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Expressive Association and Anti-Discrimination Law after *Dale*: A Tripartite Approach

Dale Carpenter
Southern Methodist University, Dedman School of Law

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Dale Carpenter†

Is *Dale*[1] a disaster?

To many who support equal civil rights for gay people, it certainly seems so.[2] In *Dale*, after all, the Supreme Court held that the First Amendment allowed the Boy Scouts of America (BSA) to exclude an openly gay scoutmaster despite a state law forbidding such discrimination.[3] More broadly, the rationale for the decision—based on the BSA's right of expressive association—has raised fears (for some, hopes) that the Court might be moving toward a sweeping review of the constitutionality of numerous state and federal statutes forbidding discrimination in business-related clubs, public accommodations, and even employment.[4] At the very least, *Dale* may have called a consti-

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1. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000).

2. In a press release, the nation's largest gay civil rights group, the Human Rights Campaign, called the decision "a travesty of justice." *Supreme Court Upholds Boy Scouts' Ban on Gays*, *at* http://www.scoutingforall.org/news/viewnews.cgi?newsid962759861,43299,. A spokesperson for the Gay, Lesbian and Straight Education Network (GLSEN) warned that *Dale* "sends the message that gay youth are second class citizens." *High Court Grants Scouts Right to Discriminate Against Gay Youth in Schools, Says GLSEN*, GLSEN NEWS, June 28, 2000, http://www.scoutingforall.org/news/viewnews.cgi?newsid962760747,53726,. The irony of GLSEN's opposition, in particular, to the result in *Dale* will become apparent in the discussion of how freedom of association claims have led to the recognition of gay-straight student alliances in public schools across the country. *See infra* Part I.B.3.

3. *Dale*, 120 S. Ct. at 2249.

4. For *fears* that this might happen, see Nan D. Hunter, *Accommodating the Public Sphere: Beyond a Market Model*, 85 MINN. L. REV. 1591, 1591

tutional halt to the expansion of these anti-discrimination statutes into new areas, like non-business-related membership organizations, traditionally regarded as private.

Of the liberties guaranteed by the First Amendment, the freedom of association may be the most distrusted.[5] To some, it is an excrescence of the First Amendment, its frightful right-wing step-child. To these critics, the phrase "freedom of association" itself has begun to sound rather like "states' rights"—part of the clever code language of conservative politics that is often nothing more in practice than a seemingly innocuous cover for bigotry. Like states' rights, the freedom of association is often seen as threatening legitimate efforts to guarantee full citizenship and economic opportunity to historically-disfavored segments of American society. It is principally useful, in this view, only to protect the prerogatives of people in white hoods, of sexist old-boys networks, and of homophobes. On this view, the First Amendment as faithful liberator has become the First Amendment as revanchist impediment.

This Essay attempts to reclaim the freedom of expressive association[6] from both its harshest critics and its most ardent

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(2001) ("[*Dale*] may portend a substantial rewriting of expressive association law . . . . At a minimum, it weakens the claim to open participation in our civic culture by lesbians and gay men."), and 1603 (stating that *Dale* "flatly contradicts the Court's holding in *Runyon v. McCrary*" and that "[t]he *Dale* majority simply ignores *Runyon*"). For *hopes* that this might happen, see David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83 ("*Dale* suggests that the *Roberts* [*v. U.S. Jaycees*, 468 U.S. 609 (1984)] era is thankfully over, and that the nine Justices of the Supreme Court . . . unanimously believe that antidiscrimination laws must be subject to the same constitutional scrutiny as other important laws with broad popular support."); Richard A. Epstein, *Free Association: The Incoherence of Antidiscrimination Laws*," NAT'L REV., Oct. 9, 2000, at 38, 40 ("Rightly understood, *Dale* forces us to confront the multiple forms of forced private association that have been staples of the New Deal and the Great Society. For starters, ask whether Title VII of the 1964 Civil Rights Act . . . can survive constitutional challenge under the First Amendment."). As I argue in Part III, *infra*, I think these reports of the death of anti-discrimination law after *Dale* are greatly exaggerated.

5. The right to "free exercise" of religion is a close second. *See* Michael W. McConnell, *Why is Religious Liberty the "First Freedom,"* 21 Cardozo L. Rev. 1243, 1244 (2000) (noting that many believe that protecting religious liberty "violates the neutrality that lies at the heart of the liberal state").

6. The freedom of association also protects *intimate* association. *Roberts*, 468 U.S. at 617-20. This Essay does not treat that aspect of the freedom of association, which was not addressed by the majority or by the dissenters in *Dale*. For an argument that New Jersey's anti-discrimination law implicated BSA troops' freedom of intimate association, see John C. O'Quinn, Note, *How Solemn is the Duty of the Mighty Chief: Mediating the Conflict of Rights in*

libertarian cheerleaders, arguing that *Dale* will not have the revolutionary consequences either camp predicts. Part I sketches the significance of the freedom of association to the protection of dissenting opinion, with an emphasis on gay experience. The freedom of expressive association has been especially valuable to gay Americans, who have suffered greatly when it is not respected. Given First Amendment history, it should not be surprising that claims by *groups* to freedom from state regulation—even more than similar claims by *individuals*—engender the most skeptical reception. For that very reason, the freedom of expressive association may be one of the most valuable aspects of First Amendment liberty.

Part II notes the increasing conflict between the freedom of expressive association and the expanding reach of anti-discrimination law. The challenge is to draw a line between them that will preserve a large realm for group expression and organization while allowing the state to promote its equality objectives in the most compelling contexts. The approach to this problem suggested by the dissenters in *Dale*, inviting courts to focus closely on a group's message, is inherently suspect under First Amendment principles. The *Dale* dissenters' approach would likely be systematically unfavorable to unpopular groups, including gay civil rights groups. A message-based approach also misses much of the subtlety and richness of speech in general and of group speech in particular.

Part III suggests a tripartite approach that treats associations differently depending on the predominance of protected expression in the association's activities. This tripartite approach is a way to reconcile the claim for associational freedom and the need for equality. My analysis develops further an approach suggested in Justice O'Connor's concurrence in *Roberts v. United States Jaycees*,[7] which upheld the application of a state anti-discrimination law to a male-only club.[8] Justice O'Connor's analysis distinguishes predominantly *commercial* associations, which do not enjoy full associational protection, from *expressive* associations, which do. I add to Justice O'Connor's approach a third, hybrid category of *quasi-expressive* associations that mix substantial commercial and significant expressive activity. These associations require an

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Boy Scouts of America v. Dale, 24 HARV. J.L. & PUB. POL'Y 319, 352-64 (2000).

7. *See Roberts*, 468 U.S. at 631-40 (O'Connor, J., concurring).

8. *See id.* at 617-29.

activity-specific analysis to avoid trenching on important First Amendment values: *expressive* organizational activities for these hybrid associations should enjoy broad protection from anti-discrimination law while *commercial* functions of these same groups should not.

Even though not yet explicitly recognized by the Court, the commercial-expressive distinction actually helps to explain the results in many of the Court's decisions pitting a claim to freedom of association against some state regulation. Although difficult to apply in some circumstances, the tripartite approach suggested in this article avoids the troubling First Amendment difficulties of the *Dale* dissenters' method by focusing analysis on the *activities* (rather than on the *message*) of the group claiming associational freedom. The tripartite approach preserves valuable associational freedom while saving anti-discrimination law from constitutional invalidation in the areas where equality guarantees are most critically needed—employment and similar predominantly commercial arenas.

Using gay experience as a guide, I conclude it is wrong to see an inherent tension between associational freedom and equality for despised groups. Instead, the freedom of expressive association contributes to equality by allowing people in groups to find strength and confidence in numbers, bolstering their civic and political power and contributing to the flow of ideas so needed for democratic government. Sacrificing associational freedom—beyond the limited area of commercial activity not strongly protected by the First Amendment—puts unpopular groups at the mercy of legislative majorities who have their own, often hostile, conception of the good life.

Finally, as an original matter, what the Supreme Court now calls the freedom of expressive association might have been conceived as an important liberty interest in itself that is foundational of other liberties. There can be little question associations have played a central role in the political and cultural life of the nation, a role whose significance the word "expressive" hardly captures. Yet the Supreme Court has taken another path, mooring this freedom in the First Amendment. This article works within that framework, rather than seeking a broader grounding for associational rights, recognizing that the Court may effectively have reached the same result by expansively defining associational freedom.

I. THE FIRST AMENDMENT AS A FREEDOM FOR ASSOCIATIONS

A standard view of the First Amendment stresses that it protects the rights of *individuals* to speak, to publish, to worship, and so on. "If the First Amendment means anything," wrote Justice Marshall in *Stanley v. Georgia*, "it means that a State has no business telling *a man, sitting alone in his own house*, what books he may read or what films he may watch."[9] Commentators, too, have emphasized the importance of the First Amendment as a tool for "individual self-realization."[10]

While the image of the lone citizen enjoying his First Amendment sovereignty is powerful and accurate as far as it goes, it misses much of the history of government's efforts to regulate the flow of information and ideas. Those efforts have frequently concentrated on harassing *organizations* and have often only incidentally or instrumentally targeted individuals. That much has been apparent from the first days of life for modern First Amendment jurisprudence, when government indicted persons but aimed at groups. For every Paul Cohen prosecuted for walking alone into a courthouse wearing an expletive-laden jacket,[11] there have been many Anita Whitneys prosecuted for little more than joining a group the government disfavors.[12]

The chief value of the First Amendment, then, is arguably not the protection it affords to individual autonomy. Its chief value may be the role it plays in protecting people who want to combine with others to promote common causes. This lesson holds for gay people, who have benefited politically and personally when they organize, and who have suffered terribly when the state impeded their ability to do so.

The history reviewed below is instructive for analysis of the *Dale* case and for consideration of the advantages or disadvantages of a given approach to the conflict between antidiscrimination law and the freedom of expressive association. However, I do not mean to suggest that the BSA is in nearly as

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9. 394 U.S. 557, 565 (1969) (emphasis added) (striking down a state law making the private possession of obscenity a crime).

10. Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

11. *See* Cohen v. California, 403 U.S. 15, 22-26 (1971) (reversing a criminal conviction for disturbing the peace).

12. *See* Whitney v. California, 274 U.S. 357, 371 (1927) (affirming a criminal conviction for membership in the Communist Labor Party).

vulnerable a position politically and culturally today as were, say, Communists in the 1920s or black civil rights advocates in the 1950s. It would be absurd to make such a comparison. The BSA is a cultural institution with a great hold on many Americans' loyalty, not a political pariah. The Attorney General is not ordering raids of BSA offices, police are not arresting its leaders, and attack dogs and water cannons do not greet meetings of Boy Scout troops.

I review the history, instead, for four reasons. First, I want to emphasize the special role associations—and therefore government regulation of associations—have played in the development of the First Amendment. Second, if an association as potent as the BSA can be made to bend to the state's will, how much more likely is it that weak and truly unpopular groups might be forced to capitulate? Third, even if an association is generally popular (as the BSA has been), it may have a particular view that is controversial, and that view may be vulnerable to state regulation (as is the BSA's gay exclusion). The history discussed below at least counsels caution in allowing such regulation. Finally, an association popular today may be reviled tomorrow and vice versa. Thus, First Amendment protection should not vary with a person's or group's opinion poll standing.

A. EXPRESSIVE ASSOCIATION AND STATE REGULATION

Much of the history of the suppression of speech is the history of the state-sponsored suppression of expressive associations: groups of people who combine their efforts to advance and to inculcate, either internally or externally, their ideas and values.

1. The Espionage Act of 1917

Consider the context in which the modern protection of free speech under the First Amendment arose. As the country entered the First World War, many groups of people were hostile to U.S. involvement. Anti-war organizations such as the Socialist Party of America made strong gains in 1917, and over 330,000 draft evaders or delinquents were reported during the war.[13] Concerned about these groups, Congress passed the Espionage Act of 1917, part of which made it a crime to obstruct

13. ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA 105-08 (1978).

the recruiting and enlistment of military personnel or to attempt to cause insubordination in the military service.[14]

Although the Espionage Act itself was directed at individuals, many World War I prosecutions charged *conspiracy* to violate it, a charge that inherently aimed at stopping expressive association by opponents of the war. In *Schenck v. United States*,[15] the decision that first announced the "clear and present danger" test for punishing subversive advocacy, the government charged that the defendants, part of a group of anti-capitalist leftists, conspired to violate the Act by mailing to military personnel a document criticizing conscription as "despotism" and urging conscripts to "assert your opposition to the draft."[16]

Similarly, in *Pierce v. United States*, the government charged the defendants, part of a group of Socialists, with a conspiracy to violate the Act by distributing an anti-war pamphlet.[17] The Court affirmed the convictions.[18] Justice Brandeis, joined by Justice Holmes, opened his dissent by characterizing the prosecution as an attack on the Socialist party itself. "What is called 'distributing literature' is a means commonly used *by the Socialist party to increase its membership and otherwise to advance the cause it advocates*," he wrote.[19] The ultimate goal of the prosecution was to suppress the freedom of an expressive association, not of individuals. Other Espionage Act cases involved similar conspiracy charges aimed at associational activity.[20]

Even where the government prosecuted a lone individual, instead of a group of defendants, its real aim seems to have

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14. Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219 (repealed 1948). Federal authorities prosecuted approximately 2,000 cases charging Espionage Act violations, which carried a penalty of fines of $10,000, up to twenty years in prison, or both. *See* GOLDSTEIN, *supra* note 13, at 108-13.

15. 249 U.S. 47 (1919).

16. *Id.* at 51.

17. 252 U.S. 239, 240-42 (1920).

18. *Id.* at 252-53.

19. *Id.* at 253 (Brandeis, J., dissenting) (emphasis added).

20. *See* Abrams v. United States, 250 U.S. 616, 623-24 (1919) (affirming convictions of defendants, part of a group of anarchist Russian immigrants, for conspiring to curtail production of armaments necessary to the war effort by writing and distributing thousands of leaflets condemning U.S. military intervention in Russia following the 1917 Revolution); Frohwerk v. United States, 249 U.S. 204, 205-10 (1919) (affirming convictions of defendants, part of a group German sympathizers, for conspiring to violate the Act by printing and circulating a newspaper containing articles critical of the war).

been to suppress the expressive activity of a *group* whose message it disdained. In *Debs v. United States*, the government charged that Eugene Debs had violated the Act by criticizing the war and the draft in a speech delivered, according to the indictment, "to an assembly of people" at the Ohio Socialist Party Convention.[21] Debs, aware of the ongoing prosecutions under the Act, had intimated in his speech to the convention that he could not say everything he wanted to say about the war. Of course, even this act of self-censorship was not enough to save him from prosecution. Government had succeeded in circumscribing what could be said at a political convention, the prototypical expressive association. The chill on associational freedom had set in.

2. Criminal Syndicalism

By the period immediately after the Russian Revolution, two-thirds of the states had enacted criminal syndicalism and criminal anarchy laws aimed at dismantling left-wing organizations.[22] These laws generally made it a crime to teach or advocate the overthrow of government by force, a tenet of revolutionary socialism and communism.

In practice, this meant ongoing state harassment of left-wing organizations. In *Gitlow v. New York*,[23] the defendant was a Socialist Party member convicted under New York's criminal anarchy statute. His crime? He served on a party committee charged with developing an organizational "Manifesto." He was also the business manager of the party's newspaper, which published the party "Manifesto" advocating "revolutionary mass action."[24]

An even more obvious state attack on expressive association came in *Whitney v. California*,[25] which affirmed the conviction of Anita Whitney for violating a state criminal syndicalism statute.[26] The statute prohibited a person from "knowingly *be-*

21. 249 U.S. 211, 212 (1919); *see also* Gilbert v. Minnesota, 254 U.S. 325, 332-33 (1920) (affirming conviction of defendant, manager of the organization department of the Nonpartsian League, for giving an anti-war and anti-government speech at a meeting of the League in violation of a state law similar to the Espionage Act).

22. For a discussion of this development, see ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 141-68 (1941).

23. 268 U.S. 652 (1925).

24. *Id.* at 657.

25. 274 U.S. 357 (1927).

26. *Id.* at 372.

com[ing] a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet [criminal syndicalism],"[27] which was defined as teaching the violent "change in industrial ownership or control or effecting any political change."[28] Thus, the statute was tailor-made to outlaw the Socialist Party without directly doing so.

Where prior decisions had at least involved prohibited speech by the defendant himself, Whitney was punished for mere *membership* in a group. In his famous concurrence in the case, Justice Brandeis noted the startling attack on expressive association. "The novelty in the prohibition introduced," he wrote, "is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at *association* with those who preach it."[29]

3. The Smith Act

When the Cold War began, governmental authorities took various steps to harass the Communist Party in the United States. Prominent among these measures were prosecutions under the Smith Act of 1940, which made it a crime "to organize[] or help[] . . . to organize *any society, group, or assembly of persons*" who teach the violent overthrow of government "or [to] *become a member of, or affiliate*[] *with*, any such society, group, or assembly of persons."[30] Though federal law did not explicitly outlaw the Communist Party until 1954, the Smith Act had the practical effect of doing so.

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27. Criminal Syndicalism Act of California, § 2, pt. 4, 1919 Cal Stat. 281 (codified at Cal. Pen. Code §§ 11400-11402) (repealed 1991) (emphasis added). For a fuller discussion of Whitney's life and trial, see Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

28. Criminal Syndicalism Act of California, § 1.

29. *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring) (emphasis added). The Court reversed a conviction under a state criminal syndicalism statute in *De Jonge v. Oregon*, 299 U.S. 353 (1937), noting that the "right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *Id.* at 364.

30. Smith Act of 1940, § 2(3) (codified at 18 U.S.C. § 2385 (1994)) (emphasis added). Other federal legislation similarly targeted expressive association. *See, e.g.*, Subversive Activities Control Act of 1950, tit. I, §§ 7-8 (codified at 50 U.S.C. § 781) (repealed 1993) (requiring certain organizations to register with the Attorney General and to disclose internal information, including membership lists); Communist Control Act of 1954, 50 U.S.C. §§ 841-44 (outlawing the Communist Party).

In *Dennis v. United States*, the Court affirmed the Smith Act convictions of the leaders of the Communist Party U.S.A. (CPUSA).[31] After a nine-month trial resulting in a 16,000 page record, including detailed examination of the most minute details of internal party organization and literature, the trial court found "the Communist Party is a highly disciplined organization," that it is "rigidly controlled" and "tolerate[s] no dissension" from its members, and that "the literature of the Party and the statements and activities of its leaders . . . advocate . . . a successful overthrow of the existing order by force and violence."[32] It did not matter that the leaders had taken no practical steps to accomplish this ambitious goal. "It is the existence of the *conspiracy* which creates the danger," the Court held.[33]

4. The Civil Rights Era

As First Amendment jurisprudence became more skeptical of suppression of even subversive ideas, state efforts to contain dissident groups turned away from direct regulation of group *speech* and toward regulation of group *organization*. This shift allowed the state to assert that the subject regulation was not infringing free-speech rights at all, while effectively accomplishing the same goal. So, in *NAACP v. Alabama ex rel. Patterson*, the first decision explicitly recognizing a First Amendment right to freedom of association, Alabama sought to require the NAACP to produce its membership list, not to punish it directly for its message.[34] Compliance with the order, as I will discuss in more detail below,[35] would have seriously impaired the civil-rights group's ability to organize in a hostile state in the South at the height of the Civil Rights movement. That consequence, of course, was the very point of seeking the membership list. Other cases have involved similar state-supported harassment of expressive associations working for civil rights.[36]

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31. 341 U.S. 494, 516-17 (1951).

32. *Id.* at 498.

33. *Id.* at 511 (emphasis added).

34. 357 U.S. 449, 451 (1958).

35. *See infra* Part II.C.4.

36. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (involving state tort law directed at stopping NAACP's efforts to organize black boycott of white merchants accused of racism); NAACP v. Button, 371 U.S. 415 (1963) (involving state law prohibiting solicitation of litigation directed at stopping NAACP's efforts to end public school segregation).

Viewed in the light of the history discussed above, the canonical "free speech" cases are really cases where the state sought to infringe the freedom of expressive association. Though the target changed—in some times and places, the target was the Socialist Party,[37] in others it was the NAACP[38] or the Ku Klux Klan[39]—the goal of putting the screws on an expressive association troubling to state authorities was the same. The state is not nearly as concerned with a Eugene Debs who spouts radical ideas to his mirror or even to random passersby in the park as it is with the same Eugene Debs who shares his ideas with a group of like-minded folk at a meeting.[40]

Of course, to the extent a Eugene Debs is saying anything harmful at all, the danger is greater when he is saying it to a group pre-disposed to agree with him than when he says it to himself or to strangers. So the state's interest in regulation in such cases, to the extent it is a legitimate interest, is more likely compelling. The point is, the state recognizes this fact and accordingly concentrates on suppressing organizations, and often only instrumental individuals, that it views as a threat.

B. EXPRESSIVE ASSOCIATION, STATE REGULATION, AND THE RISE OF GAY EQUALITY

The First Amendment created gay America. For advocates of gay legal and social equality there has been no more reliable and important constitutional text. The freedoms it guarantees have protected gay cultural and political institutions from state regulation designed to impose a contrary vision of the good life. Gay organizations, clubs, bars, politicians, journals, newspapers, radio programs, television shows—all these would be swept away in the absence of a strong First Amendment.

The First Amendment, evenhanded and detached from passions to an unusual degree for a jurisprudence, sheltered

37. Whitney v. California, 274 U.S. 357, 359 (1927).

38. *Patterson*, 357 U.S. at 551.

39. Brandenburg v. Ohio, 395 U.S. 444, 445 (1969) (reversing conviction of a Ku Klux Klan member prosecuted under the Ohio Criminal Syndicalism statute).

40. That's not to say the state is *unconcerned* with the speech of isolated individuals, *see, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303-08 (1940) (reversing conviction of individual member of Jehovah's Witnesses for inciting a breach of the peace), though even here the state's concern with dissident sects is often evident.

gays even when most of the country thought they were not just immoral, but also sick and dangerous.[41] In an era of almost unrelenting hostility, William Eskridge has written, "the right to associate was an appealing normative argument in both the political and judicial arenas."[42] The shelter afforded by this right allowed gays to organize for the purpose of accumulating and applying political power, a precondition for the effective exercise of other important liberties. For gay America, it truly is the *First* Amendment.[43]

By contrast, the Due Process Clause (in its substantive dimension) has been faithless.[44] The Equal Protection Clause has been impotent.[45] The Ninth Amendment has been missing

41. As of 1967, two-thirds of Americans reported they looked upon homosexuals with "disgust, discomfort, or fear." CHARLES KAISER, THE GAY METROPOLIS 162 (1997) (based on a poll conducted by CBS News and presented on national TV during a special report, "The Homosexuals," which aired March 7, 1967). Homosexuality was listed as a mental disorder by the American Psychiatric Association until 1973. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 186 (1997).

42. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 114 (1999).

43. I am hardly alone in recognizing the centrality of the First Amendment to the struggle for gay equality. *See id.* at 111 (concluding that "the main legal protections [for the developing institutions of early gay subculture] were the first amendment's rights to associate, publish, and speak" and that "first amendment litigation was relatively successful"); H.N. Hirsch, *Levels of Scrutiny, the First Amendment, and Gay Rights*, 7 LAW & SEXUALITY 87, 100 (1997) ("Danger to our [gay] world, for the most part, did not come from laws outlawing sexual acts. Instead, the danger came from censorship and cultural repression. In cultural and social space protected by the First Amendment, I discovered a way of life and a community, rather than how to subvert the sodomy laws . . . .").

44. *See* Bowers v. Hardwick, 478 U.S. 186, 190-96 (1986) (upholding constitutionality of sodomy law as applied to same-sex conduct).

45. In contrast to the treatment of race- and sex-based classifications under the Equal Protection Clause, federal courts do not currently apply heightened scrutiny to legislative classifications aimed at gays. The one appellate panel decision applying strict scrutiny to sexual orientation discrimination was vacated *en banc*. Watkins v. U.S. Army, 847 F.2d 1329, 1352-53 (9th Cir. 1988) (holding unconstitutional the U.S. Army's exclusion of homosexuals), *vacated en banc by* 875 F.2d 699 (9th Cir. 1989). The Supreme Court has not decided the question whether gays are a suspect class under Equal Protection analysis or whether sexual orientation discrimination might properly be analyzed as a form of sex discrimination justifying intermediate scrutiny under *Craig v. Boren*, 429 U.S. 190, 199-210 (1976). In *Romer v. Evans*, 517 U.S. 620, 626-36 (1996), the Court used rational basis scrutiny to invalidate a state constitutional amendment forbidding state and local officials from enacting or enforcing policies protecting gays from discrimination. Though *Evans* did not formally decide the level of scrutiny applicable to sexual orientation discrimination, it may suggest the Court will look especially closely at state action tar-

in action.[46] And the Fourteenth Amendment's Privileges and Immunities Clause has not been seen since it was banished at the age of five.[47]

In its *procedural* dimension, the Fourteenth Amendment's Due Process Clause is the First Amendment's only serious constitutional competitor for pride of place in assisting gay equality advocates. The criminal procedure protections guaranteed by the Due Process Clause have been powerful weapons against state prosecutions of gay people for a variety of criminal offenses, including the violation of sodomy laws.[48] The Fourth Amendment also deserves an honorable mention for preventing police from barging into private gay spaces, such as homes, without sufficient justification.[49]

Yet even these protections did not significantly reduce arrest rates of gay people for consensual sexual crimes "until *gay political power* forced police departments to consider their interests."[50] The development of gay political power, however, has depended in the first instance on the liberty of gays to organize in groups free of state regulation impinging on their internal affairs, including the content of their message and the composition of their membership. This freedom, in turn, depends on a strong and principled First Amendment committed to protecting unpopular opinion.

It took awhile to get to that point, however. Even as state authorities from the 1920s through 1960s harassed dissident political and civil-rights organizations,[51] they did the same to nascent gay associations. A detailed exposition of gay organi-

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geting gays, even if that close look comes under the guise of rational basis review. On the other hand, the unusual sweep of the law challenged in *Evans* may limit the holding to its facts.

46. Justice Goldberg started to sketch a role for the Ninth Amendment in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring). But the Court has done nothing with it.

47. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78-83 (1872). Several valiant search parties have turned up little. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 22-30, 98 (1980); Phillip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U. L.Q. 405, 405-20.

48. ESKRIDGE, *supra* note 42, at 101-04.

49. *Id.*

50. *Id.* at 104 (emphasis added).

51. *See supra* Part I.A (discussing the history of the state-sponsored suppression of expressive associations).

zations' encounter with state demands for conformity is beyond the scope of this essay. I will sketch it here briefly.[52]

1. The Chicago Society for Human Rights

The experience of the earliest known gay-rights organization in the United States illustrates the destructive consequences of state intrusion into gay association. In 1924, a small group of gay men in Chicago decided to organize an association that would work for gay civil rights. "One of our greatest handicaps was the knowledge that homosexuals don't organize," wrote a leader of the group, Henry Gerber, almost four decades later.[53] "Being thoroughly cowed, they seldom get together."[54] The key to overcoming inequality, in the eyes of the earliest organizers of the gay civil rights movement, was to form groups devoted to that goal. It was, in short, to form expressive associations.

On December 10, 1924, the state of Illinois issued a charter for a non-profit corporation, the Society for Human Rights.[55] The Society borrowed its name from a homosexual-rights group in 1920s Germany, where the political and cultural climate was arguably better for gays than in the United States.[56] Nowhere explicitly referring to homosexuals, the charter stated that the group's purpose was "to promote and to protect the interests of people who by reasons of mental and physical abnormalities are abused and hindered" in their pursuit of happiness.[57] It promised "to combat the public prejudices against them by dissemination of facts according to modern science among intellectuals of mature age."[58] The group pledged to comply with the law and denied any desire to advocate the violation of it.[59]

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52. For an excellent discussion of the history of state regulation of gay associations, and the legal arguments gay advocates used in opposition to that regulation, see ESKRIDGE, *supra* note 42, at 44-46, 74-80, 93-95, 111-16; *see also* Brief Amicus Curiae of Gays and Lesbians for Individual Liberty In Support of Petitioners at 5-14, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 228588.

53. JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 389 (1992).

54. *Id.*

55. *Id.* at 385.

56. *Id.* at 388.

57. *Id.* at 387.

58. *Id.*

59. *Id.*

The Society for Human Rights was a classic expressive association. The group selected leaders and drew up a plan to gain members and to achieve its goals, including elimination of sodomy laws. Members wrote to legislators. They published a newsletter called *Friendship and Freedom* to "keep the homophile world in touch with the progress of our efforts."[60] Significantly, the group adopted an exclusionary membership policy, allowing only gay men to join. Even bisexuals would be kept out "for the time being."[61]

Members knew they had long years of work ahead. "Yet," Gerber wrote later, "I was will to slave and suffer and risk losing my job and savings and even my liberty for the ideal."[62] It would not be long before his resolve was tested.

Within months, authorities learned of the organization's existence. They quickly ordered the arrest of its leaders for disorderly conduct. The police, without a warrant but with a newspaper reporter in tow, arrested Gerber in his home at 2 a.m. They seized his typewriter, the literature of the Society, his personal diaries, and his bookkeeping accounts. The predictable headline of the newspaper the next day was, "Strange Sex Cult Exposed."[63] At Gerber's arraignment, a social worker read aloud from his diary—out of context—the words, "I love Karl."[64] This caused the detective and the presiding judge to "shudder[] over such depravity."[65]

One of the organization's leaders pled guilty to the disorderly conduct charge. Gerber, who had also been threatened with a bogus federal obscenity charge for mailing *Friendship and Freedom*, hired a lawyer. The disorderly conduct charge against Gerber was dismissed because of the warrantless search, and no obscenity charge was filed. It was a small victory.

On Gerber's way out of the courthouse, the detective who investigated him sneered, "What was the idea of the Society for

60. *Id.* at 389.

61. *Id.* at 390. Compare the BSA's professed need to exclude gays, discussed *infra* in Parts II.C.2 to II.C.4.

62. KATZ, *supra* note 53, at 389.

63. *Id.* at 391.

64. *Id.* Compare Justice Stevens's misreading of the BSA's written materials, discussed *infra* in Part II.C.1.

65. KATZ, *supra* note 53, at 391.

Human Rights anyway? Was it to give you birds the legal right to rape every boy on the street?"[66]

Gerber's personal diary was never returned. He was promptly fired from his job at the post office, which advised him by letter that he had been terminated for "conduct unbecoming a postal worker."[67] Although his attorney offered to sue to get the job back, Gerber "had no more money for fees and took no action."[68] The litigation had financially ruined him.[69]

The whole episode doomed the Society for Human Rights. It would be a quarter of a century before gays would again form an association explicitly dedicated to advancing their civil rights.

2. Gay Expressive Association After 1950

Two fledgling gay-rights groups, the Mattachine Society (mostly men) and the Daughters of Bilitis (DOB) (women), formed in the 1950s. The FBI closely monitored their activities, beginning an internal security investigation of Mattachine in 1953 and of DOB in 1959. Neither group, of course, represented a credible internal security threat. "Nonetheless," William Eskridge writes, "FBI agents infiltrated both organizations, archived their declarations and publications, reported their meetings and activities, recruited informants, compiled lists of members whom they could identify, and speculated on the organizations' influence and future activities."[70] Agents interviewed the staff of the Mattachine's publication, *One*, and notified their employers. Group members resorted to using pseudonyms to protect their identity. Similar monitoring and harassment of gay groups by state and federal authorities occurred throughout the country.[71] Police harassment and spying on gay organizations continued into the 1970s.[72]

State intrusion on gay expressive association took many forms. Congress tried to revoke the Washington, D.C., Mattachine Society's license as an educational group on the ground

66. *Id.* at 392-93.

67. *Id.* at 393.

68. *Id.*

69. *Id.* at 392-93. Compare the Girl Scouts' decision, under pressure of litigation, to relieve girls of the duty to recite faith in "God" in the Girl Scout Oath. *See infra* note 166 and accompanying text.

70. ESKRIDGE, *supra* note 42, at 75.

71. *Id.* at 76.

72. *Id.* at 114.

that government should not support association by people whose acts were ungodly and illegal. The IRS initially refused to grant tax-exempt status to groups that "promoted" homosexuality. States like Ohio, New York, and Florida (which barred recognition of "organized homosexuality") disallowed the articles of incorporation of gay rights groups on public policy grounds.[73]

3. The Freedom of Association and the Rise of Gay Equality

As the Court developed stronger protection for the freedom of association of unpopular groups in the late 1950s,[74] gay political organizations, bars, and other groups benefited. For example, courts overturned many state decisions to deny corporate status to gay groups, often on freedom of association grounds.[75] The associational freedom shielding a group's membership list was extended to gay groups, even in the context of private civil litigation.[76] When public university administrators attempted in the 1970s and 1980s to deny school recognition and funding to gay student groups, their decisions were almost invariably reversed by courts applying the freedom of association precedents that had protected black civil-rights organizations from state harassment.

The reasoning in one especially influential freedom of association decision, *Gay Students Organization of University of New Hampshire v. Bonner*,[77] stands out:

> The [Gay Student Organization's] efforts to organize the homosexual minority, "educate" the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent but another example of the associational activity unequivocally singled out for protection in the very "core" of association cases decided by the Supreme Court.... Moreover, the activity engaged in by the GSO [sponsoring social events for members] would be protected even

73. *Id.* at 114-15.

74. Two cases of particular importance in this regard were *Yates v. United States*, 354 U.S. 298, 303-38 (1957) (reversing convictions of fourteen Communist Party members for conspiracy to violate the Smith Act), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-66 (1958) (protecting the NAACP's membership list from compelled disclosure).

75. *See, e.g.*, Aztec Motel v. State, 251 So. 2d 849, 854 (Fla. 1971); *In re* Gay Activists Alliance v. Lomenzo, 293 N.E.2d 255 (N.Y. 1973) (per curiam).

76. Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 207-10 (N.D. Cal. 1983) (denying discovery of gay group's membership list in civil litigation by Coors).

77. 509 F.2d 652 (1st Cir. 1974). For a collection of cases, see ESKRIDGE, *supra* note 42, at 116 n.61.

> if it were not so intimately bound up with the political process, for "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters."[78]

Bonner placed gays solidly inside the emerging First Amendment tradition protecting the freedom of association.

Even First Amendment freedom claims that have started out protecting organizations hostile to gay equality have been applied by courts to protect gays as well. In *Rosenberger v. Rector and Visitors of University of Virginia*,[79] the Supreme Court held that a public university could not refuse to give funds from a student activities fee to a controversial student newspaper espousing anti-gay views. Yet *Rosenberger* was soon applied by a federal court to reverse the decision of another public university to deny funding to a *gay* student group.[80] Congress passed the Equal Access Act of 1984[81] at the urging of social conservatives who wanted religious student groups to be able to meet on public school grounds. Now the very same law, along with associational freedom claims, is being used by gay student groups to secure access to public facilities.[82]

Not surprisingly, gay political organizations, bars, and other institutions have flourished since recognition of the freedom of association in the late 1950s. For example, by 1981, 80% of all public colleges had recognized gay student groups.[83] The Gay, Lesbian and Straight Education Network, which filed an amicus brief against the associational freedom of the Boy Scouts[84] and bitterly criticized the result in *Dale*,[85] estimates there are now 700 gay-straight student alliances in high schools,[86] few of which would exist without strong protection for associational liberty. The rise of gay equality and public visibility coincided—not coincidentally, however—with the rise of

78. *Bonner*, 509 F.2d at 660 (citing *Patterson*, 357 U.S. at 460).

79. 515 U.S. 819, 828-37 (1995).

80. Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1550 (11th Cir. 1997).

81. 20 U.S.C. § 4071 (1994).

82. Brief Amicus Curiae of Gays and Lesbians for Individual Liberty In Support of Petitioners at 13-14, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 228588.

83. ESKRIDGE, *supra* note 42, at 116.

84. Brief of Amicus Curiae PFLAG & GLSEN, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 339886.

85. *See supra* note 2.

86. Harriet Barovick, *Fear of a Gay School*, TIME, Feb. 21, 2000, at 52.

vigorous protection for First Amendment freedom, especially the freedom of association.

II. FREEDOM OF EXPRESSIVE ASSOCIATION AND ANTI-DISCRIMINATION LAW: THE DANGER OF A MESSAGE-BASED APPROACH

The BSA decided to exclude James Dale, an Eagle Scout, as a scoutmaster when it learned he was gay. Dale sued, losing in the trial court, but ultimately winning in the New Jersey Supreme Court. In the state court litigation, the BSA asserted that it is not a "public accommodation" under New Jersey law and that, even if it is, the First Amendment's guarantee of freedom of association made application of the law to the BSA in this instance unconstitutional. The first of these arguments was unavailable to the BSA when it reached the United States Supreme Court, but the second argument remained very much alive.[87]

Even as the Supreme Court has begun to articulate a freedom of association, protecting at least some private associations from some state regulation, federal and state governments have expanded the reach of laws against various kinds of discrimination, regulating more and more private associations in more and more ways. Negotiating the appropriate constitutional boundary between protected association and permissible anti-discrimination law is a challenge for the First Amendment. This Part will contrast the approaches of the majority and the dissent in *Dale*, with special emphasis on a critique of the dissenters' approach to the problem. Part III will suggest an approach that both explains the Court's decisionmaking in this area and offers a guide to the future.

A. THE FREEDOM OF ASSOCIATION MEETS THE CITIZENSHIP MODEL OF ANTI-DISCRIMINATION LAW

The stakes are high. On the one hand, there is a strong individual and social interest in giving citizens access to full citizenship, especially economic opportunity. For many groups of citizens, such access has either been denied altogether or seriously curtailed by irrational discrimination. This denial robs the individual of a fair chance to succeed in life and robs everybody else of the benefits of that person's success. Concern with

87. *Dale*, 120 S. Ct. at 2447-50.

these consequences led Congress to adopt the Civil Rights Act of 1964 and subsequent measures, forbidding discrimination based on race (and other characteristics) in private employment and public accommodations like inns and restaurants.[88] States have passed similar laws forbidding discrimination.[89]

On the other hand, there is—in addition to a constitutional command—a strong individual and social interest in expressive association. Alexis de Tocqueville observed that "in the most democratic country on the face of the earth," that is, the country most committed to the principle of political equality, associations are paramount.[90] "Wherever, at the head of some new undertaking, you see the Government in France, or a man of rank in England," he wrote, "in the United States you will be sure to find an association."[91] America, eschewing both statism and aristocracy, turned to associations as centers of power apart from government.[92] It was because America committed itself to equality that associations were so prevalent and so needed. On this view, equality and private association are complementary, not antagonistic.[93]

There has been antagonism, however. Equality advocates soon concluded that guaranteeing access to employment and traditional public accommodations was insufficient as a means to give citizens a fair opportunity to participate in public life. Access to places, like private membership organizations focused on commercial matters, where deals are made and personal contacts important to business are forged, also had to be guaranteed.[94] This gave us *Roberts*[95] and *Rotary International*,[96] where the Court upheld, against freedom of association claims, the application of state anti-discrimination law to the membership policies of private organizations. This focus on the need

88. Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

89. *See, e.g.*, MINN. STAT. § 363.03(3) (2000).

90. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 107 (Henry Reeve trans., Alfred A. Knopf, Inc. 1994) (1835).

91. *Id.* at 106.

92. *See id.* at 107-08.

93. *Id.* at 106-10.

94. *See, e.g.*, N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 5-6 (1988) (quoting findings of New York City Council in support of expanded public accommodations law).

95. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).

96. Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987).

for access to jobs and business contacts might be called the *economic model* of anti-discrimination law.

Going even further, some equality advocates argue that citizens must have access to large or otherwise important organizations for reasons independent of any direct economic benefit that might be derived by membership in them. First, these organizations are seen as important centers of norm-formation where attitudes inimical to equality are perpetuated.[97] Members then act upon these inegalitarian values to the detriment of the very groups intended to be helped by anti-discrimination law. Access to these organizations will improve the political and cultural, not just the economic, climate for disfavored groups. Second, denial of access to such organizations marks members of these disfavored groups as inferior in a way that handicaps their ability to participate in civic life. The idea is to avoid placing badges of inferiority on classes of citizens by virtue of their exclusion from socially-important organizations. The BSA is unquestionably an important organization in American history and culture, having been a rite of passage for generations of maturing boys. Something like this notion must have been behind what even the *Dale* dissenters recognized is the unusually broad New Jersey public accommodations law (unusually broad as interpreted by the New Jersey Supreme Court, that is).[98] This *citizenship model* of anti-discrimination law, whatever its merits, is nothing less than a plea to have government impose its values on dissident citizens.[99]

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97. Hunter, *supra* note 4, at 1630-34.

98. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2459 (2000) (Stevens, J., dissenting) (calling the law "more expansive" than "most similar state statutes"). "Public accommodation," as defined by the New Jersey statute, includes more than fifty types of places. N.J. STAT. ANN. §10:5-5. The law covers places typically thought of as public accommodations like restaurants and retail shops. *Id.* But it also includes more intimate settings, like summer camps and roof gardens. *Id.* The New Jersey Supreme Court read the statute to include private membership organizations also. *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1219 (N.J. 1999), *rev'd*, 120 S. Ct. 2446 (2000).

99. It might be argued that the citizenship model of anti-discrimination law does not *impose* state values on such groups, it merely *encourages* the adoption of these values. There is something to be said for this response, since even most advocates of the citizenship model presumably do not believe that anti-discrimination law should directly force a group to promulgate a particular message it disagrees with by, for example, requiring the group to amend its mission statement to reflect the policies of the anti-discrimination law. *See, e.g.*, *Dale*, 120 S. Ct. at 2472 (Stevens, J., dissenting). However, as I argue in Part II.C, regulation of a group's membership through anti-discrimination law is often a substantial imposition on the group's message. So membership

The Court in *Dale* noted the problem thus created. "As the definition of 'public accommodation' has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts," wrote Chief Justice Rehnquist for the majority, "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."[100] If the citizenship model of anti-discrimination law is not to overrun the First Amendment, a line must be drawn.

B. THE DISSENTERS' MESSAGE-BASED APPROACH

Every member of the Court recognizes that, under appropriate circumstances, an organization may have an associational claim that exempts it from some regulation promoting equality.[101] How do the dissenters, led by Justice Stevens, decide when the associational claim wins and when it loses?

1. The Categorization Analysis

The first step, all members of the Court agree, is to determine whether the organization fits within the protected category of an "expressive association." The Court gives this term a very broad definition, encompassing associations that pursue "'a wide variety of political, social, economic, educational, religious, and cultural ends.'"[102] It is "not reserved for advocacy groups."[103] The group merely need "engage in some form of expression, whether it be public or private."[104] The dissenters take no issue with this formulation, which seems to include many conceivable associations.[105]

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regulation may accomplish indirectly what everyone agrees the state could not do directly: it changes an association's message in the direction the state desires. In this sense, membership regulation may be a proxy for content regulation, deserving the strictest First Amendment scrutiny. *See infra* Part III.B.2.

100. *Dale*, 120 S.Ct. at 2456.

101. *Id.* at 2471 (Stevens, J., dissenting) ("Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's anti-discrimination laws will have a First Amendment right to association that precludes forced compliance with those laws.").

102. *Id.* at 2451 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).

103. *Id.*

104. *Id.*

105. Though, as I argue in Part III, primarily commercial associations, even if expressive in some respects, do not enjoy a general exemption from compliance with anti-discrimination law.

The definition does not encompass all groups, however. For example, a bowling league, or similar recreational outfit, would ordinarily not be an expressive association, since such a league would not usually be committed to promoting causes, advocating ideas, or instilling values in its members.[106] An association for socializing—such as the patrons of a dance hall—would also not ordinarily be an expressive association.[107]

Because the freedom of expressive association is not a free-standing First Amendment right, the key is that the group must be engaged primarily in protected expression in order to fall within the purview of the right. The Court has emphasized that the freedom of expressive association does not protect all human association with an expressive component. "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[108]

The dissenters in *Dale* did not dispute that the BSA is an expressive association. This is a bigger concession than it first appears because what makes the BSA an expressive association is not the political causes it pursues. It does not pursue any, in the usual sense. What makes the BSA expressive is the fact that it seeks to instill moral values in boys both through spoken and written messages[109] and through the tacit example of adult scoutmasters.[110]

2. The Message Analysis

The next step is to determine whether compliance with the anti-discrimination law (in this case, forcing the group to admit a member it does not want) intrudes on the group's expressive

106. Even if a small bowling league or similar group is not an expressive association, it might qualify as an intimate association. Intimate associations are also constitutionally protected from anti-discrimination law. *Roberts*, 468 U.S. at 620 (status as protected intimate association depends on analysis of a group's "size, purpose, selectivity, congeniality, and other characteristics").

107. *See* City of Dallas v. Stanglin, 490 U.S. 19, 20-21 (1989) (upholding the constitutionality of a city ordinance restricting age of patrons at a dance hall).

108. *Id.* at 25.

109. For example, the Scout Oath teaches boys "[t]o help other people at all times" and to be "physically strong, mentally awake, and morally straight." *Dale*, 120 S. Ct. at 2451-52.

110. *Id.* at 2452.

activity.[111] Whether it does so, in turn, depends on (1) whether the group has a message contrary to the command of the anti-discrimination law (the "message analysis"), and (2) whether compliance with the law will impair the group's message (the "impairment analysis"). While the majority and the dissent agree on this framework, they disagree sharply on its application in *Dale*.

The majority's approach on the message analysis was to defer to the group's own assertions about the existence and meaning of its message. It was enough that the BSA could point to fairly vague passages in the Scout Oath and Scout Law urging boys to be "morally straight" and "clean."[112] In new millennium America, with its widely-varying attitudes about homosexuality, these sentiments standing alone could reasonably be understood (1) to implicitly disapprove homosexuality (the BSA's interpretation), (2) to implicitly approve homosexuality (my interpretation), or (3) to be unconcerned with homosexuality (the dissent's interpretation). The majority concluded that a group is the best interpreter of its own message, even if the interpretation comes in the context of litigation.[113]

The BSA's interpretation was also supported by other statements and actions *prior* to the *Dale* litigation.[114] These include, inter alia, a declaration that an openly gay person may not be a Scout leader because "[w]e do not believe that homosexuality and leadership in Scouting are appropriate";[115] the BSA's dogged public defense, beginning in litigation battles in the early 1980s, of its associational right to exclude gays;[116] and a statement that "*homosexual conduct is inconsistent with the requirement . . . that a Scout be morally straight and . . . that a Scout be clean* in word and deed," concluding with a declaration

111. *Id.*

112. *Id.* at 2452-53.

113. *Id.* at 2453 ("We accept the Boy Scouts' assertion [contained in its brief to the Court]. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality.").

114. *Id.* (discussing internal policy statements and prior state court litigation by the BSA attempting to exclude gays).

115. *Id.* (quoting a 1978 position statement by the BSA President and the Chief Scout Executive to the Boy Scouts' Executive Committee).

116. *Id.* (stating that the BSA's defense of its policy began in the 1980s and culminated in *Curran v. Mount Diablo Council of Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998)).

that "homosexuals do not provide a desirable role model for Scouts."[117]

It is significant that the Court relied on this additional evidence only to satisfy itself that the BSA's interpretation of its message was "sincere."[118] It is clear the Court does not regard the requirement that a group's belief be sincere as an invitation to parse its message. It appears no more demanding here than it does for the evaluation of the sincerity of the religious basis for an exemption to a generally applicable law under the Free Exercise Clause.[119] Courts are not to referee disputes over the proper interpretation of an expressive association's beliefs any more than they can act as "arbiters of scriptural interpretation."[120]

The only question should be whether the organization's interpretation of its beliefs is offered in good faith. The sincerity requirement would seem to be met unless there were evidence the association was trying to mislead the Court, for example, contemporaneous evidence showing the group does not really believe what it asserts in court that it believes.[121] Given that conclusion, it is hard to see how in future cases the message analysis will be anything more than a formality. The expressive association will nearly always win on this point.

The dissent, by contrast, would not defer to the association on the existence and meaning of its message. Moreover, it would set the bar high: "At a minimum, a group seeking to prevail over an anti-discrimination law must adhere to *a clear and*

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117. *Id.* (emphasis added) (quoting a 1991 policy statement issued after Dale was terminated but *before* New Jersey amended its public accommodations law to prohibit discrimination based on sexual orientation and *before* litigation commenced).

118. "[W]e look to it [evidence of the BSA's view about homosexuality] as instructive, if only on the question of the sincerity of the professed beliefs." *Id.*

119. Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner . . . [had] an honest conviction that [compliance with state law] was forbidden by his religion."); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450 (1969) (stating that courts must not decide matters "at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion").

120. *Thomas*, 450 U.S. at 716.

121. To challenge the association's sincerity, it would not be enough to show the group had a different view on the issue *in the past*, since groups are free to change their messages.

unequivocal view."[122] This standard requires courts to scrutinize very closely a group's written and other statements. It is not enough that a group's interpretation of its message be a reasonable one; it must be clearly supported from the group's own past statements.[123] Even if these past statements are clear in some places, moreover, that is still not enough; the statements must not be contradicted elsewhere, lest they create fatal equivocality.[124] The dissent would require very close attention to the substance of a group's message.

Using this standard, the dissent carefully scrutinized the BSA's written materials—including its mission statement, its federal charter, the Scout Oath, the Scout Law, the Boy Scout Handbook, the Scoutmaster Handbook, an internal 1978 policy statement from the BSA's president, and four policy statements issued between 1991 and 1993—to determine whether the BSA really had a message about homosexuality.[125] The dissent found, in one after another of these statements, either complete silence or equivocation on the subject of homosexuality. As to the proper interpretation of the Scout Oath and Scout Law, the dissent confidently concluded, "It is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality."[126]

3. The Impairment Analysis

Although the majority framed the impairment analysis in fairly strict terms—asking whether compliance with the anti-discrimination law would "significantly affect" the group's "ability to advocate public or private viewpoints"[127]—the analysis is a sheep in wolf's clothing. The majority held, "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."[128]

The Court noted that Dale was not only openly gay, but was a leader in the gay community, having been copresident of a gay organization in college, and was still a "gay rights activ-

122. *Dale*, 120 S. Ct. at 2465 (Stevens, J., dissenting) (emphasis added).

123. *See id.* (Stevens, J., dissenting) (describing the BSA's inconsistent past statements regarding homosexuality).

124. *See id.* (Stevens, J., dissenting).

125. *See id.* at 2460-66 (Stevens, J., dissenting).

126. *Id.* at 2462 (Stevens, J., dissenting).

127. *Id.* at 2452.

128. *Id.* at 2453.

ist."[129] "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, *both to the youth members and to the world*, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[130] The Court argued this would be analogous to forcing the organizers of the St. Patrick's Day parade to include a contingent of openly gay marchers, something the Court unanimously refused to do in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.[131]

The dissent had no trouble dismissing the notion that Dale's presence would impair any BSA message since "the group itself is unable to identify its own stance with any clarity."[132] The dissent distinguished *Hurley* on the grounds that Dale's participation "sends no cognizable message to the Scouts or to the world."[133] As for the possibility that the presence of openly gay scoutmasters would send a message to the boys contrary to the BSA's desired message, the dissent argued that the BSA teaches nothing about sexuality in general or homosexuality in particular.[134] In fact, the BSA cautions scoutmasters to avoid the topic altogether.[135] Further, the dissent concluded that because the BSA includes up to one million adult scoutmasters, and some of those scoutmasters do not view homosexuality as immoral, there is little chance that admission of an openly gay person would send any message to the outside

129. *Id.* at 2454. A future litigant who was openly gay but not a "gay rights activist" might argue that *Dale* does not extend to him. It remains to be seen whether, in litigation claiming violation of an anti-discrimination law, the Court would permit the exclusion of someone who was known to be gay but was not politically active. That question is open after *Dale*. But the line between being "actively" openly gay (OK to exclude, after *Dale*) and "passively" openly gay (not OK to exclude) would be awfully hard to draw with precision or principle. For that reason alone, it is doubtful the Court will attempt it.

Another question left open by *Dale* is whether its rationale would apply to the exclusion of an openly gay scout, rather than a scoutmaster. Scoutmasters have a much more important role in promulgating the BSA's moral views than do scouts themselves. Nevertheless, it doubtful the Court would draw the line here since many of the associational concerns implicated by the New Jersey law, discussed *infra* Part II.C, apply to the forced inclusion of openly gay scouts.

130. *Dale*, 120 S. Ct. at 2454 (emphasis added).

131. 515 U.S. 557, 574-75 (1995).

132. *Dale*, 120 S. Ct. at 2470 (Stevens, J., dissenting).

133. *Id.* at 2475 (Stevens, J., dissenting).

134. *See id.* at 2470 (Stevens, J., dissenting) (stating that the BSA's mission statement, federal charter, official membership policy, Scout Oath, and law are all "devoid of any view on the topic [of homosexuality]").

135. *See id.* at 2472 (Stevens, J., dissenting).

world.[136] "In short," wrote Justice Stevens, "[the] Boy Scouts of America is simply silent on homosexuality."[137]

C. FLAWS IN A MESSAGE-BASED APPROACH

The insistence that a group's message must be "clear and unequivocal" before it is entitled to First Amendment protection is flawed for four principal reasons. First, by requiring clarity and unequivocality, the approach asks too much of speech, which is often ambiguous and even equivocal. The approach will be likely systematically to punish unpopular opinion—the very danger the First Amendment seeks to avoid—because doubt about a group's message will often be resolved against such opinion. There is evidence of this bias in the dissent's own interpretation of the BSA's message. Even assuming an impartial decisionmaker, however, unpopular opinion will suffer disproportionately under the dissent's approach because associations with controversial opinions often speak ambiguously and equivocally in order to protect themselves from popular backlash. Second, the approach misses the way in which membership itself says something about the group to both its internal and external audiences. The presence of an openly gay person, in particular, speaks powerfully to the group's members and to the outside world. Third, the approach misses the subtlety of speech, especially the way in which a group can "speak" about a subject by insisting on silence about that subject. This is especially true of the subject of homosexuality. Finally, the approach improperly dismisses the practical needs of a group to avoid the organizational harm that would be done by compliance with a state regulation. It was just this type of harm—not the need to preserve a message—that gave birth to the freedom of association in *NAACP v. Alabama ex rel. Harrison*.

1. A Message-Based Approach Is Unrealistic, Error-Prone, and Dangerous to Unpopular Opinion

Speech is painting a picture, not doing a sum.[138] Words and groups of words have many and often indeterminate mean-

136. *See id.* at 2476-77 (Stevens, J., dissenting).

137. *Id.* at 2470 (Stevens, J., dissenting).

138. "Life is painting a picture, not doing a sum." Oliver Wendell Holmes, Address at Fiftieth Anniversary of Graduation, *The Class of '61* (June 28, 1911), *in* THE ESSENTIAL HOLMES 94 (Richard Posner ed., 1992).

ings that depend on hard judgments about context and emphasis. Often more than one reasonable interpretation of a literary or political work is possible. As any student of the Uniform Commercial Code knows, even very smart people, trained in the art of using language with precision, trying to say things as plainly as possible, miss their mark. Aiming to satisfy the needs of one moment, they fail to anticipate the next. Aiming to handle future problems, they overlook the present. Aiming to resolve a particular issue, they contradict their resolution of another. Aiming to deal with all dilemmas, they speak so broadly they settle none. This is not just a "fault" of human communication. It is also what makes it rich and beautiful and fun.

Unlike code drafters, people often speak in order to obfuscate, not to illuminate; in order to compromise a web of conflicting interests, not to clear them out. Understanding the speech of a group trying to transmit moral values without unnecessarily offending or hurting people is not like understanding a tax code. To qualify for First Amendment protection, then, groups have not even been required to have *written* materials, much less *clearly written* materials.

Recognizing the opaque quality of human expression, the Supreme Court has never required clarity as a precondition for First Amendment protection.[139] It protects even symbolic expression, like wearing a black armband[140] or displaying a red flag,[141] whose thrust may be apparent but whose meanings may be difficult to discern with precision. "[A] narrow, succinctly articulable message is not a condition of constitutional protection," wrote Justice Souter (a *Dale* dissenter) for a unanimous Court in *Hurley*, "which if confined to a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[142]

Yet, consuming several pages of close textual analysis, the dissent approaches the BSA's views as a judge might approach the interpretation of a complex statutory scheme. To deter-

139. The dissent cites no authority for its clarity standard, which appears to have been concocted for this case.

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

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

142. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995) (citation omitted).

mine whether the BSA's message possesses the requisite clarity, the dissent implicitly relies on some familiar principles and canons of statutory construction: for example, words should be interpreted in light of their underlying purpose,[143] read a statute in its entirety,[144] discern the intent of the framers,[145] the specific provision controls the general,[146] and the more recent provision controls the earlier.[147] Omitting only expressio unius, the dissent barely escapes lapsing into Latin.

Part of the problem with the dissent's clarity requirement is that judicial decisionmakers will often draw the wrong conclusions, as the dissent does, about a group's beliefs. Though there are many examples of error about the BSA's beliefs in the dissent, consider just three.

First, the dissent was unconvinced by the BSA's claim that the words "morally straight" and "clean" reflect disapproval of homosexual conduct. Turning to other uses of these words in BSA materials distributed to boys, the dissent noted that sexuality is not mentioned specifically.[148] The dissent also noted these terms refer to many things, such as a duty to be kind to others and to be honest.[149] Based on these observations, the dissent confidently concluded, "It is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality."[150]

Since when? For much of American history words like "moral" and "clean" have been freighted with far more meaning

143. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2462 (2000) (Stevens, J., dissenting) ("In light of BSA's self-proclaimed ecumenism . . . it is even more difficult to discern any shared goals or common moral stance on homosexuality.").

144. *Id.* at 2463 (Stevens, J., dissenting) ("But when the *entire* 1978 letter is read, BSA's position is far more equivocal . . . .").

145. *Id.* (Stevens, J., dissenting) ("[I]t is apparent that the draftsmen of the [1978] policy statement foresaw the possibility that laws against discrimination might one day be amended to protect homosexuals from employment discrimination.").

146. *Id.* at 2463-64 (Stevens, J., dissenting) (noting that the 1978 policy statement excluding homosexuals from the BSA "clearly provided that, in the event such a law conflicted with their policy, a Scout's duty to be 'obedient' and 'obe[y] the laws,' even if 'he thinks [the laws] are unfair' would prevail in such a contingency").

147. *Id.* at 2465 (Stevens, J., dissenting) ("[W]hile the 1991 and 1992 statements tried to tie BSA's exclusionary policy to the meaning of the Scout Oath and Law, the 1993 statement abandoned that effort.").

148. *Id.* at 2461 (Stevens, J., dissenting).

149. *Id.* (Stevens, J., dissenting).

150. *Id.* (Stevens, J., dissenting).

than the duty to help elderly people cross the street. In most places for much of American history, homosexual conduct has not been considered "morally straight." Gay people have often been seen as dirty and sick—the very opposite of being "clean" in "body and mind," as the BSA urges boys to be. Though attitudes toward gays are improving, much resistance remains.[151] Surely the Boy Scouts are entitled to use familiar terms with this common background meaning in mind. Even if that meaning is increasingly contested, as it should be, the BSA must be permitted to defend its traditional interpretation of these words in the culture wars.

Second, the dissent declared it is not enough that a group have an exclusionary membership policy in order to prevail on an associational claim against an anti-discrimination law; it must also tie that exclusionary policy to some belief the group holds. The BSA pointed to two policy statements issued in 1991 and one statement issued in 1992 that did exactly that, explicitly declaring that homosexual conduct is inconsistent with being "morally straight" and "clean."[152] One would have thought this would satisfy the dissent's clarity requirement. Instead, the dissent complains that the BSA "abandoned" its interpretation of "morally straight" and "clean" by failing to repeat it in a subsequent policy statement issued in 1993. The 1993 statement explained only that excluding gays as scoutmasters reflected "the expectations that Scouting families have had for the organization" and that "homosexuals [do not] provide a role model consistent with these expectations."[153]

It is hard to see how this position "abandons" the view that homosexual conduct is inconsistent with being "morally straight" and "clean." Indeed, it seems implicitly to reinforce it. So the dissent appears to require not just that a group have a clearly expressed view, but that the view be reiterated in every statement the group makes thereafter lest the court find it has been abandoned. Perhaps the dissent is applying expressio unius to group speech after all.

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151. A majority of Americans still believe homosexual conduct is morally wrong. Carey Goldberg, *Tolerance for Gays Up, Study Says*, HOUSTON CHRON., May 31, 1998, at A4 (noting that although disapproval of homosexuality had dropped nearly 20% since its peak in the 1980s, a 1996 study still showed a 56% disapproval rate).

152. *Dale*, 120 S. Ct. at 2464 (Stevens, J., dissenting).

153. *Id.* (Stevens, J., dissenting).

Third, the dissent chided the majority for quoting selectively from a 1978 letter from the BSA president to the executive board declaring that the BSA does "not believe that homosexuality and leadership in Scouting are appropriate."[154] In response to a question about whether openly gay adult members should be excluded, the statement declared, "Yes, in the absence of any law to the contrary. . . . In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it."[155] The dissent takes this to mean the BSA intended to exclude gays unless a state enacted an anti-discrimination law prohibiting discrimination against gays. It is more plausible to conclude that BSA meant to exclude gays unless an anti-discrimination law *applicable to the BSA* required otherwise. Yet if the state's anti-discrimination requirement is unconstitutional as applied to the BSA's membership policy, it is not truly "applicable" to the BSA. The whole point of the *Dale* litigation was to test that proposition. It is not necessary for the BSA to obey unconstitutional laws, nor is it plausible to suggest the group would consent to doing so. Thus, the dissent takes a simple and unsurprising promise to behave lawfully and turns it into a surrender of constitutional rights.

The danger of a message-based approach is not only that quibbling judges (or juries) will misunderstand a group's message. It is that, in doing so, they will systematically disfavor unpopular opinions. This will happen because of a common human trait known as *confirmation bias*, the tendency to interpret subsequent words and events in a manner favorable to one's initial conclusions.[156] Thus, decisionmakers who come to a case convinced an unpopular view is wrong will be more likely to interpret the purveyor's message unfavorably. That result is antithetical to the idea of the First Amendment.[157]

The systematic bias arising from a message-based approach to the problem of associational freedom would come about in three ways. First, as an initial matter, dissident

154. *Id.* at 2463 (Stevens, J., dissenting).

155. *Id.* (Stevens, J., dissenting) (emphasis omitted).

156. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1495 (1999) (describing confirmation bias).

157. *Cf.* United States v. Ballard, 322 U.S. 78, 87 (1944) ("If one could be sent to jail because a jury in a hostile environment found those [religious] teachings false, little indeed would be left of religious freedom.").

groups[158] are the only ones that will be sued under an anti-discrimination law. By definition, only groups that are unpopular—in the sense that they are acting contrary to the legislative majority's demands—will need to defend themselves. This skews the sampling of opinion that will be subject to clarity review.[159]

Second, the clarity requirement will disproportionately impact dissident groups once they are in court. To escape public censure, dissident groups often necessarily "speak" more secretively and evasively than do dominant groups. This was apparently the case with the BSA, which wanted to maintain its gay-exclusion without shouting its views from the mountaintops.[160] Requiring the messages of these groups to be clear and public[161] is an unrealistic expectation and is therefore unfair. Further, the backdrop of the state's strong social interests in eradicating discrimination will add to pressure on decisionmakers to find "ambiguity" or "equivocality" in the group's message to begin with. Decisionmakers, acting on confirmation bias, will have leeway to impose their own political preferences on groups whose message they disdain.[162] Once this ambiguity, or some internal contradiction, is found, the state will have its way. The history of the state's attempts to regulate association by investigating its speech[163] should counsel caution in this area.

Third, even if dissident groups survive clarity review and thus win an exemption from compliance, they will have been forced to bear the burden of expensive litigation in defending

158. By "dissident group" I mean not just groups that are generally unpopular, like the CPUSA in the 1950s, but also generally-approved groups that have some controversial views. The BSA clearly fits in the latter category, not the former. Similarly, the Catholic Church, while powerful and influential generally, is a "dissident" group in its opposition to the use of contraceptives.

159. Of course, this skewing problem will be present in every approach since only groups alleged to run afoul of anti-discrimination law will be sued.

160. Reply Brief for Petitioners at 4, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 432367.

161. Among other objections, the dissent complains that the 1978 BSA policy statement on gays was never *publicly* promulgated. *Dale*, 120 S. Ct. at 2463 (Stevens, J., dissenting).

162. There are indications of such a bias against the BSA's views in Justice Stevens's own dissent. *Id.* at 2477 (Stevens, J., dissenting) (describing "unfavorable opinions about homosexuals" as "atavistic" and as "prejudices" that "have caused serious and tangible harm"). I share Justice Stevens's discomfort with the BSA's views about homosexuality, which is all the more reason people like us should not be reviewing them.

163. *See supra* Part I.A.

their views.[164] The BSA has been fighting litigation over its gay exclusion for almost two decades, *yet its views were still not sufficiently clear and unequivocal for the New Jersey courts and four members of the Supreme Court.*[165] The Girl Scouts gave up their insistence that "God" be included in the Girl Scout Oath at least in part because they could not afford protracted lawsuits.[166] Dissident expressive associations, already on the margins of majority opinion, are less likely than dominant groups (or commercial associations) to have the economic and human resources to fend off the state.[167]

In response to these risks, unpopular groups (or even groups, like the BSA, that are generally popular but have some controversial views touching on state anti-discrimination law) will self-censor their messages. The net effect of a message-based approach will be to punish the expression of unpopular ideas *the First Amendment exists to protect.*

Of course, the dissent's strict clarity requirement is not the only imaginable message-based approach. Instead of requiring clarity and unequivocality in an expressive association's message, for example, one might require much less of the group. A

164. There will, of course, be litigation costs associated with the tripartite approach suggested in Part III. But under the tripartite approach these costs are less likely to be borne by the groups least equipped to bear them—expressive associations—and most likely to be borne by the groups more equipped to bear them—commercial and quasi-expressive associations. *See supra* text accompanying notes 327-28; *cf.* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) (noting that commercial speech is more "hardy" than non-commercial speech). This is because expressive associations are almost absolutely protected from anti-discrimination under the tripartite approach and will need only litigate the issue of their proper categorization as expressive. Further, as I argue in Part III.B.4, the tripartite approach is more likely to settle into familiar and predictable rules over time than is a message-based approach, diminishing the need for litigation and allowing associations to adjust their behavior according to their principal interests, whether expressive or commercial.

165. The dissent ignores the BSA's prior litigation defending its gay exclusion. Apparently, for the dissent, advocacy in court is not a way of speaking. Yet it is clear that litigation in defense of one's beliefs is a "mode[] of expression and association protected by the First [Amendment]." NAACP v. Button, 371 U.S. 415, 428-29 (1963) (upholding, against state anti-solicitation law, the NAACP's right to solicit clients for civil rights lawsuits).

166. Reply Brief for Petitioners at n.4, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 432367.

167. *See supra* text accompanying notes 327-28. It cannot be maintained that the BSA itself, however, was poor in economic and human resources. The point is that many expressive associations fighting anti-discrimination law will be poor in these resources.

court could require only that the association's interpretation of its message be reasonable—rather than that the message be objectively clear and unequivocal—in order to get protection from membership regulation by the anti-discrimination law. This would certainly be less onerous than the dissent's standard. However, even this minimal substance requirement will involve some risk to unpopular opinion. To the extent that a lesser message-based standard requires a group to defend its own interpretation of its message in litigation, it runs this risk. To the extent it is just another way of deferring to the association on the meaning of its message, however, one wonders what purpose it would serve.

Gays may fare well under a message-based approach in places, like New Jersey, that have favorable public policy and opinion to back them up. But gays will fare poorly under this approach in other places. Imagine, for example, putting the fate of a gay organization's internal organizational rules in the hands of an elected judge in a state with an anti-gay sodomy law. Consider the intrusive nature of discovery under which judges and the group's enemies might examine the group's internal, confidential policy statements. Even if the group wins on review, it may be bankrupted by the experience and thus effectively forced to change its policy or altogether driven out of existence. Gay history teaches the danger to dissident speech and organization that comes when the state is empowered to pore over a group's internal documents and pressure it financially with even meritless claims.[168]

2. A Message-Based Approach Ignores the Expressive Component of Group Membership

The dissent rejects the notion that "Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality."[169] Dale's attorneys went further, flatly asserting that "Dale's identity is not a message" and suggesting that "declaring oneself to be gay communicates [nothing] more than one's sexual orientation."[170] These contentions miss the important way in which a group's membership policy is itself expressive. They also ignore an important lesson

168. *See supra* Part I.B.1 (recounting experience of the Chicago Society for Human Rights).

169. *Dale*, 120 S. Ct. at 2474 (Stevens, J., dissenting).

170. Brief for Respondent at 31-32, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 340276.

of the gay civil rights experience, which teaches that coming out of the closet is a profoundly expressive act affecting not only the person who comes out but everyone around him.

A group's membership policy is itself a means of communicating its values, both internally and externally.[171] It says a great deal to outsiders about the BSA's world view that the group would have a policy excluding gays. The policy is, on the one hand, an affirmation of traditional sexual morality. It is, on the other, a reflection of concern about introducing youths to sexuality at all. It is, further, a denial of the notion that gays can be moral participants in civic life. It is, less charitably, a message of personal revulsion, a denial of the basic humanity and dignity of gay people. It is in part because the policy sends such negative messages about a protected class that the state wants to regulate the BSA's membership: the message the membership policy sends runs counter to the state's goal, expressed in the citizenship model of anti-discrimination law, of ensuring gays equal access to civic life.

Gay organizations themselves have historically discriminated in membership based on sexual orientation. From the beginnings of the gay civil rights movement, gay organizations have relied on exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy. The Society for Human Rights, the first known gay civil rights organization, excluded even bisexuals. Today, there are exclusively gay social clubs, retreats, vacations, music festivals, and alumni and professional organizations. Even groups that are not exclusively gay would resist having heterosexuals in leadership positions.[172]

It might be responded that *every* exclusionary membership policy—whether based on race, sex, or sexual orientation—is

171. *Roberts* is consistent with this view. The Jaycees wanted to exclude women as full voting members but had invited women to participate in much of the group's training and community activities. Roberts v. U.S. Jaycees, 468 U.S. 609, 621 (1984). For that reason, the Court said the Jaycees' claim that full membership for women would "impair a symbolic message" conveyed by the exclusionary policy "is attenuated at best." *Id.* at 627. By contrast, the BSA does not allow openly gay people to participate in *any* aspect of membership. The BSA's exclusionary policy, because it is more complete, is also more expressive and more likely to be impaired by forced association than was the Jaycees' policy.

172. Brief Amicus Curiae of Gays and Lesbians for Individual Liberty In Support of Petitioners at 25, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 228588.

expressive in just this way. That is true. It said a lot about a business networking club, like the Rotary, that it attempted to exclude women. The reason to deny the Rotary's associational freedom claim, then, is *not* that excluding women sends no message. After decades of feminist activism, the exclusion of women from an association is often a very strong message of group resistance to changing cultural norms. The reason to deny the Rotary's claim lies elsewhere.[173]

Moreover, an exclusionary membership policy has special message-bearing force in the area of sexual orientation, where the expressive component of identity is even more distinct than in the area of race or sex. It makes sense to speak of an "openly gay person" in a way that it would not make sense to speak of an "openly black person." Homosexuality is not an observable personal trait, like skin color. To be known to others, one's homosexuality must be affirmatively communicated to them (either by the gay person himself or by those who know or believe they know his sexual orientation), where a trait like race is not "expressed" in this sense at all because it is passively communicated.[174] So one's status as openly gay is a form of communication. It is an ongoing affirmative statement from the gay person to the rest of the world. It is speech.

This is not a revolutionary view: it has been a central argument of gay rights advocates for decades. Coming out, in the context of our society and times, is freighted with personal, cultural, and even political significance. It is not just a statement of sexual orientation; it is ordinarily an affirmation that one is unashamed about being gay, that others should not be ashamed about it, that one intends to act sexually on the orientation, and that one is prepared to deal with the consequences of being honest. A person who self-identifies as gay can rationally be expected to engage in homosexual conduct. Here, the dissent's attempt to draw a bright line between Dale's *status* as gay person (for which the dissent says the BSA could not exclude him) and his *conduct* (for which the dissent says the BSA may exclude him) simply falls apart.

As Nan Hunter has written, "Self-representation of one's sexual identity necessarily includes *a message* that one has not

173. *See infra* Part III.

174. It is true, of course, that some people can "pass" as a member of another race, requiring some affirmative "coming out" by them analogous to a gay person's coming out. But this is the exception in the case of race; it is the rule for gay people.

merely come out, but that one intends to be out—to act on and live out that identity."[175] Others have argued that coming out is pure speech, entitled to full First Amendment protection from state regulation in contexts like the military.[176] Courts, too, have recognized the expressive nature of coming out,[177] and have even concluded that the First Amendment precludes the state from discharging a public employee for doing so.[178] If, as the dissent concedes, the BSA may exclude people who express messages about homosexuality it does not want to have conveyed,[179] it may exclude people like Dale who necessarily "express" a message by virtue of being openly gay.

On this point, the *Dale* majority may have inadvertently benefitted openly gay state and federal employees. By highlighting the impact Dale's being openly gay would have on the BSA, the *Dale* majority implicitly accepts the expressive nature of coming out. This should help the cause of state and federal employees everywhere who are fired or otherwise disadvantaged on the job for coming out of the closet. After *Dale*, it

175. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696 (1993) (emphasis added). *But see* James P. Madigan, Questioning the Coercive Effect of Self-Identifying Speech 59 (unpublished manuscript, on file with author) (criticizing Hunter's identity argument: "Nan Hunter does not get to decide what any and every gay person means when he or she self-identifies."). While I agree with Madigan's claim that self-identifying as gay does not necessarily imply adherence to a particular ideological agenda, *see id.* at 6, I think he misses the widely shared social understanding of what one says by being out. Even if a particular out gay person does not intend to send a gay-affirming message by being out, his self-identification will often be understood by others that way. This message is "received" even if not "sent," and it is a message an expressive association should be able to avoid. Further, even if the precise message sent by coming out varies from person to person, there is no doubt that *some* message is sent. The claim for associational freedom is an effort by the group (in this case, the BSA) to avoid being associated with *any* message tied to coming out.

176. David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 321-22, 325, 337 (1993).

177. *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979) (interpreting a provision of state labor code prohibiting discrimination based on employees' "political activity" to protect openly gay people from discrimination).

178. Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1288-89 (D. Utah 1998) (stating that the removal of a public high school teacher for acknowledging her homosexuality violated the First Amendment).

179. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2472 (2000) (Stevens, J., dissenting) (agreeing that Dale has no right to advocate gay civil rights "when he is working as a Scoutmaster," and "BSA cannot be compelled to include a message about homosexuality" if it prefers to remain silent).

should be clear the act of coming out has First Amendment significance, as does a negative employment consequence arising from that act.

Whatever the doctrinal significance of coming out, its practical impact cannot be doubted. The evidence, one might say, is clear and unequivocal that it has a profound affect on the political views of the recipients of the message. A recent survey by Harris Interactive concluded that "familiar voters"—those with a known gay family member, friend, co-worker, or acquaintance—are far more likely than "non-familiar voters" to support hate crimes legislation protecting gays (82% familiar vs. 74% non-familiar), employment discrimination laws protecting gays (74% familiar vs. 58% non-familiar), allowing gays to serve openly in the military (64% familiar vs. 46% non-familiar), legal recognition of same-sex civil unions (47% familiar vs. 22% non-familiar), and adoptions by gay parents (47% familiar vs. 19% non-familiar).[180] Familiar voters are also more likely to consider these issues "important" in their voting decisions.[181] They are correspondingly less likely than non-familiar voters to support a candidate who expresses negative views about gays.[182] Thus, to deny the significance of Dale's being openly gay in a Boy Scout troop is to deny substantial empirical data and to deny a central lesson of gay experience.

Justice Stevens himself recognized the political and cultural effect of coming out. "Over the years," he wrote in closing, "interaction with real people . . . [has] modified [anti-gay] opinions."[183] James Dale, too, understood the need to come out in order to be a "role model" for gay youth. It is this role modeling, this subtle but deep effect on the personal opinions of its members, in short *this message*, that the BSA sought to avoid sending by excluding openly gay scoutmasters.

The dissent responds that if the BSA really wanted to avoid sending a message of affirmation about homosexuality to

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180. GILL FOUNDATION, OUT AND INTO THE VOTING BOOTH: LESBIAN, GAY, BISEXUAL & TRANSGENDER VOTERS IN 2000, at 27 (on file with author) [hereinafter OUT AND INTO THE VOTING BOOTH]. Interestingly, public support for gay equality among both familiar and non-familiar voters is highest in areas related to crime prevention and job protection. That support declines as the issues move closer to family life and especially to child-rearing. This finding supports the notion that the BSA faced a serious backlash among its members if it had been forced to admit openly gay scoutmasters. *See infra* Part II.C.4.

181. OUT AND INTO THE VOTING BOOTH, *supra* note 180, at 52.

182. *Id.* at 53.

183. *Dale*, 120 S.Ct. at 2478 (Stevens, J., dissenting).

its boy members, it would also exclude heterosexual scoutmasters that disagree with its views about homosexuality. There are two responses to this. First, if only to satisfy boys' parents, the BSA would certainly not tolerate a heterosexual scoutmaster who actually conveyed a gay-affirming message to boys in his charge.

Second, tolerating the presence of gay-friendly heterosexual scoutmasters is qualitatively different than tolerating the presence of openly gay scoutmasters. A heterosexual may make abstract arguments supporting a gay equality claim and debate may ensue. But the moment a known gay person enters the room abstractions end. An openly gay person forces those around him to deal with their feelings about homosexuality in a much more personal way. The disputants confront a person, not just an argument. Arguments about "sodomy laws" become discussions about whether *this person* should go to jail. Arguments about "Don't Ask, Don't Tell" become discussions about whether *this person* is fit to serve his country. Arguments about "traditional marriage" become discussions about whether *this person* can marry the person he loves. And arguments about civil rights laws become discussions about whether *this person* should be fired or excluded. The whole dynamic changes when an openly gay person is present.[184]

Something similar to this realization has been behind the effort of the gay civil rights movement to elect openly gay people to public office.[185] It has not been enough for gay-rights ad-

184. I appreciate the counterargument that a straight person arguing for gay equality might be viewed as having more credibility on the subject than a gay person making similar arguments because the gay person speaks out of self-interest. Hunter, *supra* note 4, at 1602. In some contexts that is certainly a persuasive argument. However, it is not persuasive in the case of scoutmasters whose actual statements to the boys, all concede, may be freely silenced by the BSA. *Dale*, 120 S. Ct. at 2472 (Stevens, J., dissenting) ("Dale's right to advocate certain beliefs in a public forum or in a private debate does not include a right to advocate these ideas when he is working as a Scoutmaster."). The choice in the context of the BSA, then, is between the message sent by the presence of a muzzled but gay-friendly straight person and the message sent by the presence of a muzzled but openly gay person. I cannot believe anyone would doubt in this context that the stronger message of gay-affirmation is sent by the openly gay person; indeed, it is hard to understand how the muzzled straight scoutmaster sends any message at all. That is presumably why the BSA considers it safe to include a muzzled (pro-gay) straight scoutmaster but not a muzzled openly gay scoutmaster.

185. A prominent gay-rights organization, the Gay & Lesbian Victory Fund, is devoted entirely to electing openly gay people of either major party to public office.

vocates to elect pro-gay *straight* politicians. Is there any doubt that, everything else being equal, gay-rights advocates would prefer to have an openly gay role model heading a scout troop than a gay-friendly straight one? Gay advocates, and the BSA, instinctively understand the difference.[186]

Judges are likely to misunderstand or underappreciate, as the dissent does, the significance behind the choices an expressive association makes about why to send one message rather than another, or the meaning of the messages it sends, or how to send the message it actually wants to send, or when it should be sent, or who should send it. When it comes to the First Amendment, the state—including its judges, juries, and prosecutors—should stay out of the speech-scrutinizing business altogether.[187]

3. A Message-Based Approach Improperly Treats Organizational Silence as Neutrality

Silence can speak. Depending on the circumstances, there may be no better way to speak. If a schoolchild sits silently at a desk while the class works through an algebra equation, that is one thing. If the same child sits silently at a desk while the class stands for the Pledge of Allegiance, that is quite another. In the first instance, silence says nothing; in the second, silence says it all.[188] It communicates more powerfully than any combination of spoken words might ever manage.

Even if the dissent is correct that the BSA is determinedly silent about homosexuality,[189] that silence should not be under-

186. Justice Stevens himself has recognized the importance of this difference in the area of race. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) ("It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth [through the presence of racial diversity among teachers] on a day-to-day basis during the entire, ongoing learning process.").

187. *Cf.* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450 (1969) (stating that courts should not scrutinize "the interpretation of particular church doctrines [or] the importance of those doctrines to the religion").

188. *See* West Virginia v. Barnette, 319 U.S. 624, 642 (1943) (holding that requiring a student member of Jehovah's Witnesses to recite the Pledge of Allegiance is unconstitutional).

189. "In short, Boy Scouts of America is simply silent on homosexuality." *Dale*, 120 S.Ct. at 2470 (Stevens, J., dissenting). Even if this claim is an exaggeration, at the very least it is true the BSA does not want scoutmasters teaching the boys *anything* directly about sexuality. The topic is to be avoided,

stood as neutrality. At least since the Stonewall riot in New York City in 1969, the event that is widely understood to have launched the modern gay-rights movement, gay advocates have insisted that silence on the subject of homosexuality come to an end.[190] Gay advocates understand that silence signals tacit disapproval of gay-rights claims, or at the very least embarrassment and shame about the subject. The "love that dare not speak its name," as Oscar Wilde put it,[191] has been above all *a love about which we dare not speak.*

Here, as elsewhere, context matters. If homosexuality and the demands for gay equality were not supremely contentious issues in modern America, an insistence on silence about the issue might mean little. The BSA would then be like the schoolchild who remains silent during an algebra lesson. But against the backdrop of loud, continuous, and insistent demands to discuss and take sides on gay-rights claims, a steadfast refusal to talk at all about the issue is hardly neutral. It is itself a position, a "message." It is like the schoolchild who remains silent while students all around him recite the Pledge of Allegiance.[192]

Indeed, determined silence is not only nonneutral, it is probably the most pervasive and potent obstacle to gay equality in America today. Next to it, the hateful rhetoric of anti-gay extremists is trivial. Refusing even to discuss the issue of the morality of homosexuality is an effective way to insulate oneself and one's associates from having to think critically about it. On the other hand, the "mere presence" of an openly gay person will generate discussion and reflection on the topic. It is partly to generate such critical self-examination that the citizenship model of anti-discrimination law insists on reaching into heretofore private associations.

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if possible, and boys are steered to other sources for counseling about it. *Id.*

190. "[W]e learned long ago . . . that 'silence = death.' In politics, 'silence = zero progress.'" Michael Colby, *Voting Booths, Yes. Closets, No. Silence, Never.*, National Stonewall Democrats, *at* http://stonewalldemocrats.org/press/press88.htm (Feb. 16, 2001).

191. *See* Colin Spencer, HOMOSEXUALITY IN HISTORY 285 (1995) (quoting Wilde's statement at his 1890s sodomy trial). Actually, Wilde was speaking about affection between men and boys. But it has come to be understood as a comment about homosexuality.

192. *See Barnette*, 319 U.S. at 642 (holding that a flag salute requirement was unconstitutional as applied to schoolchildren members of Jehovah's Witnesses).

And the desire to maintain silence—and therefore avoid the consequences of critical self-examination—lies at the heart of the BSA's exclusion of openly gay people. Deep anxiety about the consequences of having to confront the issue is barely concealed in the BSA's brief to the Court: "What if, during a discussion of sexual morality, Dale interjects his own opinion? What if Dale brings his significant other to a Boy Scout banquet? What if Dale wears his Scouting uniform in a gay pride parade?"[193] The answer is if any of these things happened, the Boy Scouts would have to start *talking* about the issue. Excluding Dale, on the other hand, is a way to minimize the risk that the subject will ever surface. Preserving traditional sexual morality is the goal; silence is the method. We may not like the goal or the method. But if the First Amendment secures some space in which to develop one's own identity,[194] it surely guarantees enough to prevent the evolution of that identity in a direction the state demands.

4. A Message-Based Approach Disregards Practical Organizational Needs

The freedom of expressive association protects more than the group's desire to promulgate, or not to promulgate, a particular message. It also protects the group's ability to organize and preserve itself in the face of a social backlash that would arise from its compliance with a state's regulation. Thus, the dissent is wrong to deny the BSA's associational "right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group's membership were opened up."[195] That fear states a cognizable claim under the First Amendment to resist compliance with state regulation touching on organizational matters, including membership. It is a right to preserve the association's very existence in a contentious social climate.

The freedom of association was not born in a claim about the power of an organization to control its message. It was born in a dispute about membership. In the late 1950s, the pro-segregationist state of Alabama was harassing the NAACP

193. Brief for Petitioners at 38, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 228616.

194. Cole & Eskridge, *supra* note 176, at 327 ("The First Amendment protects the individual's freedom to explore, develop, and expand upon her identity.").

195. *Dale*, 120 S. Ct. at 2471 (Stevens, J., dissenting).

under a state law requiring out-of-state corporations to register to do business.[196] In court, the state moved for production of the NAACP's bank statements, leases, deeds, and a membership list.[197] The NAACP resisted not on the grounds that it was defending an "idea" about, for example, the sanctity of membership lists, but because protecting its membership list from public disclosure was an important part of its ability to organize. The Court agreed:

> The fact that Alabama . . . has taken no direct action . . . to restrict the right of petitioner's members to associate freely does not end inquiry into the effect of the production order. In the domain of these indispensable liberties . . . the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.[198]

The Court paid close attention to the social climate in which the NAACP operated. Preserving the privacy of the membership list was, in the South at that time, a precondition for the meaningful exercise of the right to associate. Disclosure would expose members to various manifestations of public hostility, such as loss of jobs or even physical violence. Under such circumstances, forcing the NAACP to comply with the state's regulation would be "likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate" by "induc[ing] members to withdraw from the Association and dissuad[ing] others from joining it."[199]

The state responded that these harmful consequences would flow "not from *state* action but from *private* community pressures."[200] The court quickly dismissed that argument. "The crucial factor," held the Court, "is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold."[201] The Court carefully noted that the NAACP would not be immune from all state investigation and had not objected to divulging the identity of its *employees*, as opposed to its rank-and-file members.[202]

196. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
197. *Id.* at 453.
198. *Id.* at 461 (citations omitted).
199. *Id.* at 462-63.
200. *Id.* at 463.
201. *Id.*
202. *Id.* at 463-64.

The NAACP and other groups successfully fought other litigation against disclosure of membership lists[203] and other sensitive internal information[204] under circumstances where the group faced a loss of its own membership for complying with the state's demands for information. This protection is "all the more essential . . ., where the privacy is that of persons espousing beliefs already unpopular with their neighbors."[205] Such cases are often thought to be about some organizational right to maintain the privacy of sensitive information. They are more properly understood, however, as having the instrumental purpose of exempting the association from compliance *in order to protect the ability of the group to organize effectively and even to continue to exist.*

Gay organizations have needed tight control over membership and other internal organizational matters as a practical tool for organizing in a hostile social environment.[206] They have keenly felt the need to keep and attract members by protecting them from public scorn. The coach of a team in a gay softball league recently defended the league's rule limiting the number of heterosexuals on a team: "If they open it up to straights, a lot of people will quit," he explained. "One [heterosexual player] alone won't say [anything], but you get two together, and they're going to be making fun of the [gay] kids, mocking the kids."[207]

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203. *See* Gibson v. Fla. Legislative Investigation Comm'n, 372 U.S. 539 (1963) (protecting the identity of members and contributors to NAACP); Louisiana v. NAACP, 366 U.S. 293, 295-96 (1961) (noting that members feared reprisals and hostilities after disclosure); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (stating that members feared harassment and threats of harm after disclosure); Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 207-08 (N.D. Cal. 1983) (denying discovery of gay group's membership list in civil litigation by Coors); *see also* Shelton v. Tucker, 364 U.S. 479, 485-86 (1960) (protecting teacher's associational right not to be forced to disclose his every associational tie). Note that this principle of associational membership privacy does not exempt public corporations from divulging the identity of large shareholders. Indeed, large shareholders in such corporations are *required* to make filings with the Securities Exchange Commission.

204. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101 (1982) (holding that a political party was entitled to exemption from compelled disclosure of campaign contributors and expenditures because of a "reasonable probability of threats, harassment, or reprisals" against the group's members).

205. *Gibson*, 372 U.S. at 556-57.

206. *Adolph Coors Co.*, 570 F. Supp. at 207-08.

207. Brittany Wallman, *"Straight" Player Limit Divides Gay Softball*, FORT LAUDERDALE SUN-SENTINEL, Feb. 9, 2001, at A1, *available at* LEXIS, News Library, News Group File.

This practical need for exclusivity among gay organizations has existed quite apart from any "message" the groups wanted to send about exclusivity itself. The Society for Human Rights, for example, excluded heterosexuals and bisexuals even though there is no historical record of a "message" to which it might tie that policy. Members of the Mattachine Society used pseudonyms to refer to one another, yet there is no indication members organized for the purpose of shielding their identities.[208] These were just things the groups needed to do to survive.

On an appropriate and sufficient factual record,[209] an expressive association could make a claim similar to claims made by the NAACP and other expressive associations that complying with a state's anti-discrimination law by admitting openly gay scoutmasters would be "likely to affect adversely the ability of [it] and its members to pursue their collective effort" by "induc[ing] members to withdraw from the Association and dissuad[ing] others from joining it."[210]

In *Dale*, the BSA did not make an argument that excluding openly gay scoutmasters was important to its continued functioning or its survival. Perhaps that is because the record on this point had not been sufficiently developed. Or perhaps that is because even making the argument would risk becoming a self-fulfilling prophecy in the event of a court loss. At most, the BSA cited a 1993 policy statement suggesting that gays do not "provide a role model consistent with [Scouting families'] expectations."[211] That may have been a significant understatement of the problem the Scouts might face from rebellious families and sponsors if forced to admit openly gay scoutmasters.

There was reason to believe the BSA would risk major defections in the event of an adverse decision. An amicus brief filed on behalf of a powerful group of troop sponsors—including the Catholic Church, the Church of Jesus Christ of Latter-Day

208. *See supra* Part I.B.

209. One might ask why the expressive association should need to make a record of this danger at all. It should be enough, on this view, for the association to assert the existence of the danger. The response is that the organizational-necessity aspect of associational freedom discussed here is not directly tied to the First Amendment interest in protecting speech; it is purely instrumental. It is appropriate, on the other hand, to defer to the association's assertions in the message and impairment analysis discussed above because those assertions are directly related to the content of the group's message and thus to the protection of speech itself.

210. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958).

211. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2453 (2000).

Saints, and a scouting organization within the United Methodist Church—warned,

> If the appointment of scout leaders cannot be limited to those who live and affirm the sexual standards of [the] BSA and its religious sponsors, the Scouting Movement as now constituted will cease to exist. Amicus the Church of Jesus Christ of Latter-day Saints—the largest single sponsor of Scouting units in the United States—would withdraw from Scouting if it were compelled to accept openly homosexual scoutleaders.[212]

This was a dagger held at the organizational heart of the BSA.[213] The social climate in which the BSA operates—like the social climate in which the NAACP or the Socialist Workers Party operated—includes opinions and attitudes over which the group has no control. The parents of many Boy Scouts or potential Boy Scouts believe that an openly gay scoutmaster will be a poor role model for their sexual values.[214] Presumably, they also fear that an openly gay scoutmaster may "recruit" their children into homosexuality[215] or may even molest their children.[216] Such parents may withdraw their children or refuse to enlist them if the BSA is forced to admit openly gay scoutmasters.

Although fears among parents about recruitment and molestation are unfounded or at least exaggerated, they are nonetheless real and quite common. The BSA might argue that it must take account of these attitudes about homosexuality if it is to remain intact. Otherwise, large sponsors and numerous families may withdraw or refuse to join. In this sense, excluding gay scoutmasters would not be an end but a means. But it is no less important to the effective exercise of the group's freedom of expressive association.[217]

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212. Brief of Amicus Curiae National Catholic Committee on Scouting et al., In Support of Petitioners at 25, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 235234.

213. Counsel for Dale came close to acknowledging this point after the decision: "I think the organization has in essence been hijacked by one faction of its members." *Why the Boy Scouts Case Went Down: An Interview with the Lawyer Who Argued the Supreme Court Case*, THE GAY AND LESBIAN REV., Jan.-Feb. 2001, at 15-16, *available at* http://www.glereview.com.

214. *See Dale*, 120 S. Ct. at 2453. This is the only parent-related point the BSA explicitly cited as a reason for its exclusion of openly gay scoutmasters.

215. There is no evidence that children are recruited into homosexuality. *See* RICHARD A. POSNER, SEX AND REASON 296-99, 403 (1992).

216. Homosexuals are no more likely to molest children than heterosexuals. *See* ESKRIDGE, *supra* note 42, at 214.

217. On the other hand, it may not be true that admitting openly gay scoutmasters would cost the BSA more members than excluding them has. In

There is a difference, of course, between the organizational needs of the NAACP in the 1950s and 1960s and those of the BSA today. By refusing to disclose the names of its members, the NAACP was protecting those members from the prejudice of people *outside* the organization (white racists). By refusing to admit openly gay scoutmasters, the BSA is protecting itself against its members' (or potential members') *own* prejudices. That difference makes the BSA a less sympathetic claimant than the NAACP, to be sure. But it does not diminish the group's need to frame its membership policies in ways that will allow it to achieve its larger aims.

Organizational needs are particularly acute in the area of membership. "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[218] Organizational requirements in this area are best known to the organization itself. The risk is great that outside observers—like courts and juries—necessarily less familiar with the circumstances, will err in determining which membership policies fit the organization's needs. Moreover, the interests of such decisionmakers in preserving anti-discrimination law do not align perfectly with the organization's. Where error is made, these decisionmakers will make it in favor of the law and against the organization. This counsels deference, above all, to an expressive association's judgments about whom to admit.

Thus, even if the BSA could not point to a coherent message about homosexuality, or to a relationship between its message and its exclusionary policy, it might plausibly claim that admitting openly gay scoutmasters would be "likely to affect adversely" its ability to pursue its other ends by "induc[ing]

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the wake of *Dale*, the BSA has endured a ferocious backlash from funding sources, including other private organizations and local governments, and from parents who do not want their children associated with an organization that discriminates against gays. "Unfortunately, we're in a period where Scout numbers are suffering across the country from the national publicity [after *Dale*]," said the president of the large Dallas BSA council. Todd Bensman, *Boy Scouts' Rolls Decline By 25%*, DALLAS MORNING NEWS, Feb. 25, 2001, at 29A, *available at* http://www.dallasnews.com/metro/296568_boyscouts_25me.html. National BSA officials deny a drop in membership. *See id.* Even if Scouting rolls have dropped in the wake of *Dale*, however, it is conceivable they would have dropped *even more* if the BSA had lost in *Dale*. This no-win predicament may be just the problem the BSA hoped to avoid by not publicly highlighting its gay exclusion in the first place.

218. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

members to withdraw" and "dissuad[ing] others from joining."[219] The dissent's quick rejection of this instrumental aspect of associational freedom simply ignores history.

III. FREEDOM OF EXPRESSIVE ASSOCIATION AND ANTI-DISCRIMINATION LAW: A TRIPARTITE APPROACH

We need a strategy for dealing with the conflict between associational freedom and anti-discrimination law that avoids the intensely message-based, and therefore perilous, focus of the *Dale* dissent. The approach also needs to be more completely theorized than the majority's deferential, sketchy, and somewhat disingenuous version of a compelling-interests analysis. It needs to harmonize existing law in this area—explaining how the Court could uphold the associational freedom claim in *Dale* while denying it in cases like *Rotary International* and *Roberts*—while simultaneously providing a relatively clear road map for the future.

Such an approach, as a first cut, should distinguish between primarily *commercial associations* and primarily *expressive associations*. This distinction will suffice for most occasions. However, to handle the truly hard case of an association that mixes significant and socially-important expressive activity that is also substantially commercial, we will need a third category of *quasi-expressive associations*. The analysis for this third group should focus on the nature of the specific activity or aspect of the organization sought to be regulated, generally protecting the group where it is expressive and generally enforcing anti-discrimination law where it is not. The court must determine which of these three types of associations is presented in a given case.

Note that the suggested approach will often require a detailed case-by-case examination of the nature of the association (whether commercial or expressive) or the nature of the relevant activity (whether commercial or expressive, in the case of quasi-expressive associations). Outcomes will depend on the facts at hand, reviewed under general principles. Hard calls are unavoidable, however, in this area if we are to avoid the extremes of absolute associational freedom, on the one hand, or ubiquitous anti-discrimination law, on the other.

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219. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958).

A. EXPRESSIVE, COMMERCIAL, AND QUASI-EXPRESSIVE ASSOCIATIONS

Although the Court has not explicitly adopted it, the distinction between expressive associations (generally protected from the application of anti-discrimination law) and primarily commercial associations (not strongly protected) appears to drive the results in this area. This Part distills how the distinction works and how it might apply to future cases. It also suggests an approach to quasi-expressive associations.

Under the tripartite approach, the BSA might be considered either expressive or quasi-expressive (but not commercial). Either way, the outcome in *Dale* would be the same: the BSA would be protected from anti-discrimination law in the selection of its scoutmasters. If the BSA is expressive, it should also be protected in its selection of Scouts and employees. If it is quasi-expressive, however, the application of anti-discrimination law to Scouts and even employees would present a different and more difficult case requiring a more contextualized analysis.

1. The O'Connor Concurrence in *Roberts*

In *Roberts v. United States Jaycees*, the Court rejected an all-male organization's claim that a state anti-discrimination law infringed its freedom of association by requiring it to admit women.[220] The Court held that the freedom of association must yield to "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[221] The Court held that admitting women as full voting members to the Jaycees would not impose "any serious burden on the male members' freedom of expressive association."[222]

Justice O'Connor concurred in the result but offered a different rationale.[223] She distinguished between commercial as-

220. *See Roberts*, 468 U.S. at 628-29.

221. *Id.* at 623. The Court continued to follow, at least formally, this compelling-interests test in *Dale*. However, it deferred on the existence and meaning of the BSA's message, deferred on the impact of the regulation on that message, and devoted only one sentence to dismissing New Jersey's interest in the regulation. *See* Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2457 (2000).

222. *Roberts*, 468 U.S. at 626.

223. *Id.* at 632 (O'Connor, J., concurring). Note that Justice Kennedy joined a similar concurrence by Justice O'Connor in *New York State Club Ass'n*

sociations and expressive associations, finding the majority's stated test both overprotective and underprotective of associational freedom. It was overprotective, in her view, of primarily commercial associations because it "cast[] doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society."[224] At the same time, the test offered "insufficient protection to expressive associations and places inappropriate burdens" on them in claiming First Amendment protection.[225]

Justice O'Connor objected to the Court's insistence that the group must show a connection between its message and its membership policy. "Whether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it," she wrote.[226]

The threshold inquiry, for Justice O'Connor, is whether the association is expressive or commercial. If the association is expressive, it is entitled to full First Amendment protection of both the content of its message and the choice of its members. There need be no connection between the group's message and its membership policy. "[T]he formation of an expressive association is the creation of a voice," she wrote, "and the selection of members is the definition of that voice."[227]

If the association is commercial, on the other hand, it "enjoys only minimal constitutional protection of its recruitment, training, and solicitation activities."[228] The regulation need be

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v. City of New York, 487 U.S. 1, 20 (1988) (O'Connor, J., concurring) ("Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the antidiscrimination provisions triggered by the law."). Therefore, two of the five members of the *Dale* majority have explicitly adopted the commercial-expressive association distinction.

224. *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring).

225. *Id.* (O'Connor, J., concurring).

226. *Id.* at 633 (O'Connor, J., concurring).

227. *Id.* (O'Connor, J., concurring). The selection of members is inherently tied to the promulgation of an expressive association's message. The state will almost never have an interest sufficiently compelling to overcome the association's interest in defining that message. Other activities of an expressive association, however, may be subject to a different calculus where the state's interest in the regulation is much greater. A street gang (even if such a group could properly be characterized as expressive) that wanted to express its dislike for blacks by physically attacking them could not claim an exemption from laws prohibiting assault.

228. *Id.* at 635 (O'Connor, J., concurring).

only rationally related to the government's ends. "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."[229]

How are we to decide when an association is commercial and thus unprotected from anti-discrimination law in its choice of members? It is commercial "when, and only when, the association's activities are not predominantly of the type protected by the First Amendment,"[230] that is, it is not "predominantly engaged in protected expression."[231] When the association "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[232]

Because this formulation is fairly abstract, and can sound question-begging, it is useful to consider a few cases in which the Court has appeared to give greater associational protection to expressive groups and less associational protection to commercial groups.

2. The Commercial-Expressive Distinction in Other First Amendment Cases

Greater solicitude for expressive association and expressive purposes than for commercial association and commercial purposes, along the lines Justice O'Connor suggested in her *Roberts* concurrence, is evident in the Court's associational and other First Amendment jurisprudence. Speech with a strong commercial dimension or purpose receives less protection than core speech in a variety of contexts, including boycotts, lawyer solicitation, commercial speech, and campaign finance. Something like this same relaxed protection for commercial activity is also a familiar feature of our constitutional landscape outside the First Amendment.[233]

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229. *Id.* at 634-35 (O'Connor, J., concurring).

230. *Id.* at 635 (O'Connor, J., concurring).

231. *Id.* (O'Connor, J., concurring).

232. *Id.* at 636 (O'Connor, J., concurring).

233. Here are three examples of what I mean. First, as a general matter, since the demise of *Lochner v. New York*, 198 U.S. 45 (1905), the Court has reviewed economic regulation very deferentially, asking only whether the restriction is rational. State regulation of non-economic personal liberties, like using contraceptives, gets a much more hostile judicial reception. *See* Griswold v. Connecticut, 381 U.S. 479, 493 (1965). Second, the Fourth Amendment's search-and-seizure provision generally requires less justification for

The purpose of the association or speech matters for First Amendment analysis. Boycotts organized for political purposes are a protected form of association,[234] while those for economic purposes are not.[235] While businesses cannot associate to suppress competition, and "[w]hile States have broad power to regulate *economic* activity, [there is no] comparable right to prohibit peaceful *political* activity."[236]

The Court has drawn a similar commercial-expressive line in the area of lawyer solicitation. In *In re Primus*, a lawyer had written a letter to woman who had allegedly been required to be sterilized in order to receive Medicaid benefits.[237] The ACLU attorney suggested in the solicitation letter that she challenge the constitutionality of the sterilization requirement. The Court struck down an anti-solicitation disciplinary rule as applied to the lawyer, reasoning that the litigation was "'not a technique of resolving *private differences*'; it is 'a form of *political expression' and 'political association*,'"[238] which are "core First Amendment rights."[239]

In *Ohralik v. Ohio State Bar Ass'n*, by contrast, the Court upheld an anti-solicitation disciplinary rule as applied to a tort lawyer who contacted a woman that had been in an accident.[240] The Court distinguished *In re Primus* because the lawyer's solicitation did not involve "political expression or an exercise of associational freedom . . . to secure constitutionally guaranteed . . . rights."[241] The lawyer was merely "procur[ing] remunerative employment."[242] As such, his conduct was analogous to

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searching a business than for searching a private home. *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.2 (3d ed. 1996). Third, the Fifth Amendment's guarantee against self-incrimination applies to individuals in their personal capacity but not to corporations or to corporate officers. I want to thank Don Dripps for pointing out these examples.

234. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982).

235. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504-07 (1988).

236. *Claiborne*, 458 U.S. at 913 (emphasis added).

237. *In re* Primus, 436 U.S. 412 , 415-17 (1978).

238. *Id.* at 428 (emphasis added) (quoting NAACP v. Button, 371 U.S. 415, 429, 431 (1963)).

239. *Id.* at 432 (quoting Buckley v. Valeo, 424 U.S. 1, 45 (1976)).

240. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978).

241. *Id.* at 458 (citing *Button*, 371 U.S. at 442).

242. *Id.* at 459.

commercial speech, which occupies only a "subordinate position in the scale of First Amendment values."[243]

Consider some of the differences between the Court's treatment of core political speech and commercial speech.[244] Content-based restrictions on core speech are subjected to strict scrutiny,[245] while such restrictions on commercial speech must withstand only intermediate scrutiny.[246] Under the commercial speech doctrine, solicitation by businesses is fully regulable, while charitable solicitation for *political* advocacy purposes is protected because it "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services."[247] Prior restraint on core speech faces a heavy presumption of unconstitutionality,[248] while prior restraint on commercial speech does not.[249] Core speech advocating illegal conduct is protected unless it is imminently likely to produce lawless action,[250] while commercial speech proposing illegal conduct is unprotected.[251] The overbreadth of a restriction on core speech enables a challenger to attack the facial validity of the restriction,[252] while the overbreadth of a commercial speech restriction does not.[253] The availability of a less restrictive alternative is usually fatal to regulations on core speech,[254] but not to regulations of commercial speech.[255] And state regulations compelling core speech are strictly scrutinized,[256] while those related to commercial speech generally are not.[257]

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243. *Id.* at 456.

244. I want to thank Jim Chen for highlighting some of these differences.

245. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).

246. *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

247. Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

248. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1973) (per curiam).

249. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

250. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

251. *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982) (holding that the "government may regulate or ban entirely" commercial speech "proposing an illegal transaction").

252. *See* Gooding v. Wilson, 405 U.S. 518, 521 (1972).

253. *See* Bates v. State Bar, 433 U.S. 350, 381 (1977).

254. *See* Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

255. *See* Bd. of Trustees v. Fox, 492 U.S. 469, 477-78 (1989).

256. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

257. *See* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 470-71

In the area of campaign finance regulation, the Court also distinguishes speech by individuals and expressive associations, on the one hand, and speech by commercial entities, on the other. The former group has a right to spend on campaigns and referenda.[258] By contrast, corporations must submit to restrictions on their campaign spending, on the theory that corporate wealth distorts political debate and that the state's greater power to charter corporations includes the lesser power to restrict campaign expenditures.[259] It is acceptable to require that independent campaign expenditures by profit-making businesses be made out of segregated funds, while such a restriction is unacceptable as applied to groups that are "more akin to voluntary political associations than business firms."[260] Even a non-profit corporation (like the Michigan Chamber of Commerce) that is involved in a wide range of activities other than political activity can be regulated by an expenditure-limits law, while one that is "formed for the express purpose of promoting political ideas, [and does not] engage in business activities" could not be.[261]

In the area of compelled payment of union dues, the Court has drawn a similar line between requiring employees to subsidize employment-related union activities and requiring payment for the union's ideological or political causes. In *Abood v. Detroit Board of Education*, for example, the Court held that individual employees could be made to pay compulsory fees for the union's collective bargaining expenses, which contribute to the economic well-being of all employees.[262] The First Amendment, however, prohibits requiring an individual in a union shop "to contribute to the support of an *ideological* cause he may oppose."[263] Thus, Justice O'Connor's distinction between the protection accorded business-related speech and the protec-

(1997).

258. *See* FEC v. Nat'l Conservative PAC, 470 U.S. 480 (1985) (holding unconstitutional limits on political action committee spending); Buckley v. Valeo, 424 U.S. 1 (1976) (holding unconstitutional limits on campaign expenditures, independent expenditures, and individual candidates' expenditures).

259. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 658 (1990) (upholding state restriction on corporate independent campaign expenditures, emphasizing the "unique legal and economic characteristics of corporations").

260. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986).

261. *Austin*, 494 U.S. at 662.

262. 431 U.S. 209, 222-23 (1977).

263. *Id.* at 235 (emphasis added).

tion accorded core speech is a common one in First Amendment jurisprudence.

In *Dale* itself, the Court implicitly followed the analysis of Justice O'Connor in *Roberts*. It noted in the second sentence of the opinion that the BSA "is a private, not-for-profit organization engaged in instilling its system of values in young people."[264] The Court openly worried that the expansion of anti-discrimination law beyond "*clearly commercial entities*, such as restaurants, bars, and hotels" would trample First Amendment liberties.[265]

By focusing its attention on the *activities* of the BSA ("instilling its system of values in young people"),[266] the majority in *Dale* tacitly accepted Justice O'Connor's concern in *Roberts* about scrutiny of a group's *message*. By deferring to the BSA on the connection between its message and its membership policy,[267] the majority in *Dale* tacitly accepted Justice O'Connor's criticism of the majority opinion in *Roberts* that such an inquiry into the message-membership connection was offensive to the values of the First Amendment.[268] By dismissing New Jersey's interest in promoting equality with a single sentence,[269] the majority in *Dale* tacitly accepted O'Connor's worry in *Roberts* that compelling-interests analysis might be underprotective of associational rights. There is little doubt that a majority of the Court is now following Justice O'Connor's approach in delineating associational freedom. I only urge that the Court do so explicitly, with a slight adjustment discussed in Part III.A.4 below for quasi-expressive associations.

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264. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2449 (2000).

265. *Id.* at 2456 (emphasis added).

266. *Id.* at 2449.

267. *See id.* at 2453.

268. Roberts v. U.S. Jaycees, 468 U.S. 609, 633-34 (1989) (O'Connor, J., concurring).

269. *Dale*, 120 S. Ct. at 2457 ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."). The Court did *not* hold that protecting gays from discrimination is not a compelling state interest. It may very well be a compelling state interest, but it is not strong enough to overcome the BSA's interest in maintaining its membership policy. Also, it is unlikely that Justices O'Connor and Kennedy, who joined the majority in *Dale*, would agree that eradicating anti-gay discrimination is not a compelling state interest. After all, Justice Kennedy wrote (and Justice O'Connor joined) the majority opinion in *Romer v. Evans* that declared gays needed the protection of anti-discrimination laws in order to participate in ordinary civic life. 517 U.S. 620, 631 (1996).

3. Characteristics of Commercial Associations

For purposes of the tripartite approach, the threshold determination of whether the group is commercial, expressive, or quasi-expressive is critical. If the association can be categorized as either commercial or expressive, the analysis is relatively straightforward. Expressive associations will usually prevail against an anti-discrimination law, especially in sensitive organizational matters like the composition of a group's membership.[270] Commercial associations will usually lose against an anti-discrimination law, since the law need only be rational.[271] The Court's case law helps demarcate the line between protected expressive associations and largely unprotected commercial associations.

The most obvious example of a predominantly commercial association is a for-profit business, such as a car manufacturer or large commercial law firm. Another obvious example is a traditional public accommodation, such as a theater, restaurant, or hotel.[272] Such a business or accommodation has "enter[ed] the marketplace of commerce [to a] substantial degree."[273] A for-profit business or public accommodation has no right to control, free of state restraint, the employees, customers, and suppliers with whom it does business. Thus, the provisions of the Civil Rights Act of 1964 that prohibit discrimination in public accommodations (Title II) and in private employment (Title VII) survive the tripartite approach suggested here.

More difficult cases of classification arise where, as often happens, the association mixes some degree of commercial and expressive activity. Businesses, for example, often lobby for tax and other laws from which they will benefit. They may also advance ideas through advertising and other methods, as when

270. *See Dale*, 120 S. Ct. at 2457; Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572-73 (1995).

271. N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 11-13 (1988); Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring).

272. *See* Hishon v. King & Spaulding, 467 U.S. 69, 78 (1984) (rejecting the associational freedom claim of law firm); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249-50 (1964) (rejecting the associational freedom claim of hotel). The provisions of the Civil Rights Act of 1964, including Title II (prohibiting discrimination in "public accommodations") and Title VII (prohibiting discrimination in private employment), including the voluminous case law interpreting them, will be a useful guide in this area.

273. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

the tobacco industry publicly opposes the regulation of nicotine. These are expressive activities that help advance the association's commercial interests. At the same time, expressive associations, like political parties, may rent expensive convention halls for meetings, collect and distribute large amounts of money for expenses, and even employ people for some tasks. These are commercial activities that help advance the association's expressive interests.

In such cases, "[t]he purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression."[274] If the members of the association have come together primarily to make money either through commercial transactions or through business networking, the association is commercial. This is true even if the association itself is non-profit.[275]

Even non-profit associations may be commercial if they employ a vast array of persons, manage an extensive physical plant, and charge substantial fees to those who use the facilities. Under a similar definition, the California Supreme Court has found that the Boys Club[276] and a private nonprofit country club[277] are "business establishments" for purposes of their membership decisions within the meaning of a state anti-discrimination law. Membership in such clubs or access to its facilities is tantamount to admission to a place of public amusement or restaurant. A membership fee under those circumstances is "simply a ticket of admission to a recreational facility that [was] open to a large segment of the public."[278]

Note that the primary-purpose inquiry does not ask whether the members have come together to promote the specific message the association claims will be impaired by compliance with the anti-discrimination law. The primary-purpose inquiry applies to the categorization of the group as "commercial" or "expressive," not to the content of the group's message.

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274. *Id.* (O'Connor, J., concurring); *see also* cases cited *supra* notes 271-73.

275. *N.Y. State Club Ass'n*, 487 U.S. at 8, 13-14; *Rotary Int'l*, 481 U.S. at 539, 549.

276. Isbister v. Boys Club, 707 P.2d 212, 217 (Cal. 1985).

277. Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 778 (Cal. 1995).

278. Curran v. Mount Diablo Council of the Boy Scouts, 952 P.2d 218, 236 (1998) (referring to the Boys' Club of Santa Cruz, Inc. in *Isbister*, 707 P.2d 212 (Cal. 1985)).

An expressive association, under this approach, enjoys a general exemption from anti-discrimination law *regardless of whether the particular application of the law trenches on a certain message*. A commercial association enjoys no such exemption, *even if application of the anti-discrimination law will trench on a certain message*.[279]

Ordinarily, the primary purpose of the members in coming together as an association can be determined by examining what they actually *do* when they associate. In *Roberts*, for example, the Jaycees (or Junior Chamber of Commerce) primarily trained members in "the art of solicitation and management."[280] This training was meant to give members "an advantage in business."[281] Recognizing the value of this training, "business firms . . . sometimes pay the dues of individual member[s]."[282] The primary activity of the group was the sale of memberships in the group itself, an activity by which Jaycees "hone their solicitation and management skills."[283] The Jaycees even referred to members as "customers" and memberships as a "product."[284]

In *New York State Club Ass'n v. City of New York*, the Court also emphasized the commercial nature of the association's purpose by reference to its activities.[285] The association at issue was a nonprofit corporation that served as a consortium of 125 other large private clubs and associations.[286] The clubs were subject to the anti-discrimination provisions of a New York City ordinance that covered organizations with more than 400 members that provide regular meal service to members and receive payment from or on behalf of nonmembers "for

279. This does not mean, of course, that a state could directly regulate the content of a commercial association's message. *See infra* Part III.A.4. The only point here is that the First Amendment permits an anti-discrimination law to force the business, for example, not to discriminate against a protected class even for a job with expressive functions. General Motors, as a commercial association, could be required consistent with the Constitution not to discriminate on the basis of race in the selection of its paid corporate spokesperson.

280. Roberts v. U.S. Jaycees, 468 U.S. 609, 639 (1984) (O'Connor, J., concurring).

281. *Id.* (O'Connor, J., concurring).

282. *Id.* (O'Connor, J., concurring).

283. *Id.* (O'Connor, J., concurring).

284. *Id.* (O'Connor, J., concurring).

285. 487 U.S. 1, 12 (1988).

286. *See id.* at 8.

the furtherance of trade or business."[287] The city concluded the members of the consortium were "commercial" because they were places "'where business deals are . . . made and personal contacts valuable for business purposes, employment and professional advancement are formed.'"[288] In upholding the facial constitutionality of the city ordinance as applied against the clubs, the Court considered it "crucial" to evaluate whether "business *activity* is prevalent among them."[289] The Court was unable to judge whether the city ordinance might be unconstitutional as applied against a particular club within the consortium because there was "no specific evidence on the characteristics of any club" in the record before the Court.[290]

The fact that a primarily commercial association may involve elements of arguably expressive socializing also does not make it expressive. Again, the issue is resolved by reference to the underlying commercial activity of the group, not by reference to any message expressed. In *City of Dallas v. Stanglin*, the Court upheld the constitutionality of a city ordinance restricting admission to certain dance halls to people between the ages of fourteen and eighteen.[291] The Court noted that the dance hall in question charged admission to members of the public and served as many as 1,000 customers per night.[292] It noted that the teenagers who come to dance "are not members of any organized association; they are *patrons of the same business establishment*."[293] The patrons were strangers to each other and do not "'take positions on public questions' or perform any of the other similar activities" protected by the First Amendment.[294] "We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment."[295]

The fact that a primarily commercial association also engages in some expressive activity does not make it an expressive association. Thus, the Jaycees were a commercial associa-

287. *Id.* at 6 (citing N.Y.C. ADMIN. CODE § 8-102(9) (1986)).
288. *Id.* at 5-6 (quoting Local Law No. 63 of 1984, § 1).
289. *Id.* at 18 (emphasis added).
290. *Id.* at 14 (emphasis omitted).
291. 490 U.S. 19, 28 (1989).
292. *Id.* at 24-25.
293. *Id.* at 24 (emphasis added).
294. *Id.* at 25 (quoting in part Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987)).
295. *Id.*

tion even though they engaged in "a not insubstantial" amount of "advocacy of political and public causes."[296] The *Roberts* rationale would seem to apply to most trade associations, as well as business-networking associations, whose principal activity is advancing the commercial interests of their constituent members.[297] A commercial association cannot gain First Amendment protection by occasionally (or incidentally) engaging in such expressive activity.

Similarly, an expressive association is not commercial just because it engages in some commercial activity, or even just because it makes a profit.[298] For example, an expressive association may collect dues from members, purchase printing materials, rent lecture halls, and serve refreshments at its meetings.[299] These activities do not transform its primary character from expressive to commercial. The BSA is arguably expressive even though it engages in significant commercial activity.[300]

A group's characterization of itself as expressive is not dispositive. In *Board of Directors of Rotary International v. Rotary Club*, the Court upheld the application of a state antidiscrimination law against a group that claimed an associational right to exclude women.[301] Rotary International, a nonprofit club, billed itself as "an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build goodwill and peace in the world."[302] Although this sounds fairly expressive, the Court noted the conclusions of the state court about the group: "Each active [Rotary] member must work in a leadership capacity in his business or profession";[303] each member may propose an additional member "'in

296. Roberts v. U.S. Jaycees, 468 U.S. 609, 639 (1984) (O'Connor, J., concurring) (quoting U.S. Jaycees v. McClure, 709 F.2d 1560, 1570 (8th Cir. 1983)).

297. N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 12 (1988) (noting that clubs may involve "a considerable amount of private or intimate association").

298. N.Y. Times v. Sullivan, 376 U.S. 254 (1963).

299. *See Roberts*, 468 U.S. at 635 (O'Connor, J., concurring).

300. On the other hand, the BSA might also be considered quasi-expressive under the tripartite approach. *See infra* Part III.A.4.

301. 481 U.S. 537, 549 (1987).

302. ROTARY MANUAL OF PROCEDURE 7 (1981), *quoted in Rotary Int'l*, 481 U.S. at 539.

303. *Rotary Int'l*, 481 U.S. at 540.

the same business or professional classification'";[304] Rotary International had "'businesslike attributes,'" including a "complex structure, large staff and budget, and extensive publishing activities"; business advantages of membership were not incidental; and "'business concerns are a motivating factor in joining local clubs.'"[305] These factors were enough to bring Rotary International within the anti-discrimination law's definition of "business establishment" and informed the Court's judgment in denying its associational claim.

4. Hard Cases: Quasi-Expressive Associations

Some associations simply defy categorization as either commercial or expressive because they mix significant aspects of both. Certain associations are both expressive in very important respects *and* "enter[] the marketplace of commerce [to a] substantial degree."[306] Notable among these are many private schools, which are often important centers for moral instruction yet also have substantial physical plants, big budgets, large numbers of employees, and are broadly open to all who can afford to pay. Other examples of this genre are media outlets, including newspapers, which are obviously critical to the functioning of democratic self-government yet are commercial in many of the same ways as private schools. A third example may be certain large private clubs, such as the BSA itself. For such groups, the distinction between commercial and expressive associations is too rough. We need a third category, *quasi-expressive associations*, and a more contextualized focus for such groups.

Here is how the approach would work. First, a determination must be made as to whether the association at issue is expressive, commercial, or quasi-expressive. If it is expressive or commercial, application of the anti-discrimination law should be decided as discussed above. If the association is quasi-expressive, the inquiry should focus on the nature of the activity or internal operation sought to be brought into compliance with anti-discrimination law. If the activity or internal operation at issue is primarily expressive, the activity or internal op-

304. *Id.* (quoting 2 ROTARY BASIC LIBRARY, CLUB SERVICE 67-69 (1981)).

305. *Id.* at 542-43 (quoting in part Rotary Club v. Bd. of Dirs. of Rotary Int'l, 224 Cal. Rptr. 213, 226 (Cal. Ct. App. 1986)).

306. Roberts v. U.S. Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

eration should generally be exempt from compliance. If it is primarily commercial, it should not enjoy such an exemption.

For example, suppose a private school qualified as quasi-expressive under the above definition. Under the suggested approach, the freedom of expressive association ought to protect the school in its choice of instructors for the students, since teachers are intrinsic to the expressive activity of the school. They not only serve as role models for students but also directly transmit the schools' values through instruction. It is hard to imagine a more quintessentially expressive function than teaching. On the other hand, it would be difficult to see how a private school's employment decisions about maintenance or secretarial personnel are expressive. Employment decisions in these non-expressive areas should generally not be exempt from the requirements of an applicable anti-discrimination law. This is so because application of the law in these circumstances is unlikely to inhibit the advocacy of the association's ideas.

In fact, in the Court's jurisprudence, commercially-operated, non-sectarian private schools appear to be an example of quasi-expressive associations. In *Runyon v. McCrary*, for example, the Court denied the associational freedom claim of private schools that wanted to exclude black children.[307] The plaintiffs in *Runyon* brought suit under Section 1981 of the 1866 Civil Rights Act.[308] The Court interpreted this federal statute to "prohibit[] private, *commercially operated*, nonsectarian schools from denying admission to prospective students because they are Negroes."[309] The schools at issue charged tuition to the parents, advertised widely, and made themselves open to the general public. The Court noted that parents and children had an associational right to attend a school advocating racial segregation.[310] Yet neither the schools' undeniable role in instructing children nor their desire to promote a message of racism exempted them from compliance with §1981. Although the school and parents had a right to teach racist doctrine, the Court held they had no associational right to exclude black children.[311]

The reason for this result is instructive: the schools had not shown "'that discontinuance of discriminatory admission prac-

307. 427 U.S. 160, 176 (1976).
308. 42 U.S.C. § 1981 (1994) (codifying § 1 of the Civil Rights Act of 1886).
309. *Runyon*, 427 U.S. at 168 (emphasis added).
310. *See id.* at 176.
311. *See id.*

tices would inhibit in any way the teaching in these schools of any ideas or dogma.'"[312] That is, to prevail against the anti-discrimination law, the associational right had to be linked to some expressive function. The private schools at issue in *Runyon* had not shown how admitting black *students* would impair their message. But complying with the anti-discrimination law in the employment of *instructors* might present a different case. Thus, *Runyon* survives the tripartite approach and is still good law after *Dale*.[313]

A similar analysis could be applied to many media organizations. For example, a large, general circulation newspaper is likely a quasi-expressive association, mixing significant elements of expression and commerce. Under the suggested approach, its decisions about whom to hire to deliver newspapers should be subject to anti-discrimination law. Such decisions have little bearing on the newspaper's expressive functions. On the other hand, its decisions about whom to admit to its editorial board are a different matter, bearing directly on the newspaper's expressive activity.[314] Those decisions might very well warrant First Amendment immunity from anti-discrimination law.

The BSA itself may be an example of a third category of quasi-expressive associations: large private clubs that are broadly open to the public and engage in substantial commercial activity yet are not significant places of business networking or commercial deal-making (which would make them commercial associations[315]). Although the Court did not discuss the commercial aspects of the BSA in its opinion, there is some evidence the group engages in significant business activity.

There can be little question the BSA manages a substantial physical plant nationwide, has a large budget, sells registered products to the public, and employs numerous people. In 1997, the national BSA earned 20% of its operating revenue from its retail operations.[316] Since 1992, the BSA has devel-

312. *Id.* (quoting McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)).

313. *Contra* Hunter, *supra* note 4, at 1603 (questioning whether *Runyon* is still good law after *Dale*).

314. Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1500 (2001).

315. *See supra* Part III.A.3.

316. Greg Coolidge, Note, *Worshipping a Sacred Cow:* Curran v. Mount Diablo Council of the Boy Scouts of America, 29 SW. U. L. REV. 401, 424 (2000).

oped a retail chain that sells a wide range of clothing and equipment. There are now twenty-one such stores around the country, which do 80% of their business with the general public.[317]

In one Boy Scout council in California alone, the group owns an administrative building and four camps, has a paid staff of twenty-two full-time employees, and has an annual budget exceeding $1.7 million.[318] The same council owns and operates a retail shop open to the public, where it sells clothing bearing its name.[319]

On the other hand, nonmembers cannot purchase admission to pack meetings, overnight hikes, recreational facilities, or educational activities. The BSA does not sell the primary incidents of membership. The BSA's business activities with the public are therefore arguably distinct from its core membership functions.[320]

Evaluating these facts, the California Supreme Court held in *Curran v. Mount Diablo Council of the Boy Scouts of America*, that the Boy Scouts is a "business establishment" in its business activities with the public involving retail stores and licensing activities.[321] Thus, the Boy Scouts could be required to comply with state anti-discrimination law in its hiring of retail sales clerks. On the other hand, the California Supreme Court rejected an argument that the Boy Scouts qualified as a "business establishment" under state law for purposes of its determining membership.[322] Thus, the group could not be forced to admit an openly gay scout. For the California Supreme Court, the BSA operates as what I have described here as a quasi-expressive association.

If the BSA can be considered a quasi-expressive association, a more contextual analysis than the all-or-nothing commercial-expressive distinction should be required to evaluate its claim to exemption from anti-discrimination law. The BSA might be required not to discriminate in its employment of retail sales clerks, as the California Supreme Court determined.

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317. *Id.* at 424-25.

318. Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 223 (Cal. 1998). For a useful discussion of *Curran*, see Coolidge, *supra* note 316.

319. *Curran*, 952 P.2d at 223.

320. *Id.* at 238.

321. *Id.*

322. *See id.*

But in its hiring of a national spokesperson, an obviously expressive role, the BSA would be protected.

In *Dale* itself, under the tripartite approach, the result would have been the same regardless of whether the BSA is an expressive or quasi-expressive association. Scoutmasters, who volunteer their time, serve very much the role that teachers in a private school serve by functioning as role models and by bearing the moral messages the association wants to communicate. Their function is fundamentally expressive, not commercial. On the other hand, using an analogy to *Runyon*, the BSA might be required to admit openly gay scouts (students) since their admission might not "'inhibit in any way the teaching in [the BSA] of any idea or dogma.'"[323]

B. ADVANTAGES OF THE TRIPARTITE APPROACH

Assuming an intelligible line can be drawn at protecting primarily commercial associations from anti-discrimination law, the question then becomes, why draw the line there? Why not treat commercial associations *the same* as expressive associations or quasi-expressive associations for First Amendment purposes?

1. The Tripartite Approach Focuses on Associational Activity, Not Message

Some line is going to be drawn somewhere in this area. There will likely never be absolute protection for the freedom of association, absolving all organizations from all compliance with anti-discrimination law. There will also likely never be, this side of Stalin's republic at least, complete evisceration of the freedom of association.

Wherever the line is drawn, moreover, there will be line-drawing problems. Therefore, it is not a sufficient objection to an approach that it involves such problems. *Every* approach will present hard cases. Indeed, almost every issue in First Amendment law raises these difficulties.[324] The question should be, instead, does the approach adopted attempt to settle the matter in a way that raises independent First Amendment

323. Runyon v. McCrary, 427 U.S. 160, 176 (1976) (quoting McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)).

324. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 149 (1993) ("There is no way to operate a system of free expression without drawing lines. . . . The question is not whether to draw lines, but how to draw the right ones.").

concerns? That is, does it draw lines in a way that is itself suspect under the First Amendment?

As I argued above,[325] the vice of the dissent's approach in *Dale* is that it focuses intensively on the association's message, attempting to differentiate between associations that clearly state their views (entitled to protection) from groups that do not (not entitled to protection from anti-discrimination law). The country's experience with state-sponsored suppression of association should lead us to distrust any approach, like the dissent's, that asks the group to account for itself based on the content of its message.

Whatever other faults the tripartite approach may have, by contrast, at least it does not focus on associations' messages. Nothing in the approach turns on whether an association has a particular message, or whether that message is stated in a sufficiently coherent way, or whether the association has chosen the best messenger. The approach looks only into the underlying activity of the group, an inquiry that simply does not implicate the special First Amendment concerns raised by the dissent's (or any other message-based) approach.

2. The Tripartite Approach Preserves Associational Freedom Where Expressive Interests Are Likely To Be Greatest and Where State Regulation and Judicial Scrutiny Are Most Suspect

Carving out primarily commercial associations from the freedom of expressive association preserves the freedom where it is most likely to be tied to the core First Amendment interests in promoting debate about important issues. The idea here is that the First Amendment is about the free exchange of ideas, not the free exchange of widgets. It does not protect the underlying primary activity of a commercial association—commerce. Regulations of such activity are generally subject only to rational basis review. It does, however, protect a significant activity of an expressive association or a quasi-expressive association—expression. Although an expressive association may engage in an unprotected activity (illicit drug use, for example), its principal social utility is its expression. That is not the case with a commercial association, whose principal social utility is greasing the wheels of commerce.

325. *See supra* Part II.

This is not to argue that important ideas are not sometimes debated in commercial settings; they are. It is also not to argue that commercial associations do not sometimes advance ideas, especially about commerce; they do. It is only to argue that the primary venues for the discussion of such matters, to the extent such discussions occur in organizational fora at all, are expressive and quasi-expressive associations.[326] If a line is going to be drawn, then, it makes most sense to protect the associations that are nearest the core of the First Amendment and to relegate to the margin of protection those associations that are farther away from that core.

Expressive associations also need more judicial protection from state regulation than do commercial associations.[327] Commercial associations have access to substantial financing in capital markets and from sales that expressive associations do not have. Expressive associations are less likely, therefore to be able to survive or to resist regulation.[328] Quasi-expressive associations, characterized in part by their substantial economic activity, are more likely to be able to survive state regulation than are expressive associations but less likely to withstand state interference than commercial associations. So quasi-expressive associations properly occupy a middle ground of protection.

Additionally, identity is ordinarily less expressive in a commercial setting than in a non-commercial one.[329] To take a simple example, customers who come to buy goods in a store understand that the sales personnel are not there to spread the ideas of the owners or to transmit their values. They are there to facilitate the exchange of money for goods, not to debate matters bearing on democratic self-government. As David McGowan has written, "the workplace is, and is understood by all concerned to be, an instrumental setting in which considerations of personal expression are subordinate to legal regulation of the transaction[]."[330] Thus, to the extent anti-discrimination

326. "Corporations generally have not played the historic role of newspapers as conveyers of individual ideas and opinions." Pac. Gas & Elec. Co. v. PUC, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

327. Farber, *supra* note 314, at 1497-99.

328. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

329. *See* McGowan, *supra* note †, at n.62. It should be noted that Professor McGowan disagrees in part with the outcome in *Dale* and with my suggested approach in this area.

330. *Id.* This argument holds, though with less force, in commercial set-

law forces commercial associations to associate with people they would prefer to avoid, at least this forced association is less likely to intrude on any message they want to send than would a similar requirement imposed on an expressive association.

This observation about the nature of the differences between commercial and expressive associations raises a related point. Anti-discrimination laws that restrict the freedom of expressive or quasi-expressive associations are more likely to operate as impermissible content-based restrictions on group speech than are similar restrictions on commercial associations.[331] Although the state's law may not directly suppress an association's message based on its content, it may do so *indirectly* by regulating its membership or other internal affairs. Forced association with unwanted members may act as a proxy for impermissible content regulation, just as regulations based on a speaker's identity ("No Republicans may speak in the park") or on the communicative impact of speech ("No flag-burning that is likely to offend an observer") may act as a proxy for content regulation.[332] It is clear New Jersey could not directly require the BSA to promulgate a pro-gay message. Yet the state's membership regulation forcing it to admit openly gay scoutmasters may have very much the same effect. The same cannot be said for a commercial association, where the expressive component of the group's activity is by definition subordinate to its commercial activity.

Every anti-discrimination law might be said to have two purposes, one narrow and one broad. The narrow purpose is to

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tings other than the workplace. Membership in a situs of business networking, like the Jaycees or the Rotary Club, should be seen as only the step immediately preceding the commencement of commercial transactions. In the same way, "commercial speech" is only the first step in a commercial exchange that is fully regulable, *see* Daniel Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 386-90 (1979), and thus enjoys less protection under the First Amendment than core political speech, *see* Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173, 183-85 (1999) (subjecting restriction on gambling advertisement to intermediate scrutiny).

331. Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (noting that the state has a compelling interest in providing nondiscriminatory access to "goods, services, and other advantages . . . wholly apart from the point of view such conduct may transmit").

332. *See* Texas v. Johnson, 491 U.S. 397, 411 (1989) ("Whether Johnson's [flag burning] . . . violated Texas Law thus depended on the likely communicative impact of his expressive conduct. . . . [T]his restriction on Johnson's expression is content based.").

give specific relief to specific claimants. The broad purpose is to improve the social climate for members of protected classes. Both of these purposes seem legitimate, yet their significance varies depending on context. The state's purpose in enforcing the anti-discrimination law is more suspect when aimed at expressive association than when aimed at commercial association. In the case of expressive associations, it is more likely the state's primary interest is in trying to change the group's *message*; in the case of commercial associations, it is more likely the state's primary interest is in trying to help the target of discrimination get access to economic opportunity.[333]

I am not talking here about the First Amendment protection to be accorded "commercial speech," although that too receives less protection under current First Amendment doctrine than does political speech or other forms of non-commercial speech.[334] I am also not talking about the government's regulation of the *message* of the commercial association, as opposed to its membership policy and other forms of organizational activity. Content-based restrictions on the message of a commercial association (to the extent the message is not "commercial speech") should be subject to scrutiny every bit as strict as such restrictions on expressive associations or individuals would be.[335]

The point is to observe that, at least as the Court has construed it, the freedom of association is parasitic on other First Amendment freedoms. It exists only to serve the First Amendment liberties specifically enumerated, like the rights to free speech, peaceable assembly, and free exercise of religion. Without these enumerated freedoms, the freedom of association would not exist. Associational freedom is not a constitutional end in itself; it is a means to other ends. So when choices are made about which kinds of associations to protect, it follows that expressive associations should be first on the list of protection, with quasi-expressive associations a close second.

The problem with the dissent in *Dale* is not that it abandoned this basic distinction between commercial and expressive

333. *See Roberts*, 468 U.S. at 628 (noting that the state's interest in regulating discrimination in networking association is "wholly apart from the point of view such conduct may transmit").

334. *Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 183 (applying intermediate scrutiny to commercial speech regulations).

335. R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (subjecting content-based city ordinance against hate speech to strict scrutiny).

association. The problem with the dissent is that it adopted a crabbed view of the ways in which an association expresses itself and of the impact membership regulation has on the organization's ability to promote its message.

3. The Distinction Preserves Anti-Discrimination Law Where the State's Interest Is Most Compelling

The citizenship model of anti-discrimination law insists that we see the larger picture of civic life, which encompasses more than purely economic interests. It asks us to look at the connections between value-formation in associations, the way disfavored groups of people are treated, and the ultimate access members of these groups have to material success. The process that ends in a glass ceiling for women on the job may begin with their exclusion from networking clubs like the Jaycees, or it may begin even earlier than that, with their exclusion from other important clubs where men cultivate social norms that shut women out somewhere down the line. To secure *economic* access, it may be important to secure *cultural* access. Moreover, access to the centers of norm-creation, like the BSA, may be important for reasons that have little to do directly with wealth. It may be important for personal and political development, for example. Finally, life is not so easily compartmentalized into economic and non-economic spheres. One spills over into, and contributes to, the other.

On the other hand, I suspect even most advocates of the citizenship model would, if required to do so, rank direct access to economic success higher in immediate importance than access to non-economic or cultural advantages. In a capitalist economy, once a person has economic means, other benefits tend to follow, though less easily for members of certain groups. It should not be surprising, therefore, that civil rights advocates pushed *first* for protection in employment and in other commercial settings (like hotels, restaurants, and other businesses). These protections were preconditions for enjoying the rest of civic life. As the Supreme Court has recognized, "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause *unique evils* that government has a compelling interest to prevent."[336]

Simply put, holding a job is more important to most people than learning morals from a scoutmaster while tying a knot in

336. *Roberts*, 468 U.S. at 628 (emphasis added).

front of a campfire. The state's interest is correspondingly greater in securing citizens' access to the former than to the latter. The tripartite approach, therefore, preserves anti-discrimination law in those realms of life (commerce) likely to be most crucial to personal success. It vindicates the economic model of anti-discrimination law.

4. The Tripartite Approach Reduces the Risk and Cost of Judicial Error

Judicial error in this area is inevitable. Under a message-based approach, judicial decisionmakers will sometimes find ambiguity in the message of a group where there is none, resulting in less First Amendment protection for the group. Under the tripartite approach, judicial decisionmakers will sometimes incorrectly categorize an expressive association as quasi-expressive, or a quasi-expressive association as commercial, resulting in less First Amendment protection for the association. Neither approach is so objective that it eliminates judicial bias.

However, the tripartite approach reduces the risk of judicial error in comparison to a message-based approach. By concentrating on an association's activities, courts will handle familiar and relatively objective information about a given association's size, commercial involvement, sales figures, property holdings, number of employees, status as profit-making, income, and so forth. Concentrating on an association's message, on the other hand, involves inherently subjective judgments about whether a group's expression is sufficiently clear in relation to its regulated activity. Those subjective judgments will be fed by confirmation bias, discussed in Part II.C.1, which will persist over time.

It is more likely that, using the tripartite approach, courts will slowly develop a fairly reliable set of guidelines for categorizing groups as expressive, commercial, or quasi-expressive that have nothing to do with the messages those groups advance. Associations will be able to respond to this development by organizing themselves so as to maximize whatever interests are paramount *to them*, whether commercial or expressive. This feedback loop will further reduce the risk of error.

A version of the message-based approach might reduce the risk of error by requiring associations to use certain safe-harbor words in their literature or public statements in order to gain the protection of the First Amendment from membership regulation. It is hard to know what such words might be or how

they could cover every case. But in any event, requiring groups to use some "magic words" to escape anti-discrimination law seems too wooden and too intrusive on associational speech, amounting to a state-imposed requirement that associations recite a pledge.

Even if the tripartite approach does not reduce the risk of error, however, it reduces the cost when that error occurs. For reasons discussed above, anti-discrimination law may function as a proxy for content-based regulation.[337] Applying such law to expressive associations runs a substantial risk of punishing unpopular opinion, a significant cost to First Amendment values. The tripartite approach reduces the expected cost of error by insulating expressive associations from anti-discrimination law altogether. A message-based approach magnifies this expected cost by subjecting those same expressive associations to uncertain and biased clarity review.[338]

CONCLUSION

The approach I have outlined is a compromise. For speech advocates, it preserves associational freedom where that freedom lays its strongest claim to core First Amendment values about expression. For equality advocates, it preserves anti-discrimination law where that law relates to core equality values about access to economic success. At the same time, it asks each side to give up part of its concept of the relationship between private groups and the state. Speech advocates will have to sacrifice a vision of the First Amendment as a libertarian charter. Equality advocates will have to accept that there are limits to the state's power to make people be nice. Each side will be denied its dream, but saved from its nightmare.

The Boy Scouts are not what the State of New Jersey wants them to be. They surely are not what I want them to be. Until they accept the basic dignity of people like James Dale who exemplify the moral values of honesty and integrity, they are not even what the Scout Oath and Scout Law say they should be. But if they want to be defined by a tenacious fight to ostracize some of their most faithful adherents, then the meaning of the First Amendment is that the state must let them be.[339]

337. *See supra* Part III.B.2.

338. *See supra* Part II.C.

339. To the credit of its lawyers, the BSA's briefs in *Dale* avoided gay-

We should defend their associational freedom, and the freedom of all expressive associations, out of principle.[340] But if that is not enough, there is always self-interest. The experience of discrimination seems to lead people toward one of two poles: get government out of our lives to free us or get it into our lives to protect us. The latter choice is a siren's song, especially tempting when one has gained the upper-hand in a legislature. Yet progress in manipulating government power for one's ends is not inevitable or irreversible. The norms the state enforces on private relations are as changeable as culture itself. When I hear gay writers defend the role of the state as enforcer of social norms—even norms I share—at the expense of private choices to the contrary, I think about the painful gay ordeal with the caretaker state. In Germany, there were nightclubs for gays in the 1920s and concentration camps for them in the 1940s. The relative tolerance of pre-Depression New York gave way to the repression of the 1930s.[341] Yesterday New Jersey declared us criminal;[342] today it protects us from discrimination;[343] tomorrow it may again find us wanting.

There is a cautionary lesson in this. Somewhere, someday we will again hear the state's call to heel. When that day comes we will look for sanctuary. We will be relieved to find

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bashing and even invoked *gays'* interest in associational freedom as a reason for reversing the New Jersey Supreme Court. Reply Brief for Petitioners at 1, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000) (No. 99-699), *available at* 2000 WL 432367. Moreover, the most prominent "dog that didn't bark" in the case was the stereotype of gay men as child molesters. At oral argument, counsel for the BSA expressly disclaimed fears that gays would behave inappropriately with boys in their charge. *See* Oral Argument Transcript, Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000), 2000 WL 489419, at *9-10; *cf.* Hunter, *supra* note 4, at 1611. Even if such fears really *are* at the base of the gay exclusion, the omission of the argument by itself marks *Dale* as a significant cultural and legal moment for gay Americans because it suggests the argument has lost much of its credibility. Recall the detective's parting jibe at Henry Gerber: "What was the idea of the Society for Human Rights anyway? Was it to give you birds the legal right to rape every boy on the street?" KATZ, *supra* note 53, at 392-93. At least the BSA did not argue Dale was demanding a right to do *that*.

340. Thirty years after the beginning of the modern gay civil rights movement, "it is not the right to march in other people's parades, but to create and march in our own, that gay men and lesbians should seek to protect." Hirsch, *supra* note 43, at 100.

341. GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940, at 331-54 (1994).

342. Homosexual sodomy was a criminal act in New Jersey until 1979. *See* N.J. STAT. ANN. §2A:143-1 (repealed 1979).

343. *See* N.J. STAT. ANN. §§ 10:5-4, 10:5-5 (1993).

the First Amendment intact, large enough to accommodate us and strong enough to fend off the state's long and ready list of good causes.