of a chilling effect on association."[31] When it does, the government must then show that a disclosure requirement is "substantial[ly] relat[ed]" to a "sufficiently important governmental interest"[32] and that the disclosure requirement is "narrowly tailored to the interest it promotes."[33] Previously, an association was required to show actual harm to its members due to disclosure before a freedom of association claim could proceed;[34] thus, an existing association was required in order to trigger freedom of association protections.

This Comment explores the boundaries of this new standard by positing that the ability to *form* associations may now be protected. While no actual harm from a disclosure could be shown by members of associations that have not yet been *formed*, the "risk of a chilling effect on association"[35] created by a disclosure may now be shown by comparison to the facts of *Americans for Prosperity*. In that case, the "risk of a chilling effect on association"[36] sufficient to trigger First Amendment freedom of association protection was merely the "'possible deterrent effect' of disclosure";[37] specifically, that some donors may have a "subjective preference for privacy."[38] Now, if the "risk of a chilling effect on association"[39] is greater than in *Americans for Prosperity*, the "risk of a chilling effect" on the *formation* of associations may be enough.

In essence, if the government implements restrictions that deter dissident communities from gathering in public spaces, identifying each other, and subsequently forming the types of communities that are prerequisites to developing common advocacy interests—broadly, associations—the result is a significant chill on the ability of these communities to advocate for those interests.

Such an expanded interpretation of associational protections could be particularly applicable now as legislators across the country introduce a new wave of antiqueer bills, with a particularly heavy focus on transgender rights

30. *Id.* at 2389 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

31. *Id.*

32. *Id.* at 2385 (internal quotation marks omitted) (quoting Doe v. Reed, 561 U.S. 186, 196 (2010)).

33. *Id.*

34. *See id.* at 2392 (Sotomayor, J., dissenting).

35. *Id.* at 2389 (majority opinion).

36. *Id.*

37. *Id.* at 2388 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958)).

38. *Id.* at 2395 (Sotomayor, J., dissenting).

39. *Id.* at 2389 (majority opinion).

and drag shows.[40] Many of the bills targeting drag shows impose new regulations on the commercial spaces in which queer people gather, potentially causing some businesses to close.[41] Laws that will create new burdens on the ability of queer people to form associations in their local communities raise salient First Amendment concerns at this particular moment in time, when queer people have a heightened need for political association in order to defend against those very laws.

The suppressive effects of disclosure laws on queer political association—by limiting access to public spaces where queer people congregate, identify each other, organize, and "join with others to further shared goals"[42]—could now trigger the First Amendment protection of the ability to freely associate.[43] Surely, the suppression experienced by queer people at the hands of government over the past century—for the purpose of suppressing political association[44]—shows that disclosure of such identities to those same entities amounts to more than the "risk of a chilling effect on association"[45] required by the new standard to trigger First Amendment protections.

With no principle defining the limit on how much "risk of a chilling effect on association"[46] is enough, queer history provides evidence that disclosure requirements would cause greater "risk of a chilling effect" on queer association than the risk present in *Americans for Prosperity*. This creates an opportunity to argue that more permanent protections for queer association are possible.

Part I of this Comment describes the current political landscape facing queer communities in the United States and explains how proposed "drag bans" could impose burdens on queer associational rights. Part II lays out the foundational freedom of association cases and explains how *Americans for Prosperity* may have changed the standard that triggers freedom of association protection. Part III reviews the foundational history of queer political association in the United States and chronicles government efforts to suppress such association. Part IV applies *Americans for Prosperity* to potential new disclosure requirements, and considers how chill on the formation of associational interests could now be protected. Part IV also explains how this interpretation of *Americans for Prosperity* brings freedom of association doctrine more in line with other First Amendment doctrines and addresses potential critiques of this interpretation.

40. *See infra* Part I.
41. *See infra* Part I; *see also infra* notes 54–55 and accompanying text.
42. *Ams. for Prosperity*, 141 S. Ct. at 2389.
43. *See* U.S. CONST. amend. I.
44. *See infra* Sections III.B–C.
45. *Ams. for Prosperity*, 141 S. Ct. at 2389.
46. *Id.*

I. CURRENT RELEVANCE

> These aren't just watering holes or drinking establishments, in some ways these are our community centers, in some ways, these are our temples where we gather to worship, where we gather to commune . . . . It's not just the people in that space who were harmed, anybody who could have been in that space is threatened and feels less safe after than they did before.[47]

As one commentator described after the violent November 2022 attack on Club Q, an LGBTQ nightclub in Colorado Springs, Colorado, public spaces remain vital to queer community organizing.[48] This organizing is of increased necessity in the current cultural environment in which queer people face an onslaught of legislative attempts to restrict their rights.[49] In 2022, more than 315 antiqueer bills were filed in the states,[50] and as of March 2023, more than 470 such bills had been filed in at least forty-four states around the country.[51]

Many states are considering laws described as "drag bans" that seek to place various restrictions on drag performers and the venues that host them.[52] Between January and March of 2023, forty bills targeting drag performances were filed in seventeen states.[53] Those proposals, which facially relate to drag

47. Cady Stanton, *LGBTQ Bars Are 'Community Centers' and Hallowed Spaces. But After Club Q 'Where Is Safe?*,' USA TODAY (Nov. 24, 2022, 6:00 AM), https://www.usatoday.com/story/news/nation/2022/11/24/club-q-shooting-threatens-lgbtq-safe-spaces-clubs-bars/10755304002/ [https://perma.cc/8GGD-M4PY (dark archive)] (quoting author and activist Dan Savage).

48. *See id.*

49. *See* Press Release, Hum. Rts. Campaign, BREAKING: Human Rights Campaign Condemns West Virginia Gov. Jim Justice for Signing Bill Restricting Life-Saving Gender Affirming Care for Transgender Youth (Mar. 30, 2023), https://www.hrc.org/press-releases/breaking-human-rights-campaign-condemns-west-virginia-gov-jim-justice-for-signing-bill-restricting-life-saving-gender-affirming-care-for-transgender-youth [https://perma.cc/S6WW-CKVV] [hereinafter BREAKING: Human Rights Campaign Condemns]; Jo Yurcaba, *With Over 100 Anti-LGBTQ Bills Before State Legislatures in 2023 So Far, Activists Say They're 'Fired Up*,' NBC NEWS (Jan. 14, 2023, 8:50 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/100-anti-lgbtq-bills-state-legislatures-2023-far-activists-say-fired-rcna65349 [https://perma.cc/UQ8F-DJ5D].

50. *Id.* ("State legislators introduced a record 315 bills last year attacking LGBTQ+ people, particularly transgender youth.").

51. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights [https://perma.cc/Y4QD-2MTX] (last updated Mar. 31, 2023); BREAKING: Human Rights Campaign Condemns, *supra* note 49 (noting that a record 470 bills were introduced between January and March 2023 attacking LGBTQ+ people, particularly transgender youth).

52. BREAKING: Human Rights Campaign Condemns, *supra* note 49.

53. *Id.* These states include: "Arizona, Arkansas, Iowa, Idaho, Kansas, Kentucky, Minnesota, Missouri, Montana, North Dakota, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas and West Virginia." Suzanne Nossel, *The Drag Show Bans Sweeping the US Are a Chilling Attack on Free Speech*, GUARDIAN (Mar. 10, 2023, 6:04 AM), https://www.theguardian.com/culture/commentisfree/2023/mar/10/drag-show-bans-tennessee-lgbtq-rights [https://perma.cc/5YTZ-VHJ8].

performances, could also heavily impact the commercial viability of drag venues.[54] As a result, many venues that cater to queer patrons could close.[55]

Drag performers and drag shows have long been a mainstay of queer culture, with particular importance in the southern United States,[56] often drawing packed houses in queer venues on a weekend night.[57] Drag is, fundamentally, the expressive art of performing gender impersonation.[58] Many drag performers wear elaborate costumes, wigs, and makeup, and meticulously practice to perfect their routines, whether lip-syncing, dancing, or singing live, often while impersonating celebrity entertainers.[59] As Dolly Parton, a frequently impersonated drag muse, said, "If I hadn't been a girl, I'd have been a drag queen."[60] But drag is more than a cosmetic art.[61] Drag is also inherently political expression with its roots in early Black, queer political activism, and it is credited as part of the earliest efforts to protect queer people's right to gather.[62] As Montana State Representative Connie Keogh said during floor debate on a bill proposed in her state, "[drag] is part of the cultural fabric of the LGBTQ+ community and has been around for centuries."[63]

54. *See, e.g.*, Jaya Saxena, *'If You Took the Drag Away, Then It's Just Another Boring Bar*,' EATER (Mar. 3, 2023, 9:50 AM), https://www.eater.com/23622521/tennessee-drag-ban-bill-bars-restaurants-reactions [https://perma.cc/RB9U-XZMY] ("Wendy Mccown-Williams opened Temptation in Cookeville, Tennessee, six years ago, and says drag events like brunch, bingo, and trivia are the vast majority of what she does.").

55. *See id.*

56. *See, e.g.*, Danielle Dreilinger, *Drag Shows Have a Long History in the South. Why Are They Drawing Threats Now?*, USA TODAY (Dec. 13, 2022, 6:03 AM), https://www.usatoday.com/story/news/2022/12/12/drag-shows-have-long-history-why-are-they-drawing-threats/69706168007/?gnt-cfr=1 [https://perma.cc/6FDJ-4GLH (staff-uploaded, dark archive); Jim Farmer, *A History of Atlanta Drag Bars*, GA. VOICE (Aug. 27, 2020), https://thegavoice.com/community/a-history-of-atlanta-drag-bars/ [https://perma.cc/R3MG-MZX4].

57. *See* Dreilinger, *supra* note 56; Farmer, *supra* note 56.

58. *See* Isabel Packard, *Drag in Atlanta, Contextualized by Queerness in the South*, EMORY WHEEL (Apr. 28, 2021), https://emorywheel.com/drag-in-atlanta-contextualized-by-queerness-in-the-south/ [https://perma.cc/33XF-XJPC].

59. *See* Dreilinger, *supra* note 56. As one delegate to the National Organization for Women in 1981 described her first drag show in Charlotte, North Carolina, it was "fabulously beautiful people in pink spangled evening clothes lip-syncing to great music." *Id.*

60. Kimberlee Kruesi & Jeff McMillan, *As Tennessee, Others Target Drag Shows, Many Wonder: Why?*, AP NEWS (Mar. 2, 2023), https://apnews.com/article/drag-queens-tennessee-bill-legislation-3ed2ddd0e8231819ade5d0c8b9f4c30a [https://perma.cc/SGP2-LCS9].

61. *See* Packard, *supra* note 58.

62. Channing Gerard Joseph, *The First Drag Queen Was a Former Slave*, NATION (Jan. 31, 2020), https://www.thenation.com/article/society/drag-queen-slave-ball/ [https://perma.cc/JAW8-7KP2 (dark archive)]. According to historian Channing Gerard Joseph, the first recorded female impersonator to refer to themselves as a "drag queen" was William Dorsey Swann, born around 1858, who also became one of the "earliest recorded American[s] to take specific legal and political steps to defend the queer community's right to gather without the threat of criminalization, suppression, or political violence." *Id.*

63. Kruesi & McMillan, *supra* note 60.

In March 2023, Tennessee became the first[64] state to enact a drag ban,[65] and other states are expected to follow.[66] Tennessee's law classified drag performances as "adult cabaret entertainment,"[67] the same category that features "topless dancers, go-go dancers, exotic dancers, [and] strippers."[68]

A second bill that passed the Tennessee House of Representatives several days later would require those who perform "adult cabaret entertainment," and the establishments where they perform, to seek permits from the same local boards that govern strip clubs.[69] Several Tennessee cities, including Memphis, prohibit such venues from selling alcohol.[70] This type of law could force drag bars in those cities to choose between ending liquor sales to operate as strip clubs or discontinuing their drag shows. Either decision could result in the loss of a major part of their business, creating a heavy burden on the continued existence of these public spaces where queer people gather.[71]

64. Laws regulating gender have a long history, and this wave of legislation is not the first to address the topic. *See, e.g.*, *infra* note 226 and accompanying text (describing an interpretation by the New York Police Department in the 1960s that a New York statute required a minimum number of gender-appropriate articles of clothing).

65. S.B. 3, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023). The Western District of Tennessee granted a Temporary Restraining Order prohibiting Governor Bill Lee, Attorney General Jonathon Skrmetti, and Shelby County District Attorney Steven Mulroy from enforcing Tenn. Code Ann. § 7-51-1407, the statute amended by Senate Bill 3. Friends of George's, Inc. v. State, No. 2:23-cv-02163-TLP-tmp, at *1 (W.D. Tenn. Mar. 31, 2023); Friends of George's, Inc. v. Mulroy, No. 2:23-cv-02163-TLP-tmp, at *1 (W.D. Tenn. Mar. 31, 2023). As this Comment went to final publication, a final ruling in both cases was issued.

66. *See* Brooke Midgon, *Tennessee Enacts Nation's First Law Restricting Drag Shows, Bans Gender-Affirming Care for Youth*, HILL (Mar. 2, 2023, 5:42 PM), https://thehill.com/homenews/state-watch/3881688-tennessee-enacts-nations-first-law-restricting-drag-shows-bans-gender-affirming-care-for-youth/ [https://perma.cc/VYR2-TANW]. *But see* Olivia Krauth, *Drag Show Bill on Its Deathbed in Kentucky Legislature*, COURIER J., https://www.courier-journal.com/story/news/politics/2023/03/14/kentuckys-drag-show-legislation-senate-bill-115-appears-dead/70005461007/ [https://perma.cc/44FD-XMYV] (last updated Mar. 15, 2023, 6:58 AM).

67. S.B. 3, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023). Senate Bill 3 modified the state's definition of "adult cabaret entertainment" to include "male and female impersonators" and classifies drag queens as "entertainers" if they perform in an adult oriented business. *Id.* That bill prohibited such "adult cabaret entertainment" from occurring (i) on public property or (ii) in a location where it could be viewed by nonadults. *Id.*

68. *Id.*

69. *See* H.B. 30, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); S.B. 841, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023). Tennessee requires strip clubs to receive licenses from local "Adult-Oriented Establishment Boards," which must be created by local ordinances before strip clubs can operate in a city. TENN. CODE ANN. §§ 7-51-1103, -1120, -1115 (LEXIS through the 2022 Reg. Sess.).

70. MEMPHIS, TENN., MUN. CODE § 6-72-16(F) (2022), https://library.municode.com/tn/memphis/codes/code_of_ordinances?nodeId=TIT6BULIRE_CH6-72SEORBU_S6-72-16EN [https://perma.cc/TP6P-FZ4X].

71. *See* Saxena, *supra* note 54.

This legislation faces criticism from within Tennessee and around the country.[72] Critics say the Tennessee legislation is vague, goes too far, and will be difficult to enforce.[73] In explaining why he voted against the bill, Tennessee Representative Dwayne Thompson said,

> This is so vague, that, . . . I don't see [how] this [is] going to be very workable, and it's going to be really just to[o] indefinable by law enforcement. I have no intentions of allowing any, any obscene or provocative things for minors at all. But the . . . language in the [bill] really goes too far.[74]

Chattanooga Mayor Tim Kelly said the bill had "unclear enforcement standards, putting officers in a difficult, quasi-judicial role."[75] In addressing the challenge of enforceability, the Tennessee Pride Chamber expressed concern that the law will result in "selective surveillance and enforcement" that will lead to expensive court challenges for the state.[76]

In this environment of heightened scrutiny on drag venues, compliance with and enforcement of these new restrictions is already becoming a concern.[77] As new constraints are placed on who is allowed to see these performances and where they are allowed to take place, mechanisms to enforce compliance with the law are likely to be considered as a next step.[78] One existing mechanism used in some states to enforce compliance with age restrictions at bars is a requirement that they maintain a system for checking IDs.[79] Many bars rely on digital technology to scan patrons' IDs when they enter the bar, collecting

72. *See, e.g.*, Kirsten Fiscus, *Gov. Bill Lee Sparks National Backlash After Signing Drag Bill, Ban on Gender Care for Minors*, TENNESSEAN, https://www.tennessean.com/story/news/politics/2023/03/07/tennessee-governor-bill-lee-faces-backlash-after-drag-show-gender-care-law/69981208007/ [https://perma.cc/7QCP-83HX] (last updated Mar. 8, 2023, 10:02 AM).

73. Jordan Karnbach, *New Tennessee Bill Would Require 'Adult Cabaret' Performers To Have a Permit*, NEWS CHANNEL 9 ABC (Mar. 6, 2023, 8:56 PM), https://newschannel9.com/news/local/new-tennessee-bill-would-require-adult-cabaret-performers-to-have-a-permit [https://perma.cc/6T4M-7UU6].

74. *Id.*

75. *See* Leslie Dominique, *Hamilton Co. DA at Odds with Chattanooga Mayor, Police Over Enforcement of Drag Show Bill*, NEWS CHANNEL 9 ABC (Mar. 9, 2023, 2:33 PM), https://newschannel9.com/news/local/district-attorney-wamp-will-enforce-new-law-on-drag-show [https://perma.cc/69BW-GN7E].

76. Kruesi & McMillan, *supra* note 60 ("The Tennessee Pride Chamber, a business advocacy group, predicted that 'selective surveillance and enforcement' will lead to court challenges and 'massive expenses' as governments defend an unconstitutional law that will harm the state's brand.").

77. *See* Dominique, *supra* note 75.

78. *See id.*

79. *See* N.C. ABC COMM'N, MEMBERSHIP APPS, https://portal.abc.nc.gov/Web%20Documents/Sections/Legal/Statutes%20and%20Regulations/5.%20Resources/Membership%20Apps.OK%20list.5-28-19.pdf [https://perma.cc/WBZ6-AHHF (staff-uploaded archive)]; *see also*, *e.g.*, PATRONSCAN, https://patronscan.com/id-scanner-for-bars [https://perma.cc/6FQC-MAHJ].

personally identifying information on every patron.[80] Disclosure of such information to law enforcement could become a requirement in order to ensure compliance with the law.

One recently repealed North Carolina liquor law, designed to monitor compliance with the state's "private club" law, offers an example of a law that required such disclosure of patrons' identifying information.[81] This law required establishments that served liquor to operate as either "restaurants" or "private clubs."[82] "Private clubs" were distinguished because they did not primarily serve food and carried the additional obligation to maintain alphabetized records of identifying information on all customers ("members")[83] and to disclose those "membership lists" to law enforcement without a warrant.[84] For any premises issued a permit to sell liquor by the ABC Commission, law enforcement officers and various state agencies[85] had the authority to "examine the books and records of the permittee . . . at any time it reasonably appear[ed] that someone [was] on the premises."[86] Thus, these membership records were subject to on-demand inspection by a wide host of state authorities at any time. In recent years, many venues have relied on technology to capture this patron information, as described *infra*.[87] The law was repealed in 2022, but not on constitutional grounds.[88]

Such an identity disclosure law could be reintroduced at any time in any number of states as a means of monitoring compliance with new requirements on queer venues and drag performances. Identity disclosure requirements in states with animus toward queer people could create strong incentives for queer people to avoid circumstances that may result in disclosures, due to the potential for significant personal consequences. As Professor Scott Skinner-Thompson said, such "[s]urveillance excludes . . . [because it] pushes members of targeted communities . . . out of the public square to avoid the devastating consequences of being surveilled."[89]

80. *See* N.C. ABC COMM'N, *supra* note 79; *see also, e.g.*, PATRONSCAN, *supra* note 79.

81. N.C. GEN. STAT. §§ 18B-1000 to 1001 (2018), *repealed by* Act of July 7, 2022, ch. 44, § 6(a)–(b), 2022 N.C. Sess. Laws 214–15 (codified at N.C. GEN. STAT. §§ 18B-1000, 130A-247 (2022)); Michael Crowell, *A History of Liquor by the Drink Legislation in North Carolina*, 1 CAMPBELL L. REV. 61 *passim* (1979).

82. §§ 18B-1000 to 1001; Crowell, *supra* note 81, *passim*.

83. Special Requirements for Private Clubs, 14 N.C. ADMIN. CODE 15B.0107 (2022).

84. § 18B-502(a) (2018); Crowell, *supra* note 81, *passim*.

85. This list included "alcohol law-enforcement agents, employees of the [ABC] Commission, local ABC officers, and officers of local law-enforcement agencies that [had] contracted to provide ABC enforcement." § 18B-502(a) (2018).

86. *Id.*

87. *See* N.C. ABC COMM'N, *supra* note 79; *see also, e.g.* PATRONSCAN, *supra* note 79.

88. Act of July 7, 2022, § 6(a)–(b), 2022 N.C. Sess. Laws 214–15.

89. Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 YALE L.J. F. 454, 459 (2021).

As these drag ban bills are enacted around the country, they are likely to create new barriers to queer people's access to the public spaces that host them and impose new risks on the people who gather there. These risks could create a strong deterrence for many who would otherwise congregate in these spaces, and thus potentially create a "risk of a chilling effect on [the] association[s]"[90] that would otherwise form there, at the very moment that such associations are needed the most.

II. FREEDOM OF ASSOCIATION AND *AMERICANS FOR PROSPERITY*

Many scholars have posited that the First Amendment is the future home of permanent queer rights.[91] There have been several recent LGBT rights lawsuits filed in various states seeking to defend queer people's rights through the First Amendment, including one free expression case in North Carolina.[92] It is both timely and necessary to consider how expressive freedom of association protections could be expanded to protect fundamental queer rights more extensively. As queer people face heightened vulnerability and significantly increased targeting by state officials,[93] the need for stronger protections of these interests grows.

Despite this need, First Amendment case law leaves many of these activities unprotected, with only a patchwork of ad hoc cases providing a narrow band of protection for queer communities.[94] These narrow victories, mostly litigated in state courts, began in the 1950s and have allowed queer communities to meet in public, to publish newspapers, and to congregate, organize, and build the connections required to form community and advocacy interests.[95] However, because these cases were tailored to invalidate specific state laws, they did not result in a single, unifying federal constitutional principle, leaving queer people without overarching protection of their rights to form associations.[96]

Such associational rights are a subset of First Amendment rights created by U.S. Supreme Court cases that protect the rights of individuals to associate with each other.[97] There are two threads of associational protections created by

90. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

91. *See, e.g.*, Scott Skinner-Thompson, *The Person Is Political*, SLATE (Oct. 23, 2018, 2:28 PM), https://slate.com/news-and-politics/2018/10/lgbtq-legal-first-amendment-expression-arguments.html [https://perma.cc/QDU6-SATK] ("LGBTQ legal strategy has long focused on equal protection. But if identity itself can be political speech, the First Amendment could be our future."). For a detailed history of the intersection of the First Amendment and queer rights, see generally BALL, THE FIRST AMENDMENT, *supra* note 13.

92. *See, e.g.*, Complaint for Declaratory and Injunctive Relief ¶¶ 192–200, Campos v. Cohen, No. 1:21-880 (M.D.N.C. Nov. 16, 2021).

93. *See infra* Part I.

94. *See infra* Section III.D.

95. *See infra* Section III.D.

96. *See infra* Section III.D.

97. *See infra* notes 102–12 and accompanying text.

U.S. Supreme Court jurisprudence: "intimate associations," which involve associations between individuals in "certain kinds of highly personal relationships"; and "expressive associations," which allow for individuals to collectively advocate for their interests.[98]

Distinct from intimate associations, expressive freedom of association cases serve to protect other First Amendment freedoms by giving them "breathing space to survive."[99] This "breathing space"[100] evolved over more than six decades[101] and has meant protecting association from both "heavy-handed frontal attack" and "more subtle governmental interference."[102] In *Roberts v. U.S. Jaycees*,[103] the Court declared this protection an expansive one, protecting "a wide variety of political, social, economic, educational, religious, and cultural ends."[104] The Court also explained that the protection was "especially important in preserving political and cultural diversity and in *shielding dissident expression from suppression by the majority*."[105] In *Americans for Prosperity*, the Court's conservative majority explicitly confirmed that this expansive purpose is still good law, restating these canons of free association in the Court's rationale for applying this protection in an expanded context.[106] This rationale, especially "shielding dissident expression from suppression by the majority,"[107] would certainly include dissident queer subcultures with long, documented histories of government suppression.

Many of the first expressive association cases were brought on behalf of members of the National Association for the Advancement of Colored People ("NAACP") in order to protect the organization's ability to organize from government infringement.[108] These cases explain that the First Amendment also protects individuals from the harms caused by the mere *disclosure* of political

98. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984); *see also* Shalini Bhargava Ray, *Noncitizen Harboring and the Freedom of Association*, 101 N.C. L. REV. 677, 696 (2023).

99. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2372, 2389 (2021) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

100. *Button*, 371 U.S. at 433 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).

101. *Compare* NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 462 (1958) (discussing how compelled disclosure of one's affiliation with advocacy groups "may constitute [an] effective . . . restraint on freedom of association"), *with Ams. for Prosperity*, 141 S. Ct. at 2389 ("When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive.'" (quoting *Button*, 371 U.S., at 433)).

102. *Ams. for Prosperity*, 141 S. Ct. at 2393 (citing Bates v. Little Rock, 361 U.S. 516 (1960)).

103. 468 U.S. 609 (1984).

104. *Id.* at 622.

105. *Id.* (emphasis added).

106. *See Ams. for Prosperity*, 141 S. Ct. at 2382–83.

107. *Roberts*, 468 U.S. at 622.

108. *See* NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 462–63 (1958); Bates v. Little Rock, 361 U.S. 516, 523–24 (1960); Shelton v. Tucker, 364 U.S. 479, 485–87 (1960).

association.[109] Several cases established that individuals have a protected interest in preventing the disclosure of their membership in political associations to an entity that could cause them harm, such as their employer.[110] The foundational case, *NAACP v. Alabama ex rel. Patterson*,[111] and a series of cases that followed, established that—because government mandated disclosure of membership lists led to a reduction in membership numbers for the NAACP—the association's membership lists were protected from mandated disclosure by the First Amendment.[112]

In *Patterson*, the Court held that Alabama Attorney General John Patterson could not force the NAACP to disclose a list of its members in the state.[113] The Court reasoned that the ability to associate with like-minded people for *advocacy* purposes could be fatally chilled by the public disclosure of these membership lists.[114] These protections guard against the public disclosure of membership lists for groups "engaged in advocacy" when such disclosures would "constitute as effective a restraint on freedom of association as [other] forms of governmental action."[115]

In subsequent cases, the Court further developed the parameters of this protection,[116] including a requirement that plaintiffs make a threshold showing "demonstrat[ing] that a [disclosure] requirement is likely to expose their supporters to concrete repercussions in order to establish an actual burden,"[117] and that they "plead and prove that disclosure will likely expose them to objective harms."[118] *Patterson* held that "compelled disclosure of NAACP members 'entail[ed] the likelihood of a substantial restraint' on association in light of 'an uncontroverted showing' that past disclosures exposed members 'to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.'"[119] *Bates v. City of Little Rock*[120] similarly held that "compelled disclosure of NAACP membership 'would work a significant interference with the freedom of association' based on 'uncontroverted evidence' that past identification 'had been followed by harassment and threats

109. *See, e.g.*, *Patterson*, 357 U.S. at 462–63; *Bates*, 361 U.S. at 523–24; *Shelton*, 364 U.S. at 486.

110. *See, e.g.*, *Patterson*, 357 U.S. at 462–63; *Bates*, 361 U.S. at 523–24; *Shelton*, 364 U.S. at 486.

111. 357 U.S. 449 (1958).

112. *See id.* at 462–63; *Bates*, 361 U.S. at 523–24; *Shelton*, 364 U.S. at 486.

113. *Patterson*, 357 U.S. at 462–63, 466.

114. *Id.* at 462.

115. *Id.*

116. *See, e.g.*, *Bates*, 361 U.S. 516, 524 (1960); *Shelton*, 364 U.S. 479, 488 (1960); Buckley v. Valeo, 424 U.S. 1, 71–72 (1976) (per curiam).

117. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2394 (2021) (Sotomayor, J., dissenting).

118. *Id.* at 2392.

119. *Id.* at 2394 (alteration in original) (quoting *Patterson*, 357 U.S. at 462).

120. 361 U.S. 516 (1960).

of bodily harm.'"[121] *Shelton v. Tucker*[122] held that "disclosure of teachers' organizational affiliations impaired association because record evidence substantiated a 'fear of public disclosure' and a 'constant and heavy' pressure on teachers 'to avoid any ties which might displease those who control [their] professional destin[ies].'"[123] *Buckley v. Valeo*[124] held that disclosure was allowed because "'any serious infringement' on associational rights caused by the compelled disclosure of contributors was 'highly speculative' on the record before the Court"[125] and required "specific evidence of past or present harassment of members *due to their associational ties*."[126]

In each case, the Court "carefully scrutinized record evidence to determine whether a disclosure requirement actually risks exposing supporters to backlash"[127] before moving on to the second step. The second step developed by these cases applied a "means-end tailoring" balancing test known as "exacting scrutiny" that, if the threshold likely "actual burden" was found, required that the government's restriction on association be "commensurate to the actual burdens on associational rights."[128]

As summarized by Justice Sotomayor in her dissent in *Americans for Prosperity*, the standard before *Americans for Prosperity* was decided required first the threshold showing of "an actual First Amendment burden"[129] and that plaintiffs "plead and prove that disclosure will likely expose them to objective harm."[130] Then, a "means end tailoring" balancing test was applied, weighing the burden imposed on associational rights against the government's interest in the disclosure that caused the burden.[131] If the test's threshold of likely "actual burden" is found, then the government's restriction on association must be "commensurate to the actual burdens found on associational rights."[132]

The required threshold showing of a likely "actual burden" has been described by the Court in several different ways, but each explains that evidence of specific impacts on plaintiffs' members must be shown; for example, the Court has required "specific evidence of past or present harassment of members

121. *Ams. for Prosperity*, 141 S. Ct. at 2394–95 (Sotomayor, J., dissenting) (quoting *Bates*, 361 U.S. at 523–24).

122. 364 U.S. 479 (1960).

123. *Ams. for Prosperity*, 141 S. Ct. at 2395 (alteration in original) (Sotomayor, J., dissenting) (quoting *Shelton*, 364 U.S. at 486).

124. 424 U.S. 1 (1976).

125. *Ams. for Prosperity*, 141 S. Ct. at 2395 (Sotomayor, J., dissenting) (quoting *Buckley*, 424 U.S. at 69–70).

126. *Buckley*, 424 U.S. at 74 (emphasis added).

127. *Ams. for Prosperity*, 141 S. Ct. at 2394 (Sotomayor, J., dissenting).

128. *Id.* at 2394–96.

129. *Id.* at 2392.

130. *Id.*

131. *Id.*

132. *Id.*

due to their associational ties."[133] This threshold would not permit successful claims that a government action created a chilling effect on dissident communities *before* they developed associations.

By requiring that a likely "actual First Amendment burden" be found by carefully scrutinizing facts to identify likely "objective harm" measured by "concrete repercussions" to members, the Court restricted freedom of association to *already formed* political associations because no plaintiff could show an *actual* burden with concrete repercussions for an association that *does not exist*. In spite of that precedent, the *formation* of political interests ought to be protected as a matter of basic logic: if political association is to be protected, then the ability to *form* such associations must surely be protected as well.

For the First Amendment to have any meaningful protections for association, its protections must extend to associations that have not yet *formed*. As the U.S. Supreme Court has recognized in the context of freedom of speech, "[l]aws enacted to control or suppress speech may operate at different points in the speech process."[134] Acting on this principle, courts have protected activities required to create speech, before any idea is expressed, rather than limit the scope of the First Amendment to protect only expression itself.[135] There is no reason why this principle should not also apply to the First Amendment's freedom of association by protecting activities required to create associations. To rephrase, "[l]aws enacted to control or suppress [association] may operate at different points in the [association] process"[136]—even before a group has organized.

Recently, the U.S. Supreme Court, in *Americans for Prosperity*, potentially expanded associational rights to do just that.[137] The Court adopted a new standard that increases the government's burden when imposing disclosure requirements.[138]

The new standard replaces the threshold requirement of showing *actual* harms faced by members of a plaintiff's association with a lower threshold showing of "risk of a chilling effect on association"[139] and then proceeds quickly

133. Buckley v. Valeo, 424 U.S. 1, 74 (1976) (per curiam) (emphasis added).

134. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336 (2010).

135. *See, e.g.*, *id.* at 339, 372 (striking down limits on corporate political spending in part on the theory that such spending is merely an early stage in the speech process); *id.* at 336–37 (providing other examples of unconstitutional regulation of pre-expression activities, including requiring permits); ACLU of Ill. v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012) (holding that the "act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights" based on a "straightforward application" of this principle (emphasis omitted)).

136. *See Citizens United*, 558 U.S. at 336.

137. *See Ams. for Prosperity*, 141 S. Ct. at 2389.

138. *See id.*

139. *Id.*

to evaluate the characteristics of the disclosure requirement itself. The Court explained:

> When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, "[b]ecause First Amendment freedoms need breathing space to survive."[140]

Once a disclosure requirement is found to create the "risk of a chilling effect on association,"[141] then, an analysis of the disclosure requirement evaluates whether (1) there is "a substantial relation between the disclosure requirement and a sufficiently important governmental interest"[142] and (2) the "disclosure requirement [is] narrowly tailored to the interest it promotes."[143] Narrow tailoring, the Court describes, "is crucial where First Amendment activity is chilled—even if indirectly."[144]

The Court explains that narrow tailoring means that "a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary [to the government's interest]."[145] Applying this "unnecessary" inquiry to the facts, the Court explained that it did not matter that some donors to the Americans for Prosperity Foundation "might not mind—or might even prefer—the disclosure of their identities to the State" because the disclosure requirement "'create[d] an unnecessary risk of chilling' in violation of the First Amendment, indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous."[146] In this way, the Court explained that while narrow tailoring does not require the "*least restrictive means* . . . to achieve the desired objective," it does require that unnecessary burdens be avoided.[147]

In her dissent, Justice Sotomayor took issue with the majority opinion because, under its test, "reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no burden at all."[148] Indeed, the majority found a burden on Americans for Prosperity Foundation's rights based on unrelated past harassment that was not directly caused by the

140. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

141. *Id.*

142. *Id.* at 2385 (quoting Doe v. Reed, 561 U.S. 186, 196 (2010)).

143. *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

144. *Id.* at 2384 (citing *Button*, 371 U.S. at 433).

145. *Id.* at 2385.

146. *Id.* at 2388 (citation omitted) (quoting Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 968 (1984)).

147. *Id.* at 2384 (quoting McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 218 (2014)).

148. *See id.* at 2392, 2394 (Sotomayor, J., dissenting).

disclosure of its membership lists.[149] In doing so, the majority veered away from the rigorous likely "actual burden" standard, now requiring only a "risk of a chilling effect" created by "the 'possible deterrent effect' of disclosure."[150] Critically, this new standard articulates no limiting principle, and without such, the facts of *Americans for Prosperity* offer the only instruction to guide a lower court in determining how much "risk of a chilling effect on association"[151] is enough to warrant First Amendment protection.

If the relevant inquiry is first whether a disclosure requirement risks a chilling effect on association, and then whether the disclosure requirement is substantially related to a sufficiently important government interest and is narrowly tailored to the government interest it promotes, then the queer community has a new tool in its toolbox to protect the community's right to gather. By reducing the burden that must be shown to succeed on a freedom of association challenge—from proving likely "actual burden" with "concrete repercussions" and "objective harm" to "risk of a chilling effect on association" being enough[152]—the holding in *Americans for Prosperity* may have cleared the way for queer groups to pursue claims that were previously barred. Now any plaintiff who can successfully identify a "risk of a chilling effect" need only prove that a disclosure is either not substantially related to a sufficiently important governmental interest, or is not narrowly tailored to the government interest, for example, because it "indiscriminately sweep[s] up the information of *every* [patron] with reason to remain anonymous."[153]

Without this interpretation, the government could prevent entire communities from *forming* associational ties and advocating for their own interests. As Part III documents, the queer community has faced this type of suppression since this country was founded. As discussed in Section III.C, the purpose of restrictions historically placed on queer public spaces was to suppress queer people's ability to *form* the communities they needed in order to identify and advocate for their shared political interests. These historic public spaces had one thing in common: because the role in queer community was one of

149. *See id.* at 2388 (majority opinion). The plaintiffs

> pointed to evidence that their supporters experienced threats, reprisals, and harassment when their identities and associations became publicly known in other contexts. Importantly, however, the Foundation and Law Center failed to show that such consequences would result from the confidential submission of their top donors' identities to California's attorney general's office in light of the security mechanisms the office has now implemented.

Id. at 2393 (Sotomayor, J., dissenting). Plaintiffs also "introduced evidence that they and their supporters ha[d] been subjected to bomb threats, protests, stalking, and physical violence" from unrelated past incidents not caused by disclosure of membership lists. *Id.* at 2388 (majority opinion).

150. *See id.* at 2388–89 (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958)).

151. *Id.* at 2389.

152. *Id.* at 2388; *id* at 2394 (Sotomayor, J., dissenting).

153. *Id.* at 2388 (majority opinion).

forming associational ties, they were not reached by First Amendment freedom of association protections.

An expanded interpretation of the freedom of association, protecting associational interests before associations have *formed*, would create a future pathway to protect much needed queer advocacy interests by safeguarding queer people's access to critical public spaces from government suppression.

III. QUEER HISTORY BEFORE STONEWALL

> "That every day you wake up alive, relatively happy, and a functioning human being, you are committing a rebellious act. You as an alive and functioning queer are a revolutionary."[154]

To understand the full historical implications of allowing the government to suppress *unformed* political association, a broad review of queer history in the United States is informative. This part makes the case that the First Amendment *must* protect the *formation* of political association if the protection of political association is to have value for dissident communities. An assessment of the harms inflicted upon queer communities to suppress their political association shows that it is the political association of these very communities that needs protection the most. To protect existing political association without protecting the *formation* of such association leaves vulnerable communities unprotected by denying them the ability to "join with others to further shared goals."[155]

This part seeks to impress upon the reader how the state has systematically and cruelly used the legal system to suppress queer political association through law and policy over the past century. The history recounted here shows a pattern of sustained suppression and intimidation that cannot be denied. These stories begin at the founding of the Virginia Company and pick up speed in 1880.

Following the vibrancy and growth of American queer communities seen in the 1880s, a correspondingly harsh state backlash sought to suffocate queer culture and restrict it to the fringes of society.[156] Strict and selectively enforced liquor laws were one of the government's frequent tools of suppression—leveraging state liquor authorities to harass and criminalize queer people, fracture queer community, undermine queer political power, and shut down the commercial venues that proffered public community space to queer people.[157]

154. QUEERS READ THIS (1990) [https://perma.cc/ZHC6-QEEC (staff-uploaded archive)]. This essay was published anonymously and distributed at New York Pride in June 1990.

155. *Ams. for Prosperity*, 141 S. Ct. at 2389.

156. *See infra* Sections III.B–C.

157. *See infra* Section III.B.

This space was necessary for early queer communities to congregate and form collective political interests.

Section III.A provides details of queer America's burgeoning early history, as relevant to the context through which modern laws and regulations must be considered. Section III.B establishes liquor laws as one of the state's most prolific tools to suppress and target queer people, tracing this history to its early roots. Section III.C identifies a long pattern of investigating and surveilling queer communities and using data-gathering to intimidate, suppress, and target queer people. Finally, Section III.D catalogues the early queer legal battles that pushed back against state suppression, and the role of the First Amendment in that fight.

In many ways, the jurisprudence that responded to the efforts to repress queer people bolstered the work of hardworking queer activists resisting those unjust laws and their unfair enforcement by state authorities.[158] Those queer activists also laid the groundwork for the First Amendment's development as a constitutional tool to protect Americans' free speech and associational rights.[159]

A. *Queer Congregating Created Political Interests: 1880–World War II*

Most modern narratives about queer community and queer identity in the United States begin, understandably, with the Stonewall riots and the development of modern queer rights that followed over the next fifty years. Yet, the history relevant to understanding modern state suppression of the queer community dates back to the 1880s,[160] when queer communities began growing in America's urban centers. Even this narrative is simplistic and incomplete. Queer people were documented long before queer communities began to form; credible historians have even questioned whether the United States had elected a gay President as early as James Buchanan in 1856.[161]

158. *See infra* Section III.D.

159. *See infra* Section III.D.

160. State violence towards queer communities, however, is not new. As early as the fifth century, Byzantine Emperor Justinian I, AD 527–565, ordered homosexuals arrested and murdered in order to prevent earthquakes. NOV. 77.1.1 to .1.2 (535) ("Therefore We order all men to avoid such offences . . . for as crimes of this description cause famine, earthquake, and pestilence."). In the United States, the first execution of a gay person appears to be Richard Cornish in the American colony of Virginia; Cornish was accused of making a pass at a twenty-nine-year-old male sailor, but no actual homosexual acts were alleged. MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, 1622–1632, at 42, 78 (H.R. McIlwaine ed., 1924) (recording first the trial of Richard Corning for the accused acts and then referencing his execution for the same accusations in a later colonial court document); *see also* JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 16, 569 n.7 (1976) [hereinafter KATZ, GAY AMERICAN HISTORY].

161. *See, e.g.*, Thomas Balcerski, *The 175-Year History of Speculating About President James Buchanan's Bachelorhood*, SMITHSONIAN MAG. (Aug. 27, 2019), https://www.smithsonianmag.com/history/175-year-history-examining-bachelor-president-james-buchanans-close-friendship-william-rufus-king-180972992/ [https://perma.cc/3766-Z8HD]; THOMAS J. BALCERSKI, BOSOM FRIENDS: THE INTIMATE WORLD OF JAMES BUCHANAN AND WILLIAM RUFUS KING 10–12 (2019).

Violence toward queer people in the United States can be traced back even further to colonial Virginia, when Richard Cornish was executed after a mere accusation that he made a pass at a sailor.[162] The public and expanding queer society that began in the 1880s lends critical context for understanding the need for the First Amendment to reverse the last century's efforts to force these open queer communities back into the shadows.

The rapid growth of queer communities[163] during the swift industrialization and expansion of large urban cities created an anonymity[164] that enabled lively queer subcultures to develop.[165] These early queer

162. MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, *supra* note 160, at 42, 78. In one form or another, sodomy has been banned in North Carolina since its founding, until ruled unconstitutional by *Lawrence v. Texas*, 539 U.S. 558 (2003). *See* N.C. GEN. STAT. § 14-177 (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.) ("If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon."). In the history notes of N.C. Gen. Stat. § 14-177, the earliest two citations are to "25 Hen. VIII, c. 6" and "5 Eliz., c. 17," which correspond to the Buggery Act of 1533, and its subsequent reinstatement in 1564; North Carolina's modern crimes against nature statute still cites the original Buggery Act in its current form published in 2022. *Id.* In 2005, the North Carolina Court of Appeals held that even though *Lawrence* made the same-sex provisions of the crime against nature law unenforceable as applied, the underlying statute was not facially unconstitutional because it also applied to other acts not covered by *Lawrence*. State v. Whiteley, 172 N.C. App. 772, 776–80, 616 S.E.2d 576, 578–83 (2005). When the Province of Carolina was first chartered in 1663, the Lords Proprietors were granted the power "to ordain, make, enact, and . . . publish any laws whatsoever . . . [p]rovided nevertheless, that the said laws be . . . as near as may be conveniently, agreeable to the laws and customs of this our kingdom of England." Charter Granted by Charles II, King of England to the Lords Proprietors of Carolina, Mar. 24, 1663, *reprinted in* 1 THE COLONIAL AND STATE RECORDS OF NORTH CAROLINA 23–24 (William Sanders ed., 1886) [hereinafter 1 COLONIAL RECORDS]; *see also* Charter Granted by Charles II, King of England to the Lords Proprietors of Carolina, June 30, 1665, *reprinted in* 1 COLONIAL RECORDS, *supra*, at 104–06. One of those laws imported from England was the Buggery Act of 1533. Buggery Act of 1533, 25 Hen. 8 c. 6 (Eng.) ("[T]he detestable and abominable vice of buggery committed with mankind or beast . . . be from henceforth adjudged felony . . . that the offenders being hereof convict by verdict, confession, or outlawry, shall suffer such pains of death, and losses and penalties of their goods, chattels, debts, lands, tenements and hereditaments, as felons be accustomed to do, according to the order of the common laws of this realm.").

163. In Chicago, for example, gay society was in full swing by 1889, when Dr. Frank Lydston asserted to "the Chicago College of Physicians and Surgeons [that an] extensive 'colony of male sexual perverts'" had established itself in the city as well as "every community of any size" in the country. Eskridge, *supra* note 17, at 1020 (citing G. Frank Lydston, *Clinical Lecture: Sexual Perversion, Satyriasis and Nymphomania*, 61 MED. & SURGICAL REP. 253, 254 (1889), *excerpted in* JONATHAN NED KATZ, GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY 213–14 (1983)). "Colonies" of such "sexual inverts" in the 1880s and 1890s are also documented in New York's "Bowery" neighborhood and San Francisco's Presidio. *Id.* at 1020–21, 1024.

164. As one New Yorker described in 1882, "'Only in a great city' . . . could an invert 'give his overwhelming yearnings free rein *incognito* and thus keep the respect of his every-day circle . . . . In New York one can live as Nature demands without setting every one's tongue wagging.'" CHAUNCEY, *supra* note 13, at 131 (quoting RALPH WERTHER, THE FEMALE-IMPERSONATORS 200–01 (Alfred W. Herzog ed., 1922)).

165. *See, e.g.*, Gregory Sprague, *Chicago Past: A Rich Gay History*, ADVOCATE, Aug. 18, 1983, at 28–29. In San Francisco, a particularly large "colony" of women passing as men developed in the city as a result of the city's status as a frontier town. Eskridge, *supra* note 17, at 1022.

communities flourished in mostly working class neighborhoods of America's booming urban centers,[166] including "New York, Boston, Washington, Chicago, St. Louis, San Francisco, Milwaukee, New Orleans, and Philadelphia."[167] In the early decades of the twentieth century, by one account, New York's "streets and beaches [were] overrun . . . by fairies."[168] By the 1930s, New York had a bustling gay subculture in which gays and straights[169] alike would attend large public gatherings known as "drag balls," which were hosted in the same public venues used for other community activities in their working-class neighborhoods.[170] While many of these gay men did not admit their sexuality publicly at their jobs or to their families,[171] these communities nonetheless thrived in the open.[172] Indeed, the publicity of these drag balls and other events indicates just how public gay society in America's working class neighborhoods was during this period.[173] This public expression of gay life was chronicled in many newspapers, particularly in Black urban communities.[174] For example, in 1931, the *Baltimore Afro-American* ran a headline, "1931 Debutantes Bow at Local 'Pansy' Ball"[175] and described an event announcing the coming out of new homosexuals into "homosexual society."[176] Indeed, these public spectacles of gay life occurred in some of the most notable community venues in their respective cities, including Madison Square Garden in New York City[177] and "two of Time Square's three most successful clubs."[178] One such ball, the "Masquerade and Civic Ball,"[179] drew crowds of nearly seven thousand in the Hamilton Lodge in Harlem.[180] Similar public spectacles of pre-World War II queer urban culture are chronicled in working class and Black neighborhood newspapers all across the

166. CHAUNCEY, *supra* note 13, at 10.

167. *See* Eskridge, *supra* note 17, at 1021. Edward Stevenson, writing under the pen name Xavier Mayne, described these cities as "homosexual capitals" in 1908. XAVIER MAYNE, THE INTERSEXES: A HISTORY OF SIMILISEXUALISM AS A PROBLEM IN SOCIAL LIFE 640 app. C (1908).

168. CHAUNCEY, *supra* note 13, at 4.

169. George Chauncey claims that straights at the time were referred to instead as "normals." *Id.* at 15.

170. *Id.* at 4.

171. *Id.* at 6–7.

172. *See id.* at 7.

173. *See id.*

174. *See, e.g.*, *id.*; Timothy Stewart-Winter, *How the Black Press Helped Pave the Way for Gay Rights*, WASH. POST (Aug. 5, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/08/05/how-black-press-helped-pave-way-gay-rights/ [https://perma.cc/4EV4-YPQQ (dark archive)].

175. CHAUNCEY, *supra* note 13, at 7 (quoting Ralph Matthews, *'31 Debutantes Bow at Local "Pansy" Ball*, BALT. AFRO-AM., Mar. 21, 1931, at 1).

176. *Id.* (quoting Matthews, *supra* note 175, at 1).

177. *Id.*

178. *Id.* at 320.

179. The event was also called the "Faggots Ball." *Id.* at 257.

180. *Id.* at 259.

country.[181] During this same period, gays were first reported beginning to congregate in gay bars in large cities.[182] In Chicago, in the 1920s and 1930s, gays had developed vast social networks and were congregating publicly in gay bars.[183] This same trend was occurring in other places around the world, and was particularly vibrant in Berlin, Germany, in the years leading up to World War II.[184]

During both world wars, military mobilization played an important factor in the growth of queer society.[185] For many in America's young conscripted army, war service would provide the first opportunity for same-sex encounters and the first exposure to queer subcultures and society.[186] In New York in particular, the city's role as a "major port of embarkation for the European Theater"[187] for World War I meant that hundreds of thousands of young men would pass through the city before the end of the war.[188] For many of these men, New York would be their first exposure to queer society, and many would choose to return to these large urban cities after the war to rejoin these queer communities.[189]

As World War II brought queer people from around the country together, and their embarkments and deployments brought them through many of the

181. *See, e.g.*, *id.* at 7 ("An article published in the *Baltimore Afro-American* in the spring of 1931 under the headline '1931 DEBUTANTES BOW AT LOCAL "PANSY" BALL' drew the parallel explicitly and unselfconsciously."); Stewart-Winter, *supra* note 174. These urban centers included New York, Chicago, New Orleans, and Baltimore. CHAUNCEY, *supra* note 13, at 7.

182. *See, e.g.*, Sprague, *supra* note 165, at 28.

183. *Id.*

184. As just one example of many, queer culture was thriving in Berlin, Germany, in the years between World War I and World War II, complete with queer magazines, newspapers, cafés, dancehalls, and dramatic advancements of queer medicine and academic scholarship, exemplified by the famous Institut für Sexualwissenschaft (commonly translated as the Institute of Sexology or Institute of Sex Research) and Magnus Hirschfeld, a Jewish doctor who established the world's first transgender health clinic. *Between World Wars, Gay Culture Flourished in Berlin*, NPR (Dec. 17, 2014, 1:12 PM), https://www.npr.org/2014/12/17/371424790/between-world-wars-gay-culture-flourished-in-berlin [https://perma.cc/MRW9-H72Z] (transcribing an interview between host Terry Gross and historian Robert Beachy); ROBERT BEACHY, GAY BERLIN: BIRTHPLACE OF A MODERN IDENTITY 160–86 (2014); Brandy Schillace, *The Forgotten History of the World's First Trans Clinic*, SCI. AM. (May 10, 2021), https://www.scientificamerican.com/article/the-forgotten-history-of-the-worlds-first-trans-clinic/ [https://perma.cc/UB46-H8S6].

185. CHAUNCEY, *supra* note 13, at 145 ("Military mobilization also gave many recruits the chance to see the sort of gay life that large cities, especially New York, had to offer.").

186. *See* SUSAN STRYKER & JIM VAN BUSKIRK, GAY BY THE BAY: A HISTORY OF QUEER CULTURE IN THE SAN FRANCISCO BAY AREA 29–30 (1996).

187. CHAUNCEY, *supra* note 13, at 142.

188. *Id.* at 142.

189. *Id.* at 145.

nation's large port cities,[190] the gay night life in these cities flourished.[191] Because many "gay male and lesbian GIs" were only in these cities for a few hours, and were therefore "forced to . . . [find the gay life] . . . near the heart of the city," there was a dramatic growth of commercial queer nightlife in the areas of these cities where many GIs congregated.[192] This bolstered the already growing nightlife scene in these cities and introduced many more servicemembers to gay society.[193] These bars also played a significant role in facilitating communications between gay servicemembers during the war; one such bar at the Astor Hotel in New York is noteworthy for its practice of passing messages between servicemembers who came into port at different times.[194]

Many homosexual servicemembers would be labeled "government-certified homosexuals" and indignantly expelled from the military.[195] Such a "less-than-honorable discharge[]" was known as a "Blue Discharge"[196] and led to dramatic social consequences, hindered future employment, and prohibited these veterans from receiving their benefits.[197] With this humiliation hanging

190. *See* ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 106 (1990) ("No matter where GIs did their training, it was likely that at some point during their military service they would be stationed near one of the nation's many port cities."); *see also* CHAUNCEY, *supra* note 13, at 10–11.

191. BÉRUBÉ, *supra* note 190, at 112–13. Before the war, much of this gay socializing occurred behind closed doors in private homes hosted by older, more-established queer people. *Id.* at 112.

192. *Id.* at 113.

193. *Id.*

194. *See id.* at 115 (citing Paul Forbes, *Mrs. Astor's Bar*, N.Y. TIMES, June 30, 1966, *reprinted in* DRUM, no. 20, 1966, at 11–12). One particularly noteworthy establishment was the Astor Hotel in Manhattan. *Id*. The Astor was frequented "from the four corners of the earth [by] politicians, potentates, and [privates first class]" who "made their way to 44th and Broadway for comfort, companionship, and a quick pick-up." *Mrs. Astor's Bar*, *supra*, at 11. "The Astor Bar was a haven in particular for the serviceman." *Id.* The Astor was so popular with gay servicemen at the time, that the New York Times article describing its ultimate demise was republished in *Drum* magazine, a queer magazine in Philadelphia. *See id.* at 11–12.

195. STRYKER & VAN BUSKIRK, *supra* note 186, at 29–30.

196. *See* Dave Philipps, *Ousted As Gay, Aging Veterans Are Battling Again for Honorable Discharges*, N.Y. TIMES (Sept. 6, 2015), https://www.nytimes.com/2015/09/07/us/gay-veterans-push-for-honorable-discharges-they-were-denied.html [https://perma.cc/PV58-YH7G (staff-uploaded archive)]; Da Lin, *Gay, Lesbian Veterans Receive Overdue Recognition*, CBS S.F. (June 30, 2022, 5:05 PM), https://www.cbsnews.com/sanfrancisco/news/da-dont-ask-dont-tell-draft/ [https://perma.cc/QKR7-HFL5].

197. Many discharges for LGBTQ servicemembers at the time were a type known as "Blue Discharges," which were neither honorable nor dishonorable, and "[b]ecause discharge records were public, LGBTQ servicemen were forced 'out of the closet' and finding employment became difficult. Unlike a court-martial, there was no right to appeal . . . [and they were] barred from receiving the benefits of veterans." *Blue and "Other Than Honorable" Discharges*, NAT'L PARK SERV., https://www.nps.gov/articles/000/blue-and-other-than-honorable-discharges.htm [https://perma.cc/MEF4-UKJE] (last updated Jan. 26, 2022). The nation's largest Black newspaper at the time declared such discharges to be "a vicious instrument which should not be perpetrated against the American Soldier." John H. Young III, *Limit on Army Blue Discharges*, PITTSBURGH COURIER, Oct. 27, 1945, at 1; *see also Blue and "Other Than Honorable" Discharges*, *supra*.

over them due to the public disclosure of intimate details of their lives,[198] many of these servicemembers would choose to stay in San Francisco[199] or New York,[200] further swelling the permanent queer populations in these cities and contributing to the expansion of queer society in the post-World War II period.[201]

B. *Liquor Laws: A Frequent Tool for Suppression*

As queer communities were advancing throughout the 1900s, so too were efforts to quelch these thriving societies. Raids on queer establishments, designed to deliberately terrorize queer communities, started as early as 1896,[202] but increased in the early 1900s as cities developed police "vice" squads to address the "prevalent and growing"[203] problem of "sexual perversion."[204] Vice squads partnered with groups of private citizens who formed new civic organizations specifically to promote a narrow-minded morality.[205] In New York, the "Committee of Fourteen" and the "Society for the Suppression of Vice" worked together with the police on "campaigns to erase public displays of inversion or perversion."[206] In Chicago, the "Vice Commission" received instructions from Mayor Fred Busse to "determin[e] a plan of control" to suppress the flourishing queer society that was blooming in the city.[207] Where gay life flourished, so too did these vice squads' efforts to contain queer community within the shadows.[208] These police vice squads and vigilante organizations of private citizens terrorized the queer community for decades, slowly driving queer people back into the closet.[209]

198. Homosexuality remained a reason for less-than-honorable discharges until the repeal of "Don't Ask, Don't Tell" in 2011. *See* Philipps, *supra* note 196. The *New York Times* estimates that approximately "100,000 service members were discharged for being gay between World War II and the 2011 repeal." *Id.* Since the repeal of "Don't Ask, Don't Tell," servicemembers who were discharged due to homosexuality are eligible to upgrade their discharge to "honorable" and become eligible for full veteran's benefits; however, the process is arduous and tracking down old copies of records is proving to be a barrier to many. *See id.*

199. STRYKER & VAN BUSKIRK, *supra* note 186, at 29–30.

200. CHAUNCEY, *supra* note 13, at 145.

201. STRYKER & VAN BUSKIRK, *supra* note 186, at 30.

202. The New York City Police Department raided Paresis Hall in 1896 and the Ariston Hotel Baths in 1903. Eskridge, *supra* note 17, at 1081.

203. Sprague, *supra* note 165, at 28–29.

204. *Id.*

205. BALL, THE FIRST AMENDMENT, *supra* note 13, at 60.

206. Eskridge, *supra* note 17, at 1081 ("By 1910, police in New York City had been organized into vice teams that . . . raided gay baths and bars, and cooperated with private antivice societies (Society for the Suppression of Vice and the Committee of Fourteen) in campaigns to erase public displays of inversion or perversion.").

207. Sprague, *supra* note 165, at 28–29 (citation omitted).

208. *See infra* Section III.C.

209. *See infra* Section III.C.

Before Prohibition, liquor establishments were mostly regulated by municipal code and state law, with many provisions granting significant discretionary authority to mayors to deny or revoke permits from businesses known to be the "resort of disreputable persons."[210] This discretion allowed vice squads and other authorities, at the encouragement of citizen committees of moral crusaders, to target bars offering patronage to queer society.[211]

In the 1930s,[212] the end of Prohibition returned control of liquor enforcement to state authorities who would use that new authority to sanction even bolder abuses of queer people[213] that would continue for decades.[214] As Professor William Eskridge stated bluntly, "During Prohibition, gay bars . . . were raided because they were serving illegal booze. After Prohibition, gay bars were raided because they were serving illegal patrons."[215] Laws were enacted, or newly enforced, targeting "drag balls" and "lesbian and gay images in plays and films"; officials began to target queer people for simply existing in public.[216] During this period, most states, including North Carolina, authorized revocation of liquor licenses due to some variation of "disorderly or immoral conduct."[217] This language was so broad that many state liquor authorities interpreted it to require refusing service to homosexuals.[218] Because the consequences of enforcement meant a bar owner could lose their license and thus their livelihood,[219] many bars implemented a strict policy rejecting gay patrons entirely.[220] During this period, "[h]undreds of bars were closed . . . in

210. Eskridge, *supra* note 17, at 1083–84 (citing CHI., ILL. MUN. CODE § 1536 (1911)).

211. Eskridge, *supra* note 17, at 1084.

212. During Prohibition, the targeting of queer bars for liquor related infractions was a nonissue because all sales of liquor were federal crimes. *See* BALL, THE FIRST AMENDMENT, *supra* note 13, at 60.

213. Eskridge, *supra* note 17, at 1084.

214. CHAUNCEY, *supra* note 13, at 8–9.

215. Eskridge, *supra* note 17, at 1084.

216. CHAUNCEY, *supra* note 13, at 8–9.

217. BALL, THE FIRST AMENDMENT, *supra* note 13, at 60. North Carolina's Alcoholic Beverage Control (ABC) regulation governing disorderly conduct reads: "No permittee or his employee shall engage in an affray or disorderly conduct, or permit any other persons to engage in an affray or disorderly conduct on the licensed premises." 14B N.C. ADMIN. CODE 15B.0207 (2016) (originally effective January 1, 1982).

218. Eskridge, *supra* note 17, at 1084. North Carolina's current "disorderly conduct" statute defines disorderly conduct very explicitly to require violence and could not be interpreted to include gay lewdness. *See* N.C. GEN. STAT. § 14-288.4 (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.).

219. *See* Stoumen v. Reilly, 234 P.2d 969, 972 (Cal. 1951) (reversing a lower court decision to revoke a liquor license because of the presence of known homosexuals in the bar, but not specific homosexual conduct in the bar); *see also* BALL, THE FIRST AMENDMENT, *supra* note 13, at 62.

220. *See id.*

New York City alone."[221] One such New York bar put up a sign that said, "If You're Gay, Please Go Away."[222] All of these laws targeted the ability of gay society to congregate and "drink, dance, find lovers, or simply talk" with each other,[223] a necessary part of forming community and building political associations[224] to "join with others to further shared goals."[225]

Over the next four decades, police raids on queer bars and liquor license enforcement would become two of the most common tools in the states' arsenals for targeting queer people and the public spaces in which they gathered.[226] These police raids also came with great psychological consequences for queer people, since "[e]very evening spent in a gay setting . . . carried a reminder of the criminal penalties that could be exacted at any moment."[227]

During the 1950s, a "paralyzing fear" set in, which forced queer people to "seek[] cover once again."[228] Thousands of gay men in cities across the United States would face arrest and other major consequences. Washington, D.C.,[229] Philadelphia,[230] New Orleans,[231] Baltimore,[232] Wichita, Dallas, Memphis, Seattle, Ann Arbor, and many other cities all saw "sudden upsurges in police

221. Brief of Professors of History George Chauncey, Nancy F. Cott, John D'Emilio, Estelle B. Freedman, Thomas C. Holt, John Howard, Lynn Hunt, Mark D. Jordan, Elizabeth Lapovsky Kennedy, and Linda P. Kerber as Amici Curiae in Support of Petitioners at 14, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Brief of Professors of History].

222. LILLIAN FADERMAN, GAY REVOLUTION: THE STORY OF THE STRUGGLE 117 (2016); Nandini Rathi, *The Sip-In That 'Legalized Gay Bars' Before Stonewall*, BEDFORD + BOWERY (Jan. 7, 2020), https://bedfordandbowery.com/2020/01/the-sip-in-that-legalized-gay-bars-before-stonewall/ [https://perma.cc/D88M-3L35].

223. *See* BALL, THE FIRST AMENDMENT, *supra* note 13, at 60.

224. For a collection of citations to historians cataloguing the importance of public congregation and association to development of queer subculture, see BALL, THE FIRST AMENDMENT, *supra* note 13, at 60 n.25, 298 n.25.

225. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

226. *See* Eskridge, *supra* note 17, at 1080–86. These were not only tools used: at one point in the 1960s, for example, it became common practice for lesbians in New York to always wear at least three pieces of female clothing because an internal New York Police Department policy had interpreted a New York statute to subject anyone to arrest who was not wearing at least three pieces of clothing for their gender. Cain, *supra* note 20, at 1564 n.85 (cataloguing various laws in the United States that applied to cross dressing in the 1960s).

227. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970, at 49 (2d ed. 1983).

228. *Id.* at 50. An extensive collection of newspaper clippings documenting harassment by police during this period, collected by James Kepner who covered police matters for *ONE*, can be found in the National Gay Archives, Los Angeles. *Id.* at 49 n.16.

229. One thousand men were arrested per year during the 1950s. *Id.* at 49.

230. One hundred men and women were arrested per month in Philadelphia during the 1950s. *Id.* at 50.

231. Sixty-four women were arrested in a single raid in 1953. *Id.*

232. One hundred-sixty-two gay men were arrested in a single raid in October of 1955. *Id.*

action against gays."[233] In Miami in 1954, for example, the mayor ordered the police chief to close all gay bars within one year, leading to a dramatic escalation of enforcement, abuse, and harassment.[234]

These raids continued to escalate through the 1960s and 1970s and frequently meant arrest, which invariably led to one's homosexuality becoming a matter of public record that could no longer be concealed.[235] It could also mean a criminal conviction for conduct based on lies told by police officers.[236] For example, according to one bar patron arrested at the Yukon in Manhattan[237] in March 1966, the New York City vice squad's reputation was so bad that the officers transporting him to jail after his arrest openly derided the integrity of the vice squad, saying, "Who knows what those bastards are up to!"[238] According to a gay attorney at the time, "[t]he police would lie" about allegations against queer people.[239] One civil rights attorney estimates that between 40,000 and 50,000 people, mainly gay men, were arrested in the 1970s in California alone.[240] The most famous of these raids, of course, was Stonewall in June of 1969, when the queer community of New York City pushed back against egregious police abuse in what would later be known as the first celebration of Pride Month.[241]

233. *Id.* at 50. One study conducted in 1973 showed that twenty percent of gay men had "encountered trouble with law enforcement officers." *Id.* (citing JOHN H. GAGNON & WILLIAM SIMON, SEXUAL CONDUCT: THE SOCIAL SOURCES OF HUMAN SEXUALITY 138–39 (2d ed. 1973)). That number has not improved since: one 2014 national survey found that twenty-one percent of "LGBT people and people living with HIV" encountered "hostile attitudes from officers, 14% reported verbal assault by the police, 3% reported sexual harassment and 2% reported physical assault at the hands of law enforcement officers." CHRISTY MALLORY, AMIRA HASENBUSH & BRAD SEARS, THE WILLIAMS INST., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY 5–7 (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf [https://perma.cc/XJC8-6KLG].

234. BALL, THE FIRST AMENDMENT, *supra* note 13, at 61.

235. *See* Cain, *supra* note 20, at 1564–65.

236. According to "Evander Smith, a gay attorney in San Francisco, . . . the police would accuse 'men of fondling each other. The police would lie.'" *Id.* at 1565 n.86 (quoting ERIC MARCUS, MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS 1945–1990, at 149 (1992)); *see also* David S. (as told to Dick Michaels), *Anatomy of a Raid*, ADVOCATE, July 1968, *reprinted in* WITNESS TO REVOLUTION: *THE ADVOCATE* REPORTS ON GAY AND LESBIAN POLITICS, 1967–1999, at 5–7 (Chris Bull ed., 1st ed. 1999) (recounting the author's experience being among a group of gay men in a jail in New York and being informed by the arresting officers, who made up lewd acts, that they were charged with performing those acts with other men arrested at the same bar, despite not knowing or having seen the other men until booking).

237. *Manhattan Bars*, 2 N.Y. CITY GAY SCENE GUIDE, 1969, at 11.

238. David S., *supra* note 236, at 6.

239. *See* Cain, *supra* note 20, at 1565 n.86.

240. Connor Richards, *How California Police Departments Targeted Gay Men in Sting Operations for a Century*, PENINSULA PRESS (Dec. 19, 2018), https://peninsulapress.com/2018/12/19/how-california-police-departments-targeted-gay-men-in-sting-operations-for-a-century/ [https://perma.cc/7QHA-Y886] (citing independent estimates by civil rights attorneys Bruce Nickerson and Stephanie Loftin).

241. Meg Metcalf, *The History of Pride: How Activists Fought To Create LGBTQ+ Pride*, LIBR. CONG., https://www.loc.gov/ghe/cascade/index.html?appid=90dcc35abb714a24914c68c9654adb67

C. *Surveillance, Subversion, and Investigation*

In many of these efforts to squash queer society, state authorities set out to catalogue, count, and identify queer communities and individuals by gathering extensive data about them. This information was then leveraged to suppress their political voices. This section discusses how state investigations and data gathering tools have been used to chill the ability of queer people to build community and "join with others to further shared goals."[242]

In 1910, Chicago's Vice Commission launched a large-scale effort to gather data on homosexuals and identify individual members of the city's queer society.[243] This investigation involved a special agent hired to surveil the gay community and infiltrate gay spaces by adopting known behaviors and language used as signals by gay men to identify each other during this era.[244] This episode reflects one of the earliest examples of entrapment and targeting of queer people by government officials and the investment of significant government resources to gather data on queer society.[245]

In 1918, the U.S. Army collaborated with the public morals squad of the San Francisco Police Department to raid a gay sex club.[246] The Army set up a sting operation and, over a ten-day period, detained anyone who entered the club, extracted confessions from them, and forced them to name other homosexuals who were subsequently rounded up and interrogated.[247] Of the thirty-one arrested, two were San Francisco police officers.[248] Many of those arrested went to jail and two died by suicide.[249]

In 1924, Henry Gerber founded the first organization in the United States dedicated to education about homosexuality: the Society for Human Rights in Chicago ("the Society").[250] The Chicago police subsequently raided the Society without a warrant, seized all of the Society's records, and arrested Gerber and

[https://perma.cc/7RMF-6K6B (staff-uploaded archive)] ("On June 28, 1970, on the one year anniversary of the Stonewall Uprising, the first Pride marches were held in New York, Los Angeles and Chicago.").

242. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

243. Through their own investigation, the city estimated that more than 20,000 gay men were actively participating in the city's queer society. Sprague, *supra* note 165, at 28–29.

244. *Id.* Wearing a red tie was a common signal at the time to signal gay identity. *Id.*

245. *See id.*

246. Eskridge, *supra* note 17, at 1082.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* It is worth noting that Henry Gerber did not often frequent venues like bars because "[h]e was too sober-minded and practical." JIM ELLEDGE, AN ANGEL IN SODOM: HENRY GERBER AND THE BIRTH OF THE GAY RIGHTS MOVEMENT 36–37 (2023). Nevertheless, at the time of the Society's founding, Chicago was in fact "a haven for queer people" due to the "bohemians" moving to the area and the "literary and artistic upsurge" occurring there. *Id.* at 34. Scanned images of the original 1924 corporate charter for the Society of Human Rights have been preserved by Jonathan Katz in GAY AMERICAN HISTORY, *supra* note 160, at 386–87.

two others.[251] After the raid, Henry Gerber was fired from his job at the U.S. Post Office.[252]

The most famous government effort to identify homosexuals through data gathering was led by Congressman Joseph McCarthy and U.S. President Dwight D. Eisenhower in what is now colloquially known as the "Lavender Scare."[253] In 1953, President Eisenhower signed an executive order that would kickstart decades of abuse toward America's queer citizens.[254] Congressman McCarthy led the government-wide effort to expel gay public servants from their jobs and destroy their families.[255] President Eisenhower equated homosexuals to those who engage in "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct," and ordered them expelled from the government.[256] Over the next thirty years, this program would evict thousands of innocent queer people from their government jobs, publicly humiliating them in the process.[257] This vigorous campaign to oust gay people from their employment extended into the private sector as well, with an explicit requirement that federal contractors fire any queer people they employed.[258] Many private employers chose to mirror these federal government employment policies.[259]

This period saw a massive expansion in the use of subversive methods to surveil the queer community.[260] The FBI, under the leadership of J. Edgar Hoover,[261] collected data on queer communities on an unprecedented scale.[262]

251. Eskridge, *supra* note 17, at 1082.

252. *Id.*

253. Suyin Haynes & Arpita Aneja, *You've Probably Heard of the Red Scare, but the Lesser-Known, Anti-gay 'Lavender Scare' Is Rarely Taught in Schools*, TIME (Dec. 22, 2020, 9:11 AM), https://time.com/5922679/lavender-scare-history/ [https://perma.cc/6R4T-QSTY (dark archive)].

254. Executive Order 10450 made eligibility for employment with a government agency dependent on subjecting oneself to investigation to identify and root out specific unsuitable employees so they could be fired, including homosexuals. *See* Exec. Order No. 10450, 18 Fed. Reg. 2489, 2490–92 (Apr. 27, 1953); *see also* Haynes & Aneja, *supra* note 253. President Eisenhower, through this executive order, categorized homosexuals (or in the words of the order, those with "sexual perversion[s]") the same as people who participate in "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct" as well as drug addictions. *See* Exec. Order No. 10450, 18 Fed. Reg. 2489, 2491 (Apr. 27, 1953).

255. Haynes & Aneja, *supra* note 253.

256. Exec. Order No. 10450, 18 Fed. Reg. 2489, 2491 (Apr. 27, 1953).

257. Haynes & Aneja, *supra* note 253. In 1980, Jamie Shoemaker was fired from his job at the National Security Agency for "leading a gay lifestyle." *Id.*

258. Brief of Professors of History, *supra* note 221, at 2.

259. *Id.* "Other private industries adopted the policies of the federal government . . . even though they had no direct federal contracts." *Id.* at 17 (quoting David Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, WASH. HIST., Fall/Winter 1994–1995, at 45, 53).

260. *Id.* at 13.

261. *See J. Edgar Hoover, May 10, 1924 - May 2, 1972*, FBI, https://www.fbi.gov/history/directors/j-edgar-hoover [https://perma.cc/29FV-2W35].

262. D'EMILIO, *supra* note 227, at 46–47; *see also* Brief of Professors of History, *supra* note 221, at 17.

Particularly concerning was their collaboration with local vice squad officers who turned over scores of data on homosexuals around the country, including arrest records.[263] They also deployed local FBI agents to "gather[] data on gay bars, compile[] lists of other places frequented by homosexuals," and gather information on homosexuals from local press coverage.[264] In a particularly egregious invasion of privacy, the U.S. Postal Service also engaged in this effort; as documented by the American Civil Liberties Union, Postal Service employees surveilled the mail for homosexual material and reported individuals receiving such materials to their employers for termination.[265]

In 1955, this "hysteria" got out of hand in Boise, Idaho.[266] Following three early arrests of homosexuals, the city quickly found itself in a moral panic, seeking to remove all homosexuals from the city.[267] Local authorities questioned more than 1,400 people over fourteen months.[268] Although only sixteen men would be charged with crimes,[269] the aggressiveness of the city's leadership and law enforcement nonetheless ruined many lives.[270] One future West Point cadet who was questioned later died by suicide in a local hotel.[271]

In Florida, a similarly aggressive search for homosexuals caused scores of accused homosexuals to be fired from state universities and public schools.[272] At the University of Florida alone, fourteen employees were fired, more than 320 were interrogated,[273] and "countless others" were pressured into resigning.[274] Additionally, "many students [were] quietly removed from state universities."[275]

263. Brief of Professors of History, *supra* note 221, at 17.

264. *Id.*

265. *See generally* Letter from Spencer Coxe, Exec. Dir., Greater Phila. Ch. of ACLU, to Alan Reitman, Assoc. Dir., ACLU (Aug. 5, 1965) (on file with the North Carolina Law Review); Letter from Alan Reitman, Assoc. Dir., ACLU, to Affiliates, ACLU (Sept. 1, 1965) (on file with the North Carolina Law Review); Letter from Ernest Mazey, Exec. Dir., ACLU of Mich., to Alan Reitman, Assoc. Dir., ACLU (Sept. 10, 1965) (on file with the North Carolina Law Review); Letter from Sanford Jay Rosen, Assistant Professor, Univ. of Md. Sch. of L., to Alan Reitman, Assoc. Dir., ACLU (Sept. 23, 1965) (on file with the North Carolina Law Review); Post Office: Seizure of Private Obscene Mail (1965) (ACLU Records, Princeton Univ.) (research database identifying information includes Box 793 Folder 25 Item 285, GALE|OWAWQJ209735218) (compiling the above cited letters between ACLU affiliates regarding the Post Office surveilling suspected gay people's mail); *see also* D'EMILIO, *supra* note 227, at 47 n.13.

266. Brief of Professors of History, *supra* note 221, at 19.

267. Bill Dentzer, *How Did 1955 Boys of Boise Scandal Affect the City and Idaho*, IDAHO STATESMAN (Oct. 30, 2015, 6:52 PM), https://www.idahostatesman.com/news/local/article41367867.html [https://perma.cc/D2QH-YX4U (staff-uploaded, dark archive)].

268. *Id.*; Brief of Professors of History, *supra* note 221, at 19.

269. Dentzer, *supra* note 267.

270. *Id.*

271. *Id.*

272. Brief of Professors of History, *supra* note 221, at 19.

273. *Id.*

274. *Id.* at 19–20 (quoting Stacy Braukman, *"Nothing Else Matters but Sex": Cold War Narratives of Deviance and the Search for Lesbian Teachers in Florida, 1959–1963*, 27 FEMINIST STUD. 553, 555 (2001)).

275. *Id.* (quoting Braukman, *supra* note 274, at 555).

One particularly cruel abuse of authority saw twenty-nine gay men arrested at the order of the mayor of Sioux Falls, South Dakota, and committed to asylums.[276] They were never charged with any crimes.[277]

In the 1970s, hit singer Anita Bryant led a series of campaigns to reverse progress made on gay rights in the United States.[278] Over several years, she worked to overturn the few laws that protected gay people from discrimination, predominantly municipal ordinances.[279] She was fairly successful until 1978, when she led the Briggs Initiative in California which would have prohibited any public-school employee from supporting homosexuality.[280] The campaign sought to "mandate[] the firing of any gay or lesbian teacher in California public schools" and "any teacher who supported gay rights."[281] The initiative failed.[282]

D. *Early Court Cases Pushed Back*

As queer activists fought back against the restrictive and oppressive laws and attacks of the post-war era, lawyers fought to enshrine the progress these activists were making into law. These legal efforts would secure critical decisions that began to protect the ability of queer people to communicate, form communities with cognizable political interests, and push back against restrictive laws.[283] Attorneys wielded free speech arguments to push back against obscenity laws restricting queer publishing. *One, Inc. v. Olesen*[284] and

276. D'EMILIO, *supra* note 227, at 50–51.

277. *Id.*

278. *See* Gillian Frank, *"The Civil Rights of Parents": Race and Conservative Politics in Anita Bryant's Campaign Against Gay Rights in 1970s Florida*, 22 J. HIST. SEXUALITY 126, 128 (2013) ("Anita Bryant and the organization to combat gay rights that she represented, called Save Our Children (SOC), are infamous as catalysts for the backlash against gay rights in the 1970s . . . ."). *See generally* ANITA BRYANT & BOB GREEN, AT ANY COST (1978) (describing the lives of Anita Bryant and Bob Green and explaining "their side of the story" as an outspoken activist pair); ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY (1977) (recounting her time campaigning as an Evangelical Christian against gay rights, specifically against an ordinance in Florida).

279. *See generally* BRYANT & GREEN, AT ANY COST, *supra* note 278 (describing the lives of Anita Bryant and Bob Green and explaining "their side of the story" as an outspoken antigay activist pair); BRYANT, THE ANITA BRYANT STORY, *supra* note 278 (recounting her time campaigning as an Evangelical Christian against gay rights, specifically a gay rights ordinance in Florida).

280. Trudy Ring, *The Briggs Initiative: Remembering a Crucial Moment in Gay History*, ADVOCATE (Aug. 31, 2018, 4:21 AM), https://www.advocate.com/politics/2018/8/31/briggs-initiative-remembering-crucial-moment-gay-history [https://perma.cc/SHT4-KCFV].

281. *Id.*

282. *Id.*

283. *See* BALL, THE FIRST AMENDMENT, *supra* note 13, at 59, 62–65 (describing legal efforts to overturn laws restricting queer access to commercial liquor establishments).

284. 355 U.S. 371 (1958) (per curiam) (reversing a Ninth Circuit decision that enjoined the postmaster from mailing a magazine published to promote public knowledge and understanding of homosexuality); *see also* One, Inc. v. Olesen, 241 F.2d 772, 777–78 (9th Cir. 1957), *rev'd*, One, Inc. v. Olesen, 355 U.S. 371 (1958) (per curiam).

Manual Enterprises, Inc. v. Day[285] ensured that queer magazines and newspapers could continue to distribute important community information, including critical political information, to their subscribers and the public.[286]

Lawyers turned their attention to securing the rights of queer people to congregate in public and to protecting queer public community spaces.[287] Bar owners in the 1940s who organized to fight these oppressive laws lost uniformly; however, their efforts set the stage for lawsuits in the following decades that would begin to find success.[288]

In 1951, the Black Cat Restaurant in San Francisco saw a major legal victory for the rights of queer people to congregate.[289] The restaurant and its owner, Sal Stoumen, were brought before the California State Board of Equalization and charged with "permit[ing] [the] premises to be used as a disorderly house for purposes injurious to public morals."[290] Specifically, in determining that Stoumen operated a "disorderly house" and suspending his liquor license, the Board found as fact that "persons of known homosexual tendencies patronized said premises and used said premises as a meeting place."[291] Reversing the decision of the Board of Equalization, the California Supreme Court noted in *Stoumen v. Reilly*[292] that proof showing any specific homosexual conduct occurred at the bar was absent from the findings of fact; the only evidence of homosexuality included testimony from police officers that patrons at the bar were known to be homosexual and arrest records of individuals at the bar for "homosexual actions" for which they were not convicted.[293] In its reversal of the ruling of the Board of Equalization, the *Stoumen* court drew analogies to cases holding that prostitutes have the right to dine in restaurants.[294] The opinion highlighted that both homosexuals and prostitutes are human beings and merely patronizing a restaurant or using a bar

285. 370 U.S. 478 (1962) (holding three magazines catering to homosexuals could be sent through the mail because they were not obscene).

286. BALL, THE FIRST AMENDMENT, *supra* note 13, at 41–42.

287. *See id.* at 59.

288. *See id.* at 62.

289. *See* Stoumen v. Reilly, 234 P.2d 969, 972 (Cal. 1951).

290. *Id.* at 970. "At the license revocation hearing, . . . Stoumen[] described the Black Cat as 'one of the few remaining colorful Bohemian traditions in the City of San Francisco.'" Joan W. Howarth, *First and Last Chance: Looking for Lesbians in Fifties Bar Cases*, 5 S. CAL. REV. L. & WOMEN'S STUD. 153, 154 (1995) (quoting Clerk's Transcript at 6, *Stoumen*, 234 P.2d 969 (Cal. 1951) (No. S.F. 18310) (Clerk's Transcript available at [https://perma.cc/8HT5-UTSV (staff-uploaded archive)]; Reporter's Transcript available at [https://perma.cc/AJN5-4VDJ (staff-uploaded archive)]).

291. *Stoumen*, 234 P.2d at 970. This finding was based on testimony provided by San Francisco Police Inspector Frank Murphy "that it was '[at least] 50 percent homos going in there.'" Howarth, *supra* note 290, at 155 (quoting Respondent's Brief at 19, *Stoumen*, 234 P.2d 969 (Cal. 1951) (No. S.F. 18310) (unable to independently verify quote)).

292. 234 P.2d 969 (Cal. 1951).

293. *Id.* at 970–71.

294. *Id.* at 971 (citing *In re* Farley, 111 N.E. 479 (1916)).

for a "meeting place" was not enough to violate the law, as long as the illegal or immoral acts were not occurring on the premises.[295] This case was especially significant for queer associational rights because it was the first case to hold that queer people had a fundamental right to meet in public;[296] it held that queer people, as human beings,[297] have a right to "habitual or regular meetings . . . for purely social and harmless purposes, such as the consumption of food and drink."[298] For the first time, bars and restaurants in California could no longer be shut down just for permitting the mere presence of homosexuals.[299] However, this victory was short lived. In 1955, the legislature amended the law to prevent any liquor licensee from "operating 'a resort for . . . sexual perverts,'"[300] which was then used to exclude homosexuals once again.[301]

Stoumen, described as the "first successful American 'gay rights' case,"[302] also marked the beginning of the shift in approach of the homophobic state from targeting enforcement and harassment based on gay *status* to enforcement and harassment based on gay *conduct*.[303] During this period, the language used to describe queer people would, as Professor Joan Howarth chronicled, also shift from describing queer people as "human beings" deserving of fair treatment and equal rights to "sexual perverts" deserving of fewer inherent rights.[304] Professor Howarth describes the advancement of some marks of progress as "also sobering because it tracks legal repression becoming worse, not better, over time."[305]

For example, California's ban on "sexual perverts,"[306] enacted in response to the *Stoumen* case, did not actually change the language in order to address conduct. Instead, the ban merely changed the language used to criminalize homosexual status, referring to homosexuals as "sexual perverts" as though

295. *Id.*

296. Howarth, *supra* note 290, at 154; BALL, THE FIRST AMENDMENT, *supra* note 13, at 63.

297. Howarth, *supra* note 290, at 154.

298. *Stoumen*, 234 P.2d at 971.

299. BALL, THE FIRST AMENDMENT, *supra* note 13, at 63.

300. Howarth, *supra* note 290, at 157 (quoting CAL. BUS. & PROF. CODE § 24200(e) (West 1955) (subsequently amended in 1963)).

301. For a collection of caselaw litigating enforcement of this statute, see Cain, *supra* note 20, at 1569 n.113.

302. Cain, *supra* note 20, at 1567; *see also, e.g.*, Howarth, *supra* note 290, at 155.

303. This distinction of gay conduct was a legal concept that was effective for opponents of LGBT rights in the decades that followed to distinguish unconstitutionally targeting homosexuals for simply existing from constitutionally targeting them for acting on their homosexuality. *See* Cain, *supra* note 20, *passim*. The U.S. Supreme Court would later use this distinction to uphold outright bans on homosexual sex. *See* Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

304. Howarth, *supra* note 290, at 154.

305. *Id.*

306. CAL. BUS. & PROF. CODE § 24200(e) (West 1955).

being a "sexual pervert" was somehow *conduct*.[307] But nothing had changed; being homosexual was still a status offense, one merely masquerading as conduct.[308] This status definition was enforced against homosexuals between 1955 and 1959.[309]

Kershaw v. Department of Alcoholic Beverage Control of California,[310] a California District Court of Appeal case, cleared the way for widespread enforcement of this statute against homosexuals.[311] Relying on *Roth v. United States*,[312] the *Kershaw* court held that the 1955 statute was not ambiguous,[313] and that therefore the "homosexual *activity*" engaged in by the bar patrons was within the scope of the "sexual pervert" definition in the statute,[314] behavior that permitted revocation of the bar's liquor license.[315]

As *Kershaw* made clear, "sexual perverts" was just another term for homosexuals; the court explained that "'sex pervert' ha[s] a core . . . meaning to the average person. Homosexual activity, to the extent indicated by the patrons of the licensee's bar, is within the general meaning of sexual perversion."[316] The court left unanswered the question of whether the mere presence of such "sexual perverts" was enough to violate the new law, addressing only the facts of the

307. *See* Cain, *supra* note 20, *passim*. The first execution of a queer person in the United States was due to accused queer identity, not conduct: Richard Corning was executed for allegedly making a pass at someone and consequently revealing his queer identity. *See* MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, *supra* note 160, at 42, 78.

308. Critically, this change in the underlying statutory language was one of semantics: prohibiting a licensee from allowing "sexual perverts" to meet and gather in their venue is the same type of behavior the California Supreme Court protected in *Stoumen*. *See* Stoumen v. Reilly, 234 P.2d 969, 716–17 (Cal. 1951). California's new statute merely selected a more hostile vocabulary to impose a similar status-based ban as the one addressed in *Stoumen*. *Id.* Indeed, this distinction was recognized by a California District Court of Appeal in 1957 when it first interpreted the statute, recognizing that the legislature must have meant to focus on *conduct* as a sexual pervert, not status, and upholding the statute on the grounds that the legislature intended to pass a constitutional statute and therefore intended to prohibit homosexual *conduct*. *See* Kershaw v. Dep't of Alcoholic Beverage Control, 318 P.2d 494, 496–98 (Cal. Dist. Ct. App. 1957).

309. *See, e.g.*, Nickola v. Munro, 328 P.2d 271, 273, 276 (Cal. Dist. Ct. App. 1958) (upholding a decision revoking the liquor license of an establishment, in part, for violating CAL. BUS. & PROF. CODE § 24200(e) after testimony from the sheriff that "the tavern had a general reputation in the county as a place where homosexuals were gathering for dancing and entertainment, and as a place catering to sexual perverts").

310. 318 P.2d 494 (Cal. Dist. Ct. App. 1957).

311. *See id.* at 496–98.

312. 354 U.S. 476 (1957).

313. *Kershaw*, 318 P.2d at 497 ("These words, applied according to the proper standard for judging obscenity . . . give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . .'" (alteration in original) (quoting Roth v. United States, 354 U.S. 476, 491 (1957))).

314. *See id.* at 498.

315. *Id.*

316. *Id.*

case that involved specific "homosexual activity" present in the bar.[317] The state liquor authorities continued to enforce this effective status ban against homosexuals.[318]

Finally, in 1959 in *Vallerga v. Department of Alcoholic Beverage Control*,[319] the California Supreme Court held the status-based language in the 1955 statute unconstitutional, declaring that "something more must be shown than that many of his patrons were homosexuals and that they used [the] bar as a meeting place."[320] While the facts presented in *Vallerga* still evidenced homosexual "conduct" in the bar, the lower court relied solely on the *presence* of homosexuals in the bar, and not on the evidenced conduct, in its decision to revoke the license.[321] The case therefore left conduct by homosexuals in the same legal position as before the ruling. In describing why homosexual *conduct* was different from homosexual *status*, the *Vallerga* court clarified that when defining conduct that could be found "contrary to public welfare or morals," homosexuals would not "be held to a higher degree of moral conduct than are heterosexuals."[322] *Vallerga*, in theory, if not in reality, equalized the moral status of homosexual conduct with heterosexual conduct under the liquor laws of California by clarifying that "any public display which manifests sexual desires, whether they be heterosexual or homosexual in nature may, and historically have been, suppressed and regulated in a moral society."[323]

Over the next decade, several other states also held that homosexual status could not be criminalized.[324] New Jersey notably became the first state to rely on binding precedent from the U.S. Supreme Court to protect homosexuals against status-based laws. Expanding on *Robinson v. California*,[325] which held that status crimes could not be criminalized,[326] the New Jersey Supreme Court in *One Eleven Wines and Liquors, Inc. v. Division of Alcoholic Beverage Control*[327] ruled that *Robinson* protected against the criminalization of one's status as a

317. *See id.* ("It is not necessary, under the circumstances of this case . . . [to address whether it] prohibited any liquor licensee from suffering any portion of the premises to be patronized by sex perverts no matter how orderly their conduct or circumspect their behavior while in attendance.").

318. Nickola v. Munro, 328 P.2d 271, 273, 276 (Cal. Dist. Ct. App. 1958).

319. 347 P.2d 909 (Cal. 1959) (en banc).

320. *Id.* at 912, 914.

321. *See id.* at 912–13.

322. *Id.* at 912.

323. *Id.*

324. *See* Kerma Rest. Corp. v. State Liquor Auth., 233 N.E.2d 833, 834–35 (N.Y. 1967); *see also* Cain, *supra* note 20, at 1571; Chipman Assocs., Inc. v. N.Y. State Liquor Auth., 363 N.Y.S.2d 162, 164 (N.Y. App. Div. 1975); Becker v. N.Y. State Liquor Auth., 234 N.E.2d 443, 444–45 (N.Y. 1967).

325. 370 U.S. 660 (1962).

326. *Id.* at 667.

327. 235 A.2d 12 (N.J. 1967).

homosexual.[328] Other states, however, continued to aggressively strengthen laws that targeted homosexuals for status alone,[329] potentially contradicting *Robinson*.

Six years after *Robinson*, the U.S. Supreme Court refused to hear[330] a case from Florida upholding an extreme local ordinance that prohibited any "known homosexual" from employment in a liquor venue, from purchasing liquor from any liquor venue, and from even allowing "two or more homosexuals to congregate on the premises" at the same time.[331] This Florida law explicitly prohibited queer people from meeting each other in public in liquor establishments at all, and they could not purchase any alcohol regardless of what type of company they were with, even if they were alone.[332]

It was not only high state courts that would move to protect the rights of queer people. The 1970s and 1980s saw efforts by municipalities to write the first LGBT nondiscrimination ordinances to protect access to public spaces, including Raleigh, North Carolina.[333] This period saw the first jury verdict upholding such protections.[334] In February of 1978, four Austin, Texas, college students heard that the Driskill Hotel's Cabaret Bar was violating the city's public accommodations ordinance and set up a sting operation.[335] Accompanied by a city attorney and a member of the city's Human Rights Commission as witnesses,[336] the four students broke the cabaret's rule against same-sex dancing

328. *Id.* at 18.

329. Cain, *supra* note 20, at 1571–72.

330. Inman v. City of Miami, 389 U.S. 1048 (1968) (mem.) (denying petition for a writ of certiorari requesting that the Court consider an appeal from *Inman v. City of Miami*, 197 So. 2d 50 (Fla. Dist. Ct. App. 1967)).

331. Cain, *supra* note 20, at 1572; *see also Inman*, 197 So. 2d at 51, *cert. denied*, 201 So. 2d 895 (Fla. Dist. Ct. App. 1967), *cert. denied*, 389 U.S. 1048 (1968).

332. *See Inman*, 197 So. 2d at 51.

333. Raleigh, North Carolina, passed such an ordinance in 1988. *Gays Win Protection in Raleigh, N.C.*, ADVOCATE, Mar. 1, 1988, at 10–11.

334. *Gay Victory in Court: Verdict Against Driskill*, GAY AUSTIN, Summer 1979, at 1 ("The municipal court jury composed of three women and three men took less than half an hour to reach its verdict that the disco's house rule against same-sex dancing violates the 'public accommodations' ordinance."); *see* CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 10 (Michael Bronski ed., Beacon Press 2010) [hereinafter BALL, FROM THE CLOSET].

335. BALL, FROM THE CLOSET, *supra* note 334, at 5.

336. Human rights or human relations commissions are a common municipal structure for the enforcement of municipal code. *See, e.g.*, *Human Rights Commission*, CITY GREENSBORO, https://www.greensboro-nc.gov/departments/human-rights/commissions-committees-and-taskforces/human-rights-commission [https://perma.cc/GP3N-FNHQ]; *Human Relations Commission*, CITY RALEIGH, https://raleighnc.gov/equity-and-inclusion/human-relations-commission [https://perma.cc/S6BQ-XQMW]; *Human Relations Council*, CITY GREENVILLE, https://www.greenvillenc.gov/government/city-council/boards-and-commissions/human-relations-council [https://perma.cc/BVF5-CHTT]; *Human Relations Commission Meeting*, CITY LEXINGTON, https://www.lexingtonnc.gov/Home/Components/Calendar/Event/11964/ [https://perma.cc/6RRQ-ZH2Y].

and were escorted out of the building.[337] The students brought the case to the city's Human Rights Commission and, knowing they were guilty and impending a loss, the Driskill Hotel sued the city.[338] The case was set for trial and would become one of the few times that juries would weigh in on basic queer human rights during the early decades of queer legal victories.[339] The jury found for the dancing couples and upheld the municipal nondiscrimination ordinance.[340]

As this part has demonstrated, gathering in queer bars formed the foundations of community building and led to the development of early queer advocacy interests. One of the earliest collective advocacy interests was the fight to maintain access to the very spaces that had enabled those community advocacy interests to develop in the first place.

IV. FREEDOM OF ASSOCIATION AFTER *AMERICANS FOR PROSPERITY*

Considered through the lens of the queer history reviewed in Part III, commercial venues that provide gathering space for queer people are, undoubtedly, important places where queer people engage in protected First Amendment activities.[341] Yet, as explained previously, these spaces themselves are not protected by an overarching federal principle.[342] The First Amendment presents a compelling possibility for protecting these activities permanently under well-grounded law. Potentially expanded freedom of association protections may offer a new tool to do so, by shielding queer people from the chilling effects of disclosure requirements that reveal their identities to the government.

As enforcement mechanisms for drag bans are considered in various states, disclosure requirements placed on venues hosting drag shows could trigger freedom of association concerns. As history has shown, required disclosure of queer identities to law enforcement would create a "constant and heavy"[343]

337. BALL, FROM THE CLOSET, *supra* note 334, at 5.

338. *Id.* at 5–6.

339. Selecting an unbiased jury proved difficult for Judge Steve Russell; in an initial poll of the jury, many jurors indicated they would find it "difficult to be impartial in a case that involved homosexuality." *Id.* at 9. One juror, when asked whether he would be able to fairly apply a law requiring homosexuals to be served similarly to laws protecting Black patrons, replied, "That's different. Blacks are human beings." *Id.* (quoting Opinion and Order at 548, State v. Driskill Bar & Grill, Nos. 739,130 & 739,131 (Austin, Texas, Mun. Ct. Apr. 16, 1980) (Order available at [https://perma.cc/H5SH-EMN3 (staff-uploaded archive)]).

340. Opinion and Order, *supra* note 339, at 537; BALL, FROM THE CLOSET, *supra* note 334, at 10.

341. *See infra* Sections III.A–C.

342. *See infra* Section III.D.

343. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2395 (2021) (quoting Shelton v. Tucker, 364 U.S. 479, 486 (1960)).

reason for queer people to avoid such disclosures and could cause significant "risk of a chilling effect" on the associations formed in those spaces.[344]

While these queer gathering spaces are important places for the associational rights of queer people, they are not themselves *associations*. Associations are the connections that flow from these spaces, and so the Supreme Court's previous standard for freedom of association cases could not have reached them. Yet, that might be possible under the approach the Court took in *Americans for Prosperity*, which considers the characteristics of the disclosure requirement itself when there is a "risk of a chilling effect on association."[345]

Section IV.A explains how this new approach articulated by the Court creates a pathway for freedom of association claims when plaintiffs cannot show actual harms to an existing association. When associational interests are burdened by imposing "risk of a chilling effect" on their *formation*, the government would then be required to show that the disclosure requirement is substantially related to an important governmental interest and "sufficiently narrowly tailored to the interest it promotes."[346] In this way, cases in which chill is imposed on stages of the associational process that occur *before* association forms can now argue that a disclosure requirement is unconstitutional when it does not meet the "substantial relation" and "narrow tailoring" requirements.

Section IV.B explains how other areas of First Amendment law lend support to this doctrinal shift toward protecting preassociational activities. Free speech safeguards have long protected against chill imposed on activity that occurs before speech,[347] such as requiring permits or preclearance of speech.[348] Prespeech protections have also protected the anonymity of speakers whose identities could be disclosed by certain restrictions on speech before it occurs,[349] a concept closely related to the anonymity at the heart of association protections.[350] Further, a growing area of scholarship and judicial opinion argues that association stems from the language in the First Amendment providing the "right of the people peaceably to assemble." This potential return to assembly

344. *See infra* Sections III.B–C.

345. *Ams. for Prosperity*, 141 S. Ct. at 2389.

346. *See supra* notes 141–44 and accompanying text; *infra* notes 362–64 and accompanying text.

347. The Supreme Court has long been concerned with the chilling effect that government actions could have on speech; in the landmark decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court declared that "debate on public issues should be uninhibited, robust, and wide-open" and set a high bar for public officials to recover damages for libel to protect against the potential chilling effect it could have on public debate. *See id.* at 270, 283.

348. *See infra* notes 399–403 and accompanying text.

349. *See infra* notes 404–11 and accompanying text.

350. *Ams. for Prosperity*, 141 S. Ct. at 2389 (recognizing "the vital relationship between freedom to associate and privacy in one's associations." (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958))).

is supported by Justice Thomas,[351] religious liberty advocates,[352] and law professors.[353]

Section IV.C addresses questions raised by this expanded interpretation of freedom of association protections, broadly, and as-applied to queer venues.

A. *Expansion of Freedom of Association After* Americans for Prosperity

The Court's decision in *Americans for Prosperity* established a new approach, which may allow claims to be brought to protect the stages of association that occur *before* association has formed. This is now possible because the Court has changed the required threshold showing for a case to proceed. Now, the "risk of a chilling effect on association is enough" when it hinders the "ability to join with others to further shared goals."[354] Under this interpretation, cases with no formed association could potentially meet that standard and proceed to an analysis of the disclosure requirement itself.

The Court concluded *Americans for Prosperity* by introducing two new phrases into associational protections, underscoring that this new interpretation is needed. First, the Court explained that "the protections of the First Amendment are triggered *not only* by actual restrictions on an individual's *ability to join with others* to further shared goals."[355] By including the phrase "ability *to join* with others" in the final, overarching description of the holding, the Court articulated that it covers not only *existing* associations—ones that have already been joined—but also protects ones that have not yet been joined.[356] Then, in the next sentence, the Court stated that the "risk of a chilling effect on association is enough,"[357] indicating that the new rule requires only a showing of *risk* that chill could occur. By prefacing this language with the words "not only by actual restrictions," the Court indicated that claimants no longer need to show actual harm to current members to trigger associational protections.

The previous standard started by analyzing first the association itself to see whether "concrete repercussions"[358] and "objective harms"[359] had been experienced by members of the association *due to the required disclosure* of such memberships.[360] This approach would have excluded queer venues from such

351. *See infra* note 413 and accompanying text.
352. *See infra* notes 414–22 and accompanying text.
353. *See infra* notes 423–29 and accompanying text.
354. *Ams. for Prosperity*, 141 S. Ct. at 2389.
355. *Id.* (emphasis added).
356. *Id.* (emphasis added).
357. *Id.*
358. *Id.* at 2394 (Sotomayor, J., dissenting).
359. *Id.* at 2392, 2394.
360. *See* Buckley v. Valeo, 424 U.S. 1, 74 (1976) (per curiam) (stating that "specific evidence of past or present harassment of members due to their associational ties" is an indicator that disclosure may cause harm).

protections because they provide merely the space where associational connections later form. Without such a *formed* association against which to measure the harms, the test would not allow preassociation claims to proceed to the means-end tailoring balancing test,[361] which weighed the government's interest against the burden imposed on associational rights.

The Court's standard in *Americans for Prosperity* changes this. If the threshold "risk of a chilling effect" on the "ability to join with others to further shared goals"[362] is met, then a case can proceed quickly to the analysis of the disclosure requirement itself, whether or not an association yet exists. As discussed in Part II, in analyzing the disclosure requirement, the Court now asks whether: (1) there exists "a substantial relation between the disclosure requirement and a sufficiently important governmental interest,"[363] and (2) "the disclosure requirement [is] narrowly tailored to the interest it promotes."[364]

By allowing claims to proceed to the analysis of the disclosure requirement without showing actual harms to an existing association, the Court has opened the door for claims that a disclosure requirement creates a "risk of a chilling effect"[365] on such associations by preventing them from *forming*. A potential queer plaintiff, bringing a claim that their freedom of association had been violated by a disclosure requirement, could make that claim by first showing that the disclosure requirement created a "risk of a chilling effect"[366] on their ability to *form* associational interests.

Queer venues, such as those hosting drag shows, proffered the earliest public spaces for queer people to congregate, and have served an essential community-forming role for more than 100 years, making them important places for the formation of associational interests.[367] As queer people presently organize to resist new suppression by the government, the connections that are formed in these spaces are essential to that political activity, and allow subsequent political associations to *form*. Just like neighborhood gatherings that lead to galvanized, local political resistance to a new zoning proposal, or carpool lines that allow parents to organize against a local school policy, queer venues allow queer people to identify like-minded people in their local communities and are an inherent part of *forming* useful political association.

As age-old tools used to prevent queer people from meeting in such queer venues[368] are revived in modern forms,[369] they will create a "risk of a chilling

361. *See supra* note 128 and accompanying text.
362. *Ams. for Prosperity*, 141 S. Ct. at 2389.
363. *Id.* at 2385 (quoting Doe v. Reed, 561 U.S. 186, 196 (2010)).
364. *Id.* (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
365. *Id.* at 2389.
366. *Id.*
367. *See supra* Section III.A.
368. *See supra* Section III.B.
369. *See supra* Part I.

effect on [the] association[s]"[370] formed in those venues. Disclosure of the identities of people who congregate in such spaces would potentially expose them to significant personal risks. This would result in *at least* a "chilling effect on association" and could even prevent associations from forming at all.

Once such a "risk of a chilling effect" has been established, queer preassociation plaintiffs would then have an opportunity to argue both prongs of the disclosure requirement analysis. First, they could argue that there is not "a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[371] A disclosure requirement could fail that prong in any number of ways. If a disclosure requirement implemented to enforce age requirements at drag shows were modeled off of the repealed North Carolina "private club" membership disclosure law,[372] the requirement that home addresses be disclosed would not bear a substantial relationship to the interest in enforcing the age restriction. If a requirement merely disclosed names and ages, it would bear a closer relationship to that government interest, but disclosing that information would not prove that no other attendees were present in the venue; it would only prove that no IDs had been scanned of anyone under the age restriction. To prove positively that no patrons had entered who were underage, a video of the front door for the full period of the venue's occupancy would be needed, a disclosure that would surely raise concerns beyond associational implications, and would also heavily discourage gathering.

Such a disclosure requirement could fail the narrow tailoring prong if the risks imposed by the disclosure, like in *Americans for Prosperity*, "'create[d] an unnecessary risk of chilling' in violation of the First Amendment . . . [by] indiscriminately sweeping up the information of every [patron] with reason to remain anonymous."[373] Disclosure requirements designed to enforce an age restriction at a drag show would be measured against other alternatives for achieving that interest. As the Court describes in *Americans for Prosperity*, invoking *Shelton*, "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."[374] The majority in *Americans for Prosperity* indicated that narrow tailoring is even harder to meet now than in *Shelton*, stating "a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are *unnecessary*."[375]

370. *Ams. for Prosperity*, 141 S. Ct. at 2389.

371. *Id.* at 2385.

372. *See supra* notes 81–89 and accompanying text.

373. *Ams. for Prosperity*, 141 S. Ct. at 2388 (quoting Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 968 (1984)).

374. *Id.* at 2388 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

375. *Id.* (emphasis added).

To the extent that other enforcement mechanisms were available to the state that rendered the chilling effect of a disclosure requirement sufficiently unnecessary, a disclosure requirement would not be considered narrowly tailored. Indeed, other mechanisms of enforcing age restrictions at bars are deployed all across the United States, without requiring bars to disclose patrons' personally identifying information.[376] One such mechanism used in North Carolina leverages decoy customers who are, or physically appear to be, under twenty-one years old to test that businesses are only selling alcohol to customers who meet the age requirements.[377] Such enforcement mechanisms often impose harsh penalties if violations are found, including revocation of alcohol permits.[378] This type of enforcement mechanism could be compared against a disclosure requirement to show that the burdens imposed by the disclosure requirement are unnecessary because the government's interest can be achieved in another way.

Under this interpretation of *Americans for Prosperity*, if disclosure requirements create a "risk of a chilling effect on association" plaintiffs will be able to proceed to the analysis of the disclosure requirement itself. Therefore, preassociation claims that were previously barred could now be protected by the freedom of association.

B. *Support from Other First Amendment Doctrines*

Protecting against chill imposed on the stages of association that occur before an association is formed would be a new concept to associational law. However, preactivity protections are not new to First Amendment doctrine itself, and are currently being expanded by circuit courts.[379] Protecting the *formation* of association—by increasing the government's burden when imposing disclosure requirements—would bring freedom of association

376. *See, e.g.*, *Popular South End Bar Facing Fine After Serving Underage Customers, Report Shows*, WSOCTV (Jan. 14, 2023, 12:42 PM), https://www.wsoctv.com/news/local/popular-south-end-bar-facing-fines-after-serving-underage-customers-report-shows/UBEJMOCMHVEWBNIQ5NGDB6VVXQ/ [https://perma.cc/Q59Y-RACR] (describing an undercover investigation resulting in a fine for serving alcohol to undercover agents).

377. *ABC11 Cameras Watch as Agents Send Minors into Stores for Booze During Crackdown in Cumberland County*, ABC11 (Feb. 7, 2019), https://abc11.com/abc-store-underage-drinking-cumberland-county-sting/5125744/ [https://perma.cc/W47S-AS6L].

378. *See, e.g.*, Blake Hodge, *He's Not Here Remains Open Under Agreement with ABC*, CHAPELBORO (Jan. 13, 2016), https://chapelboro.com/featured/hes-not-here-remains-open-under-agreement-with-abc [https://perma.cc/Y9YL-UFYK] (explaining a final compromise offer imposing a twenty-one-day alcohol license suspension on He's Not Here, a bar in Chapel Hill, North Carolina, after an investigation found repeat incidents of sales to underage customers, including one patron who later "drove the wrong way on I-85 for at least six miles, according to law enforcement, before crashing head-on into another vehicle[, in which t]hree of the four passengers in the second car, including a six-year-old girl, were killed").

379. *See infra* notes 392–93 and accompanying text.

protections closer to the standard required by other well-established doctrines that have long protected First Amendment activity before it occurs.[380] Association protections are unique in applying "exacting scrutiny"[381] and in the previously required threshold showing of actual harms to the members of an existing association before protections could be applied. In this light, it is logical that the Court would close the gap between freedom of association and other First Amendment rights.

This broader interpretation is supported in *Americans for Prosperity*, reviving language from *Baird v. State Bar of Arizona*[382]: "When it comes to 'a person's beliefs and associations,' '[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.'"[383] This expansive language, referring to broad constitutional rights, supports an interpretation that the majority is protecting the freedom of association under a standard more in line with free speech and freedom of assembly doctrines.

Free speech doctrine, in particular, provides extensive protections to speech before speech can occur. Courts across the country have invalidated many prespeech restrictions, with many of those decisions ultimately decided by the Supreme Court.[384] Freedom of assembly scholarship offers additional support for this broader interpretation, under the argument that assembly is the core origin of association and therefore core protections on freedom of assembly—which have not been frequently applied in the past sixty years[385]—ought to apply to freedom of association cases as well. Justice Thomas supported

380. *See infra* notes 396–411.

381. *See supra* note 128 and accompanying text.

382. 401 U.S. 1 (1970).

383. *Ams. for Prosperity*, 141 S. Ct. at 2384 (quoting *Baird*, 401 U.S. at 6).

384. *See infra* Section IV.B.1.

385. *See* John D. Inazu, *The Forgotten Right To Assemble*, 84 TULANE L. REV. 565, 610 (2010) ("[B]y the end of the 1960s, the right of assembly in law and politics was limited almost entirely to public gatherings like protests and demonstrations.").

this argument in his concurrence in *Americans for Prosperity*,[386] and the argument has also been advanced by religious liberty advocates[387] and law professors.[388]

Precedent from other First Amendment doctrines—including the closely related doctrines of free speech and assembly—protects the preactivity stages of First Amendment rights, providing additional support for an expanded interpretation of the freedom of association. By removing the language that would have required an association to prove that actual harms were experienced by its members before a claim could proceed, the Court has closed the gap between associational protections and these other well-established doctrines, creating more consistency among First Amendment protections.

1. Free Speech Protections

It is well established in free speech cases that restrictions imposed on speech before it occurs are precluded by the First Amendment. A multitude of different impositions placed on prespeech rights have been ruled unconstitutional.

As *Citizens United v. Federal Election Commission*[389] highlighted, "Laws enacted to control or suppress speech may operate at different points in the speech process."[390] This decision marked the beginning of a recent expansion of the stages of speech to which protections apply.[391] Since *Citizens United*,

386. *Ams. for Prosperity*, 141 S. Ct. at 2390 (Thomas, J., concurring in part) ("The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously.").

387. Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 2, *Ams. for Prosperity*, 141 S. Ct. 2373 (2021) (Nos. 19-251 & 19-255) [hereinafter Brief of the Becket Fund] ("By leaving free association to emanate from the penumbras of other constitutional rights, depending upon how 'expressive' it is, other vital aspects of association are left unprotected. Freedom of speech, freedom of religion, and freedom to petition the government can flourish only to the extent individuals can find an audience, co-believers, or a testing ground for new ideas. And that depends first upon the freedom to assemble, especially where new ideas or beliefs are countercultural or potentially disruptive.").

388. *See, e.g.*, JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 4 (2012) (hereinafter INAZU, LIBERTY'S REFUGE) ("The forgetting of assembly and the embrace of association . . . marked the loss of meaningful protections for . . . dissenting, political, and expressive group[s]."); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 (2009) (explaining the "political origins and functions of the right of assembly" in order to "rectify the errors and omissions in the current understanding of this important right"); Bhagwat, *supra* note 4, at 981 (explaining a theory of "associational speech" that would provide greater protection to associations under free speech doctrine because "one of the most important functions of free speech in our society, and in constitutional law, is to advance and protect the right of association," and such associational speech "is speech that is meant to induce others to associate with the speaker, to strengthen existing associational bonds among individuals including the speaker, or to communicate an association's views to outsiders (including government officials)").

389. 558 U.S. 310 (2010).

390. *See id.* at 336–37 (listing examples of unconstitutional "restrictions that have been attempted at different stages of the speech process").

391. *See infra* notes 392–93.

multiple circuit courts have applied this concept to include recording as a protected prespeech activity, primarily in the context of recording police officers,[392] but also in the context of other protected activities, such as newsgathering.[393] This concept builds on previous Supreme Court precedent, holding that "the creation and dissemination of information are speech within the meaning of the First Amendment."[394] The creation of such recordings—which could later be disseminated as speech—is now clearly included as a protected prespeech step.[395]

Another well-grounded prespeech protection precludes censorship of speech before it occurs, known as "prior restraint," which has been unconstitutional since *Near v. Minnesota*[396] in 1931.[397] Prior restraint doctrine has prevented the government from requiring a license to publish something, requiring preclearance of publication, and from seeking an injunction against speech before it occurred.[398]

392. *See, e.g.*, Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1228 (10th Cir. 2021) ("[U]nambiguously . . . Recording . . . is speech-creation and, consequently, is not mere conduct." (citing W. Watersheds Project v. Michael, 869 F.3d 1189, 1197 (10th Cir. 2017))); ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected."); Fields v. City of Phila., 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos, videos, and recordings . . . and for this protection to have meaning the Amendment must also protect the act of creating that material."); Irizarry v. Yehia, 38 F.4th 1282, 1295 (10th Cir. 2022) ("[The] right to film the police falls squarely within the First Amendment's core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power."); *W. Watersheds Project*, 869 F.3d at 1196 ("If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by 'simply proceed[ing] upstream and dam[ming] the source' of speech." (quoting Buehrle v. City of Key W., 813 F.3d 973, 977 (11th Cir. 2015))).

393. *See, e.g.*, People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc., 60 F.4th 815, 829 (4th Cir. 2023) ("If the First Amendment has any force, such 'creation' of information demands as much protection as its 'dissemination.'" (citing Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011))).

394. *Sorrell*, 564 U.S. at 570 ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment." (citations omitted)).

395. *See, e.g.*, *Alvarez*, 679 F.3d at 596 (rejecting the premise that the state can suppress speech by "restricting an early step in the speech process rather than the end result").

396. 238 U.S. 697 (1931).

397. *Id.* at 713–23.

398. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1034 (6th ed. 2019) ("While court injunctions stopping speech and licensing systems are classic forms of prior restraints, they are not the only types of government actions that constitute prior restraints."). "In practice, most prior restraints involve either an administrative rule requiring some form of license or permit before one may engage in expression, or a judicial order directing an individual not to engage in expression, on pain of contempt." *Id.* (quoting Rodney Smolla, *Smolla and Nimmer on Freedom of Speech* § 8:4 (1994)).

Many cases have invalidated municipal ordinances requiring permits to be sought before public speech could occur.[399] This has included permits for both public speeches[400] and for distributing pamphlets or canvassing door to door.[401] In *Thomas v. Collins*,[402] the Court drew connections between this aspect of free speech protections and free assembly: "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly."[403]

One of the concerns with permits is that requiring a permit removes the anonymity of the speaker,[404] a long protected concept in First Amendment doctrine for speech and assembly.[405] This anonymous aspect of free speech functions to protect the rights of speakers whose speech might be chilled if their identities were disclosed.[406] The concept that speech can be chilled by the disclosure of speakers' identities is similar to the chill experienced by members of associations when their identities are disclosed publicly, the foundational premise of the freedom of association cases. The Court reiterated the significance of anonymity in *Americans for Prosperity*, quoting from *Patterson*: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,"[407] and noting "the vital relationship between freedom to associate and privacy in one's associations."[408] In her dissent, Justice Sotomayor quoted *Patterson* to acknowledge this point as well: "[P]rivacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[409]

399. *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002).

400. Thomas v. Collins, 323 U.S. 516, 540 (1945).

401. *See, e.g.*, *Vill. of Stratton*, 536 U.S. at 165–66 ("It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.").

402. 323 U.S. 516 (1945).

403. *Id.* at 539.

404. *Vill. of Stratton*, 536 U.S. at 166 ("The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity.").

405. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995) ("The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."); *Vill. of Stratton*, 536 U.S. at 166.

406. *See Vill. of Stratton*, 536 U.S. at 166 n.14 (considering that individuals might be deterred from speaking if required "to forgo their right to speak anonymously").

407. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2382 (2021) (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958)).

408. *Id.* (quoting *Patterson*, 357 U.S. at 462).

409. *Id.* at 2393 (quoting *Patterson*, 357 U.S. at 462).

One concept from door-to-door petition cases that protected anonymous speech lends additional credibility to the notion that preassociation protections could apply to physical venues that cater to members of certain dissident groups. While door-to-door petitioners reveal part of their identities by physically appearing at the door, in *Buckley v. American Constitutional Law Foundation*,[410] the Court nonetheless protected their interest in anonymity by protecting their right not to disclose identifying information about themselves, such as their names.[411] Applying this holding to physical venues, patrons who attend venues in person may still be entitled to anonymity to the extent possible.

The close relationship of these underlying concepts connecting free speech and freedom of association lends credibility to the interpretation that the Court in *Americans for Prosperity* may have closed the gap between the two doctrines.

The right of free speech, closely intertwined with the right of association, is similarly linked with the right of assembly; as Professor Ashutosh Bhagwat explains, it is "hard to imagine how assemblies or associations can be created without speech."[412] This fundamental link between these doctrines suggests that similar standards should function to protect them.

2. Freedom of Assembly

As this section discusses, a growing body of scholarship supports the link between the freedom of association and the freedom of assembly and supports applying protections to the freedom of association that are similar to those that protect the freedom of assembly. Some have even argued that the freedom of association is rooted in the freedom of assembly, articulated explicitly in the text of the First Amendment, and that association therefore should be protected as a form of assembly. Justice Thomas invoked this argument in his dissent in *Americans for Prosperity*, asserting that the strict scrutiny standard required in freedom of assembly cases should apply to association because "[t]he text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously."[413]

410. 525 U.S. 182 (1999).

411. *Vill. of Stratton*, 536 U.S. at 167 (citing Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182 (1999)) ("The badge requirement that we invalidated in *Buckley* applied to petition circulators seeking signatures in face-to-face interactions. The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity.").

412. Bhagwat, *supra* note 4, at 998.

413. *Ams. for Prosperity*, 141 S. Ct. at 2390 (Thomas, J., concurring in part) (citing 4 Annals of Cong. 900–02, 941–42 (1795)) (defending the Democratic-Republican societies, many of which met in secret, as exercising individuals' "leave to assemble"); *see also* Brief of The Becket Fund, *supra* note 387, at 13–20.

Justice Thomas cited to an amicus filed in that case by the Becket Fund for Religious Liberty[414] that highlighted that point as well.[415] The cited amicus noted:

> At . . . critical moments [in American history], governments invoked law enforcement and public safety concerns as grounds to curtail free association . . . . The Assembly Clause's text, history, and tradition, however, already account for those concerns, while still ensuring a robust, principled protection for the freedom of assembly.[416]

In arguing for "[r]egrounding free association in the Assembly Clause"[417] to better protect groups that do not have an expressive purpose, including their formation, the Becket Fund argued that "doctrinal confusion" about freedom of association leaves many groups with important First Amendment interests unprotected by the freedom of association.[418] The Becket Fund highlighted, specifically, the example of an LGBTQ youth support center whose mission is one of *service* instead of political advocacy, yet whose donors might still fear reprisal if their identities were disclosed.[419] The brief raised an important point: such groups do "important and honorable work," yet, their nature as nonexpressive groups leaves them excluded from current association protections, but "assembly would not."[420] Further, the Becket Fund argued that this shift to protect association as assembly should be guided by "[t]he Court's treatment of religious assemblies"[421] because the interests of those groups also "depend[] first upon the freedom to assemble, especially where new ideas or beliefs are countercultural or potentially disruptive."[422]

Law professors have also argued for the return to a freedom of assembly model.[423] In his book, *Liberty's Refuge*, cited extensively in the Becket Fund's

414. The Becket Fund for Religious Liberty

> is a non-profit, nonpartisan law firm that protects the free expression of all religious faiths . . . . The Becket Fund frequently represents religious people who seek to vindicate their constitutional rights against government overreach, both as individuals and in community with others . . . . In particular, the Becket Fund has long sought to vindicate the rights of people of all faiths to assemble for worship.

Brief of the Becket Fund, *supra* note 387, at 1.

415. *Ams. for Prosperity*, 141 S. Ct. at 2390 (Thomas, J., concurring in part).

416. Brief of the Becket Fund, *supra* note 387, at 4.

417. *Id.*

418. *Id.* at 7–8.

419. *Id.* at 8.

420. *Id.*

421. *Id.* at 11.

422. *Id.* at 3.

423. *See, e.g.*, INAZU, LIBERTY'S REFUGE, *supra* note 388, at 4 ("The forgetting of assembly and the embrace of association . . . marked the loss of meaningful protections for . . . dissenting, political,

brief, Professor John Inazu outlines four principles underlying assembly protections: (1) protecting groups both advancing, and dissenting from, the common good, (2) protecting both religious and social groups, (3) protecting assembly from "restrictions imposed prior to an act of assembling . . . protect[ing] a group's autonomy, composition, and existence," and (4) protecting a group's expressive message.[424] Inazu chronicles a doctrinal shift over the past century, from relying on assembly to protect those goals, to relying on a bifurcated model of protecting some aspects under *speech* (for example, protesting and petitioning government) and other aspects under *association*.[425] Inazu articulates a doctrinal loss in this shift to association, explaining that "[t]he forgetting of assembly and the embrace of association . . . marked the loss of meaningful protections for . . . dissenting, political, and expressive group[s],"[426] particularly, a loss of protections for "formation" and "gathering" of these groups.[427] Professor Inazu's scholarship argues that a return to assembly would restore the strength of group protection under assembly, proposing a new defined right "*to form* and participate in peaceful, noncommercial groups," absent a "compelling reason for thinking that justifications for protecting assembly do not apply."[428]

Professor Tabatha Abu El-Haj has similarly chronicled the transition away from reliance on assembly protections and toward associational protections, through a slow and unnoticed narrowing of the protections afforded by assembly.[429]

The Court's continued application of the exacting scrutiny standard made clear that *Americans for Prosperity* was not decided under the freedom of assembly standard, which applies strict scrutiny and requires the government to select the least restrictive means possible. However, by pivoting to a lower threshold test—requiring the mere "risk of a chilling effect" on the "ability *to join with others*"[430]—and increasing the government's burden when it imposes a disclosure requirement, the Court appears to have closed the gap between the two standards.[431] This shift in the Court's protection of association is consistent

and expressive group[s]."); Abu El-Haj, *supra* note 388, at 547 (explaining the "political origins and functions of the right of assembly" in order to "rectify the errors and omissions in the current understanding of this important right").

424. INAZU, LIBERTY'S REFUGE, *supra* note 388, at 4.

425. *Id.* at 2.

426. *Id.* at 4.

427. *See id.*

428. *Id.* (emphasis added).

429. Abu El-Haj, *supra* note 388, at 543 ("[T]hrough the nineteenth century, the state could only interfere with gatherings that actually disturbed the public peace, whereas today the state typically regulates all public assemblies, including those that are both peaceful and not inconvenient, before they occur, through permit requirements.").

430. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

431. *See id.*

with other First Amendment doctrines and is logical under the Court's recent focus on providing greater protections for the privacy of groups.

C. *Concerns with Expanding Freedom of Association*

This proposed interpretation of freedom of association doctrine—protecting preassociation activity—may bring this doctrine more in line with other First Amendment doctrines, but it is not without implications and challenges. This section addresses several criticisms of this interpretation. First, while it may seem unlikely that the conservative-leaning courts would expand this interpretation to protect venues such as queer bars, applications of freedom of association that protect the privacy of political donors and religious liberties suggest that there may be overlapping interests that make this expansion more likely.

In addition, some would say that queer people also meet in other ways. This has certainly been true historically[432] and remains true now, as virtual space and social media are becoming increasingly important to queer gathering and associational interests.[433] However, the existence of other possible places in which First Amendment activity can occur does not prevent protections against chilling one particular form or location of the activity. In fact, the concept of preformation protections may apply to those virtual spaces as well.

This section also addresses two cases that might be interpreted to preclude protection of associational interests formed in queer venues. A Ninth Circuit case, *Ward v. Thompson*,[434] could be interpreted to preclude applying *Americans for Prosperity* to preassociational chill.[435] Separately, a U.S. Supreme Court case, *Dallas v. Stanglin*,[436] could be interpreted to exclude associations formed in dancehalls.

1. Overlapping Interests with Political and Religious Privacy

It may seem unlikely that conservative jurists would support this expanded application of the freedom of association to protect queer venues. Indeed, the flexibility of the "exacting scrutiny" standard makes it less likely. That flexibility would allow courts to uphold disclosure laws in some cases, finding that the burden was "necessary" and the governmental interest was "substantially related" to the disclosure, and to overturn disclosure laws in other cases, finding the burden "unnecessary" or the governmental interest not

432. *See infra* Section IV.C.2.
433. *See infra* Section IV.C.3.
434. No. 22-16473, 2022 WL 14955000 (9th Cir. Oct. 22, 2022).
435. *See id.* at *1.
436. 490 U.S. 19 (1989).

"substantially related" to the disclosure. It could be that this flexibility would result in inconsistent decisions.

However, other interests that are protected by applications of the freedom of association—including the privacy of political donors—suggest that overlapping interests make this expanded interpretation plausible, if not even likely. *Americans for Prosperity* marks a landmark decision in a nationwide effort by conservative actors to increase the privacy of political donations.[437] Additionally, efforts by conservative religious groups to increase protections for religious liberties and increase religious exemptions in many laws suggest religious organizations have a similar interest in expanded rights to privacy in group activity.[438]

These overlapping interests, at the center of several conservative causes, make it more likely that conservative courts would interpret *Americans for Prosperity* to expand the application of freedom of association protections to preassociational activity. However, the flexibility afforded in the exacting scrutiny standard makes it equally likely that courts might selectively apply associational protections to applications favorable to conservative causes, leaving equally important groups in a status-quo position with no protections on the formation of their associations.

2. Alternative Ways To Gather

Commercial venues are not the only spaces where queer people can gather, and they are not the only way that queer people identify each other.[439] This is particularly true in light of the increasing prevalence of social media, but it has

437. *See Ams. for Prosperity*, 141 S. Ct. at 2380; *see, e.g.*, Adam Liptak, *Supreme Court Backs Donor Privacy for California Charities*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/us/supreme-court-donor-privacy.html [https://perma.cc/JHD3-V5UY (dark archive)] ("The decision concerned charitable donations but its logic was sweeping, Justice Sonia Sotomayor wrote in dissent, suggesting that it could erode disclosure laws concerning political campaigns, too."); Donna King, *Donor Privacy Approved by N.C. Senate*, CAROLINA J. (May 11, 2021), https://www.carolinajournal.com/donor-privacy-to-face-debate-on-senate-floor/ [https://perma.cc/8L4X-BCKP] ("A measure that would keep charitable donors' personal information private was approved in the N.C. Senate Tuesday. The 28-21 vote fell along party lines, with Republicans voting in favor of SB636.").

438. *See* Heather L. Weaver & Daniel Mach, *A New String of State Bills Could Give Religious Organizations Blanket Immunity from Any Wrongdoing*, ACLU (Mar. 10, 2021), https://www.aclu.org/news/religious-liberty/a-new-string-of-state-bills-could-give-religious-organizations-blanket-immunity-from-any-wrongdoing [https://perma.cc/D8AG-VXA8] ("Religious exemptions on steroids: That's the only way to describe legislation being considered this week by lawmakers in Arizona, South Carolina, and Montana. Under the guise of protecting the ability to worship during emergency disasters, these bills could give religious organizations blanket immunity from all civil and criminal liability—as long as they claim to be exercising their faith while engaging in the unlawful conduct.").

439. *See supra* note 17 and accompanying text (describing other queer meeting places that were similarly targeted by government suppression).

been true since the beginning.[440] Throughout all of the history discussed *infra*, queer people have met in other ways. For example, queer people have long used semiotics, a form of covert signaling, to signal queerness to other queer people in ways that people who do not know the code would not identify.[441] Queer people have also met by frequenting known public locations, such as parks, where other queer people were known to meet, deploying similarly coded behavior to safely identify each other.[442] These tools were used, and are still used, by queer people to find each other in spite of broadly hostile social climates; this can be an extremely dangerous experience for queer people who often fear violent consequences of misinterpreting signals.[443]

Indeed, the *first* recorded formal organization in the United States to advocate for queer rights was not founded in connection with queer commercial venues.[444] The short-lived Society for Human Rights was founded by Henry Gerber, a man who was "too sober minded and practical" to frequent queer establishments in Chicago at the time.[445] Gerber is said to have met the organization's officers through his friends, who he mostly met in other public locations.[446]

However, just because associations *can* form in other ways does not foreclose protection of one critical place that they *do* form. Just as newspapers are protected even though there are *other* forms of publication, and religious spaces are protected even though there are *other* places to practice religion, so too would important venues for associations be protected, even though there are *other* places where they could form.

440. *Id.*

441. Sprague, *supra* note 165, at 28. For example, wearing a red tie was a common signal in Chicago in 1910 to signify involvement in gay society. *Id.*

442. For example, in Berlin in the 1920s, the

> most famous [public park to meet in] was the so-called gay path (*Schwuler Weg*), a particular trail through the city's largest park, the Tiergarten. . . . According to Hirschfeld, there was at that time a homeless homosexual man, often referred to as the "Tiergarten Park Butler," who sat on a bench near the entrance to the gay path. If one approached him and asked to buy a "ticket," he would ask for ten cents and then relate which areas were safe from police observation and other kinds of useful information.

ELLEDGE, *supra* note 250, at 23 (quoting Clayton J. Whisnant, *The Growth of Urban Gay Scenes*, in QUEER IDENTITIES AND POLITICS IN GERMANY: A HISTORY, 1880–1945, at 88–89 (2016)).

443. *See* Arielle P. Schwartz, *Why Outing Can Be Deadly*, NAT'L LGBTQ TASK FORCE, https://www.thetaskforce.org/why-outing-can-be-deadly/ [https://perma.cc/2R69-FTGY].

444. *See* ELLEDGE, *supra* note 250, at 36–37.

445. *Id.*

446. *Id.* at 37 ("Despite the doomsayers, he invited a handful of the men he had met while cruising the streets to his place to discuss organizing.").

3. Application to Online Communities

Online space is rapidly becoming a center of political activity. As social media takes on a larger role in facilitating First Amendment activity, so too does it raise questions of how First Amendment protections apply.[447] While this Comment has focused on *physical* spaces where queer people gather, in the context of queer commercial venues and drag bans, the question of whether preassociation protections would apply to online space is critical. As states move to suppress queer people's access to public space, online space will play a critical role in how queer communities maintain themselves and form in other contexts. This question is particularly important for people who may not be able to meet in public spaces because they live in remote or hostile areas, or quite often, because they are not "out" and cannot reveal their queer identities publicly.[448]

Disclosure requirements placed on these online communities would raise similar concerns as those placed on physical commercial queer venues. As most of the "community" spaces on the internet are hosted by for-profit companies,[449] very similar questions about disclosure requirements on those spaces could be raised. For example, similar preassociation concerns could be raised if a social media platform was required to disclose all of its users accessing a certain queer-focused forum, or if an LGBTQ app was required to disclose all of its users in the state. Indeed, although not an incidence of required disclosure, a recent scandal in the Catholic Church has highlighted the poignancy of this concern; in March 2023, it was revealed that a Catholic charity spent millions of dollars purchasing commercially available "app data" to identify priests engaging with gay dating apps.[450] A similar government-sponsored effort to force disclosure of

447. *See, e.g.*, David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, AM. BAR ASS'N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/ [https://perma.cc/AEZ9-37HQ] ("The First Amendment only limits governmental actors—federal, state, and local—but there are good reasons why this should be changed. Certain powerful private entities—particularly social networking sites such as Facebook, Twitter, and others—can limit, control, and censor speech as much or more than governmental entities. A society that cares for the protection of free expression needs to recognize that the time has come to extend the reach of the First Amendment to cover these powerful, private entities that have ushered in a revolution in terms of communication capabilities.").

448. *See* Schwartz, *supra* note 443.

449. *See* Carmen Ang, *Ranked: The World's Most Popular Social Networks, and Who Owns Them*, VISUAL CAPITALIST (Dec. 6, 2021), https://www.visualcapitalist.com/ranked-social-networks-worldwide-by-users/ [https://perma.cc/UF4G-XDC4] ("[W]hile social media's audience is widespread and diverse, just a handful of companies control a majority of the world's most popular social media platforms.").

450. Michelle Boorstein & Heather Kelly, *Catholic Group Spent Millions on App Data That Tracked Gay Priests*, WASH. POST (Mar. 9, 2023, 8:52 AM), https://www.washingtonpost.com/dc-md-va/2023/03/09/catholics-gay-priests-grindr-data-bishops/ [https://perma.cc/9BD2-HUEC (dark archive)].

online data could have a chilling effect on queer people's access to these online spaces.

As many queer people gravitate toward online and app-based ways of meeting each other, online spaces are taking on more of a role in facilitating the formation of queer association. These spaces will need the same protections against preassociation chill as do physical spaces.

4. Explaining *Ward v. Thompson*

One recent case from the Ninth Circuit, decided after *Americans for Prosperity*, must be explained. In October 2022, *Ward v. Thompson* held that a January 6th defendant was not entitled to freedom of association protections and was therefore required to disclose her phone records in response to a grand jury subpoena.[451] Relying on *Americans for Prosperity*, the court rejected the defendant's argument that the records were protected under freedom of association, in part, because the "subpoena [did] not target any organization or association."[452] Based on an out-of-context reference to "organizations" in *Americans for Prosperity*, the Ninth Circuit determined that such an "*organization*" was still *required*.[453] The court then applied its own freedom of association precedent, requiring the previous threshold showing of actual harm to an association's members.[454]

By relying on this language alone to apply its previous precedent, the *Thompson* court made an unnecessary assessment about the defendant's present associational ties.[455] In this way, the court erred by ignoring the language in *Americans for Prosperity* that lowered the threshold test for when First Amendment protections are triggered to include "not only . . . actual restrictions on an individual's *ability to join with others*" but now a "risk of a chilling effect on association."[456] Regardless, the court would have concluded the same if it had applied the full language of *Americans for Prosperity*.

In its assessment that the defendant did not have an association, the court determined specifically that the defendant did not have any "associational *activity*" at stake based on the facts.[457] This assessment would have been the same if the court had applied the new *Americans for Prosperity* threshold test, determining that there was no "risk of a chilling effect on association"[458] because there was no "associational activity" at stake.[459]

451. Ward v. Thompson, No. 22-16473, 2022 WL 14955000, at *1 (9th Cir. Oct. 22, 2022).
452. *Id.* at *2 (emphasis added).
453. *Id.*
454. *Id.* at *1.
455. *Id.* at *2.
456. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021) (emphasis added).
457. *See Thompson*, 2022 WL 14955000, at *2 (emphasis added).
458. *Ams. for Prosperity*, 141 S. Ct. at 2389.
459. *See id.* at 2389.

Further, the court also determined that the "[t]he subpoena is substantially related to the important government interest in investigating the causes of the January 6 attack and protecting future elections from similar threats"[460] and that "[t]he subpoena is a narrowly tailored mechanism for doing so because it seeks only [the defendant's] phone records, only" for a limited period of time,[461] and therefore satisfied the disclosure analysis.

The holding from *Thompson* is therefore explained because the outcome would have been the same using the lower threshold test establishing that the "risk of a chilling effect on association is enough."[462]

5. Distinguishing *Dallas v. Stanglin*

It is important to distinguish the type of association discussed in this Comment from one U.S. Supreme Court case that seems to preclude an interpretation of freedom of association protecting strangers meeting in dancehalls and other social venues. In *Dallas v. Stanglin*,[463] the Court addressed a Dallas, Texas, ordinance that restricted admission to a specific type of social dancehall, limiting admission to teenagers ages fourteen to eighteen.[464] The law was challenged on the grounds that it did not allow teenagers to associate with people older than eighteen, and the Court consequently found that there was no generalized right to purely "social association" and distinguished the "chance encounters" between strangers in a dancehall from both "intimate" and "expressive" associations.[465]

While on its surface, the facts of *Stanglin* related to associational rights in dancehalls, the Court noted that the activities in these dancehalls were neither expressive nor political in nature in the context of excluding adults from a teenage-only venue; instead, these dancehalls were primarily for "recreational dancing."[466] Moreover, the Dallas ordinance was designed to protect individuals with potentially common interests—teenagers from ages fourteen to eighteen—from the potentially corrupting influences of "older teenagers and young adults."[467] This distinction is important because if the inverse had been true—that the ordinance *prohibited* the gathering of those with like interests—the freedom of association may have been implicated.

The purely recreational activity with no political interests involved, coupled with an ordinance that actually protected the subject group, make this

460. *Thompson*, 2022 WL 14955000, at *2.
461. *See id.* at *3.
462. *Ams. for Prosperity*, 141 S. Ct. at 2389.
463. 490 U.S. 19 (1989).
464. *Id.* at 21–22.
465. *Id.* at 24–26.
466. *See id.* at 25.
467. *Id.* at 26.

instance of unprotected association easily distinguishable from the question of whether government could suppress the formation of *protected* associational interests.

CONCLUSION

As queer communities in the United States return to the vibrant trajectory they were on at the beginning of the twentieth century, they must be ever vigilant to guard against the tools of oppression that have been used to harm them in the past. The suppression of queer communities that occurred over the last century must not be repeated.

Queer people's ability to "join with others to further shared goals"[468] is necessary to safeguard queer political interests. The First Amendment freedom of association should—and can—better protect the formation of the associations needed to collectively advocate for those interests. The freedom of association is of little use if the government can prevent the very formation of those associations in the first place. Borrowing words from a Tenth Circuit free speech case, "If the creation of [association] did not warrant protection under the First Amendment, the government could bypass the Constitution by 'simply proceed[ing] upstream and dam[ming] the source' of [the association]."[469]

As states and municipalities across the country place new restrictions on public spaces where queer people gather, enforcement mechanisms for the restrictions could require disclosing patrons' identifying information to authorities. Such disclosures would dissuade queer people from visiting spaces where they form important associations.

The freedom of association, especially as expanded by the Supreme Court in *Americans for Prosperity*, may offer a new avenue for protecting queer people from disclosure requirements in those spaces. The Court's new threshold test, measuring the "risk of a chilling effect on association"[470] rather than *actual harms* to an *existing* association, may allow plaintiffs to bring cases *before* an association is formed. Lowering this threshold showing and eliminating the need to measure harms on an existing association paves the way for the First Amendment to protect spaces in which queer people *form* important associations.

468. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

469. W. Watersheds Project v. Michael, 869 F.3d 1189, 1196 (10th Cir. 2017) (quoting Buehrle v. City of Key W., 813 F.3d 973, 977 (11th Cir. 2015)) ("If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by simply proceeding upstream and damming the source of speech."). This case is about speech, but, as explained in Section IV.B.1, prespeech protections offer a framework through which to view preassociation protections as possible.

470. *Ams. for Prosperity*, 141 S. Ct. at 2389.

Considered in the context of queer history, the required disclosure of information identifying individuals who gather in queer venues provides an example of the type of disclosure requirement that could create a "risk of a chilling effect on association"[471] and therefore meet the Court's new standard.

As queer legal advocates seek broader queer-rights protections under the First Amendment, they should also pursue expanded freedom of association protections for queer people and the spaces—physical and virtual—in which queer people meet and gather. This new frontier of freedom of association—on a trail blazed by a case that protected conservative donors' anonymity—creates the potential to argue that expanded protections ought to apply to the ability of dissident communities to congregate, form associations, and "join with others to further shared goals."[472]

MICHAEL S. WILSON[**]

471. *Id.*

472. *Id.*

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