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EXPRESSIVE ASSOCIATION AFTER *DALE*

By David E. Bernstein

I. Introduction

The right to join with other people to promote a particular outlook, known as the right of expressive association, is a necessary adjunct to the right of freedom of speech, which is protected by the First Amendment of the United States Constitution. Freedom of speech would be of little practical consequence if the government could suppress ideas by bluntly prohibiting individuals from gathering with others who share their perspective. Freedom of expression must consist of more than the right to talk to oneself.

Freedom of speech could also be more subtly eroded if the government could force organizations dedicated to promoting a particular perspective to accept as members individuals who have a conflicting perspective. Such members would immediately dilute an organization's message because their membership would confuse public perceptions of the organization. In the longer term, dissenting members forced upon an organization by the government could achieve sufficient power to change the organization's values. For example, if a gay rights organization in Mississippi could not control its membership, conservative Christian activists could join and ultimately take over the organization. Conversely, if a conservative Christian organization in San Francisco, California, were banned from discriminating in selecting members, the organization would be at risk of a takeover by gay rights activists.

Concerns about the autonomy of private, nonprofit organizations recently led the U.S. Supreme Court to issue a rousing endorsement of the right of expressive association. In *Boy Scouts of America v. Dale* (2000),[1] the high Court found that because the Boy Scouts of America (BSA) as an organization promotes a belief in chastity outside of marriage, the BSA had a First Amendment expressive association right to exclude an openly homosexual adult volunteer. *Dale* is likely to prove to be one of the most important First Amendment cases of recent years because the Court enforced a broad right of expressive association against the competing claims of antidiscrimination laws.

The Supreme Court first articulated the right of expressive association in the course of protecting civil rights activists from racist state governments in the South in the late 1950s and early 1960s. For the next two

[1] 530 U.S. 640 (2000).

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decades, the right to expressive association languished in relative obscurity as few relevant cases were decided. Renewed controversy over constitutional protection of expressive association arose in the 1980s, when private associations claimed the right to discriminate in membership when such discrimination would aid the associations in pursuing their goals.

The Supreme Court seemed aghast that the expressive association right, with its origins in the civil rights struggle, had been embraced by those who sought to use it as a shield against antidiscrimination laws. In a series of opinions during the mid to late 1980s, the Court both narrowly defined the circumstances in which expressive association rights are impinged and suggested that antidiscrimination laws are always "compelling government interests" sufficient to override these rights. Expressive association rights had become a virtual nullity, at least in cases involving competing antidiscrimination claims.

The tide began to turn in 1995 with a significant, if somewhat ambiguous, ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* and in 2000 *Dale* dramatically revived the right of expressive association. The Court found that the Boy Scouts had an expressive association right to exclude gay scoutmasters even though the Scouts' anti–homosexual activity policy was neither well publicized nor central to its mission. Moreover, the Court rejected New Jersey's claim that its law, which prohibited sexual-orientation discrimination in places of public accommodation, justifiably applied to the Boy Scouts because of the state's compelling interest in eradicating discrimination against homosexuals.

This essay examines the right of expressive association and the consequences of its reinvigoration by the Supreme Court in *Dale*. Section II recounts the ups and downs of the right, from its inception in civil rights cases almost fifty years ago, to its low ebb following the Court's 1984 decision in *Roberts v. United States Jaycees,*[2] to its reinvigoration in *Dale*. Section III discusses reactions to *Dale* and concludes that after *Dale* expressive association rights will receive vigorous, but not unlimited, protection. Section IV examines post-*Dale* lower court decisions that implicitly interpret *Dale* as adopting a broad-based expressive association right fully applicable to a variety of situations. Finally, Section V looks at some of the untapped potential uses of the right of expressive association.

II. The Rise and (Temporary) Fall of the Right of Expressive Association

The significance of *Dale's* broad protection of the right of expressive association is apparent when one considers the earlier trend established by the Court's previous decisions in this area. Pre-*Dale* decisions reflected an ebb and flow that saw the right develop from a powerful

[2] 468 U.S. 609 (1984).

shield for civil rights organizations to a neglected weak sibling of the First Amendment.

A. Origins of the right to expressive association

The first explicit recognition of the right of expressive association by the Supreme Court came in the 1950s, when the civil rights movement in the South was gathering steam. In *NAACP v. Alabama* ex rel. *Patterson*,[3] the question before the Court was whether the State of Alabama—a state that rigorously enforced discriminatory laws against African Americans—could compel the Alabama branch of the National Association for the Advancement of Colored People (NAACP), the leading civil rights organization in the state, to reveal to the state attorney general the names and addresses of its members. The state planned to turn these names over to local "White Citizens' Councils." The state expected that the councils would use the information to help squelch the growing civil rights movement by harassing NAACP members. Here we see an example of how expressive association rights are necessary for the exercise of free speech rights: African Americans in the South never could have succeeded in promoting their pro–civil rights message to the American public if the Southern states had been permitted to use law to intimidate civil rights organizations like the NAACP.

The Court found that requiring the NAACP to turn over its membership lists illicitly infringed on NAACP members' right to expressive association. In discussing the right of expressive association, the Court stated that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[4] The Court added that it was "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters"; rather, regulation that might have the effect of burdening freedom of expressive association would receive "the closest scrutiny."[5] Given the relatively minor benefit of disclosure to the state's asserted interest of determining whether the NAACP was engaged in technical violations of state law, the Court determined that Alabama had failed to show a compelling interest sufficient to overcome the "deterrent effect on the free enjoyment of the right to associate" that compelled disclosure was likely to have.[6]

Following *Patterson*, the Court decided several other expressive association cases pitting the associational rights of the NAACP and its mem-

[3] 357 U.S. 449 (1958).
[4] *Id.* at 460.
[5] *Id.* at 460–61.
[6] *Id.* at 462–66.

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bers against the obstructionist policies of state governments in the South.[7] In each of these cases, the Court applied strict scrutiny to the asserted state interest involved and resolved the cases in favor of associational rights.[8] Strict scrutiny, also known as the 'compelling interest test', is the highest level of scrutiny the Court gives to regulations, requiring that to pass constitutional muster a regulation must be narrowly tailored to achieve a compelling governmental interest.

While the Court strictly protected expressive association rights in cases involving racial discrimination, similar assertions of expressive association rights by the Communist Party were less well received. In two cases during the late 1950s and early 1960s, the Court found that national security concerns overrode the Communist Party's freedom of association rights and, thus, upheld legislation requiring the party to relinquish its membership lists.[9] The only case involving Communism from this era in which the Court sided with expressive association also involved racial discrimination: in *Gibson v. Florida Legislative Investigation Committee* (1963),[10] a committee of the Florida Legislature attempted to gain access to the membership list of the Miami branch of the NAACP for the stated purpose of investigating whether its members were involved with the Communist Party. The Court found that there was no evidence of any substantial relationship between the NAACP and Communist activities and, therefore, there was no compelling state interest in acquiring the NAACP's membership records.[11]

B. A shift in focus brings a shift in application

Expressive association cases largely died out for a time after the civil rights movement achieved its major legislative goals in the 1960s, rendering moot attempts by state governments to stifle the movement, and with the end of the "Red Scare" of the 1950s. Ironically, the civil rights movement's legislative triumphs also sowed the seeds for new litigation over expressive association. Following the federal government's lead, states began either to pass new laws or to enforce old laws guaranteeing African Americans and other beneficiaries of the civil rights movement equal access to "places of public accommodation." When these laws were passed, legislatures had in mind restaurants, hotels, theaters, and other public spaces. Some state courts gradually expanded their interpretations

[7] *See*: *Bates v. City of Little Rock,* 361 U.S. 516, 523–27 (1960)(requirement forcing NAACP to disclose membership lists violated freedom of expressive association); *NAACP v. Alabama* ex rel. *Flowers,* 377 U.S. 288, 307–10 (1964)(order enjoining NAACP from conducting business violated freedom of expressive association); see generally *NAACP v. Button,* 371 U.S. 415 (1963).

[8] *See: Bates,* 361 U.S. at 527; *Flowers,* 377 U.S. at 308–10; *Button,* 371 U.S. at 428–29.

[9] *Uphaus v. Wyman,* 360 U.S. 72, 77–81 (1959); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 90–104 (1961).

[10] 372 U.S. 539 (1963).

[11] *Id.* at 555–57.

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of public accommodations laws so that they covered private membership organizations, even those with no permanent meeting places. The phrase "places of public accommodation" was stretched to include the membership policies of these organizations, despite the obvious semantic problem with fitting that particular square peg into that particular round hole. State courts that applied public accommodations laws to membership organizations held that their membership policies could not discriminate against protected groups. Thus, a new class of expressive association litigants was born: membership organizations raising the right of expressive association as a defense against antidiscrimination laws.

Roberts v. United States Jaycees (1984)[12] involved the assertion of the right to expressive association by a membership organization that sought exemption from a state public accommodations law prohibiting discrimination on the basis of sex. At the time, the United States Jaycees admitted only men between the ages of eighteen and thirty-five as full members, although it allowed women to be associate members with no voting or office-holding rights.[13] In 1974 and 1975, two Minnesota chapters of the organization began admitting women as full members. The Jaycees' national organization imposed sanctions against the chapters for this violation of membership rules and began proceedings to revoke their charters.[14]

The chapters then filed a complaint with the Minnesota Department of Human Rights, contending that the Jaycees' membership rules violated Minnesota's law banning discrimination in public accommodations.[15] The national Jaycees sought relief from the enforcement of the law in federal court, arguing that "application of the [law] would violate the male members' constitutional rights of free speech and association."[16] The Jaycees noted that their charter called for the organization to "promote the interests of young men," a presumptively easier task for an organization with an all-male membership than for a mixed-sex organization.

The national Jaycees lost at the district court level, but won on appeal before the Eighth Circuit Court of Appeals.[17] The Eighth Circuit held that the national Jaycees had a right to associate as the means to achieve their expressive ends, including the advancement of the interests of young men, and that allowing women as full members would directly burden that right.[18] The Eighth Circuit also found that Minnesota's asserted com-

[12] 468 U.S. 609 (1984).
[13] *Id.* at 612–13.
[14] *Id.* at 614.
[15] *Id.* at 614–15. The law in question prohibited the denial to "any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." Minn. Stat. § 363.03(3) (1982).
[16] 468 U.S. at 615.
[17] *See*: *United States Jaycees v. McClure*, 534 F. Supp. 766 (D. Minn. 1982); *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983).
[18] *United States Jaycees v. McClure*, 709 F.2d at 1566–72.

pelling interest, the prevention of discrimination in places of public accommodation on the basis of sex, was not sufficiently compelling to overcome the national Jaycees' right to expressive association.[19]

Minnesota appealed, and in its *Roberts* decision the U.S. Supreme Court reversed the Eighth Circuit's ruling. Justice William Brennan wrote the opinion for the Court, joined by four of his colleagues. Justice Sandra Day O'Connor and Justice William Rehnquist concurred in the judgment, while Chief Justice Warren Burger and Justice Harry Blackmun did not participate. Justice Brennan's opinion, while acknowledging a broad right to expressive association and recognizing that the central purpose of the national Jaycees was the promotion of the interests of young men, held that forcing the organization to admit women as full members would not infringe the national Jaycees' right to expressive association.[20] He stated that there was no evidence that the admission of women would substantially impair the organization's promotion of the interests of young men, and that without further evidence he would "decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech."[21]

Justice Brennan added that even if Minnesota's public accommodations law did impinge on expressive association, and the Court therefore had to apply strict scrutiny, the law served Minnesota's compelling interest in eliminating discrimination and ensuring its citizens equal access to publicly available goods and services. Moreover, the law was narrowly tailored because it abridged the national Jaycees' expressive association rights only incidentally and insofar as it was necessary to accomplish the act's purpose.[22] Brennan also suggested that discriminatory practices were analogous to "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact" and that such activities were "entitled to no constitutional protection."[23]

Justice Brennan's opinion in *Roberts* is significant in two respects. First, he tendentiously interpreted the facts to find that expressive association rights were not impinged. His assertion that it is merely stereotypical thinking to assume that women as a group are less inclined than young men as a group to desire to promote the interests of young men seems almost risible.[24] Second, and even more significant, Brennan characterized the Jaycees' discriminatory practices as akin to violence and not

[19] *Id.* at 1572–76.
[20] *Roberts v. United States Jaycees,* 468 U.S. at 622–28.
[21] *Id.* at 627–28.
[22] *Id.* at 623–26, 628–29.
[23] *Id.* at 628.
[24] For criticisms of this part of the *Roberts* opinion, see David E. Bernstein, "Antidiscrimination Laws and the First Amendment," *Missouri Law Review* 66 (2001): 97–98 (hereinafter, Bernstein, "Antidiscrimination"); Neal E. Devins, "The Trouble with *Jaycees*," *Catholic University Law Review* 34 (1985): 913–14; Douglas O. Linder, "Freedom of Association After *Roberts v. United States Jaycees*," *Michigan Law Review* 82 (1984): 1892.

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worthy of constitutional protection, and therefore gave the right of expressive association short shrift in his compelling interest analysis. In adopting this argument, the Court sent the message that expressive association was far less important than other First Amendment rights.[25]

Justice O'Connor's concurring opinion in *Roberts* was far narrower. She recognized that an association's right to define its membership is an important part of the right of expressive association. She nevertheless concluded that the Jaycees were not entitled to claim the right because they were primarily a "commercial" association—providing networking contacts to young businesspeople—rather than a primarily expressive one.[26]

After the *Roberts* opinion, the Court rejected two other expressive association challenges to public accommodations laws and, in doing so, reinforced the idea that the right to expressive association was a weak constitutional right at best.[27] In *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987), the Court held that Rotary International, a membership organization, could not revoke the membership of a local Rotary Club that admitted two female members in violation of Rotary International's policy. As in *Roberts,* in *Duarte* the Court argued that requiring the admission of female members would not hinder the advancement of the club's purposes.[28] The Court also applied the same lax version of strict scrutiny it had adverted to in *Roberts,* finding that any infringement on the right to expressive association was justified by the State's compelling interest in eliminating discrimination against women.[29]

Similarly, in *New York State Club Association v. City of New York* (1988), the Court brushed aside a challenge by a consortium of New York private clubs and associations to the application of the antidiscrimination provision of the New York City Human Rights Law. While acknowledging the existence of a right to expressive association, the Court stated that the New York law at issue did not on its face "affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints."[30]

[25] *See* David E. Bernstein, "The Right of Expressive Association and Private Universities Racial Preferences and Speech Codes," *William and Mary Bill of Rights Journal* 9 (2001): 623 (arguing that the *Roberts* decision sent a message that expressive association rights were not to be taken seriously).

[26] *Roberts,* 468 U.S. at 633–40 (O'Connor, J., concurring).

[27] *See*: *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York,* 487 U.S. 1 (1988).

[28] *Duarte,* 481 U.S. at 548. In fact, the Court stated that the admission of women would promote Rotary International's goals of providing humanitarian service, encouraging high ethical standards, and ensuring that Rotary clubs represented a cross section of their communities. *Id.* at 548–49.

[29] *Id.* at 549. In all, the Court's entire discussion of both the effect of the admission of women on the ability of the organization to promote its goals and the compelling interest test consists of only three paragraphs. *See id.* at 548–49.

[30] *New York State Club Ass'n,* 487 U.S. at 13 (quoting *Duarte,* 481 U.S. at 548). In rejecting the plaintiffs' challenge, the Court did note that "if a club seeks to exclude individuals who do not share the views that the club members wish to promote," then different issues would arise, perhaps leading to a different result. *Id.* at 13.

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The Court's apparent disdain for expressive association claims had a marked effect on lower courts. Following Justice Brennan's opinion in *Roberts*, lower federal courts and state supreme courts routinely held that the right of expressive association had to yield to antidiscrimination statutes.[31]

C. The tide begins to turn

From the mid 1980s to 1995, protection of the right of expressive association was at a low ebb, with courts generally refusing to enforce it in the face of conflicting antidiscrimination legislation. However, the tide began to turn in favor of expressive association beginning with the 1995 Supreme Court opinion in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[32]

In *Hurley*, the Boston Irish-American Gay, Lesbian and Bisexual Group (GLIB) sought to require the organizers of Boston's annual St. Patrick's Day Parade to allow the organization to march under its own banner. GLIB argued that the privately sponsored parade was subject to Massachusetts' public accommodations law, which banned discrimination against homosexuals.[33] The organizers of the parade countered that the admission of GLIB to the parade under its own banner would violate the organizers' right to expressive association by forcing them to convey a sexual message.[34]

The trial court, following the *Roberts* methodology, found that any burden on the organizers' right to expressive association caused by allowing GLIB to march in the parade was merely "incidental."[35] Further, the trial court held that this incidental burden was justified by Massachusetts' interest in "eradicating discrimination."[36] The Massachusetts Supreme Court affirmed.[37]

[31] *See, e.g., Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212 (Cal. 1985); *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987).

[32] 515 U.S. 557 (1995).

[33] See *id.* at 560–61. The public accommodations law prohibited, in pertinent part, "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws § 272:98 (1992).

[34] *See*: *Hurley*, 515 U.S. at 563.

[35] *Id.* at 563.

[36] *Id.*

[37] *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 636 N.E. 2d 1293 (1994). Interestingly, in the interim between the decision of the Massachusetts Supreme Court and the United States Supreme Court's decision, a Massachusetts federal district court issued a declaratory judgment holding that the organizers of the parade had a right to exclude GLIB. *South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891 (D. Mass. 1995). The federal district court distinguished *Roberts* and *Duarte*, finding that the Massachusetts public accommodations statute significantly burdened the organizers' right to expressive association, and that even if Massachusetts had a compelling interest in eradicating discrimination, this could not overcome that right. *Id.* at 915–17.

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However, the U.S. Supreme Court reversed in a unanimous opinion written by Justice David Souter. The Court noted that the organizers of the parade disclaimed any interest in excluding homosexuals generally from the parade, but, rather, were seeking to bar GLIB from marching as its own parade unit under its own banner. The Court stated that "[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."[38] Thus, according to the Court, the Massachusetts courts' application of the public accommodations statute had the effect of "declaring the sponsor's speech itself to be the public accommodation," which was contrary to the fundamental rule of the First Amendment that "a speaker has the autonomy to choose the content of his own message."[39]

The Court distinguished *Roberts,* as well as *New York State Club Association,* by noting that in those cases "compelled access to the benefit [provided by the organization] . . . did not trespass on the organization's message itself."[40] Here, according to the Court, even if the parade could be called a public accommodation, "GLIB could nonetheless be refused admission as [its own parade unit in the same manner that] a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."[41] Interestingly, there was no mention of the compelling interest test.

The Court's decision in *Hurley* seemed to halt the trend away from protection of the right to expressive association, but its implications were somewhat ambiguous. The *Hurley* opinion was unclear as to whether its holding relied on the right to expressive association or on the right to free speech, and whether there was a meaningful distinction between these two rights. However, the Court's decision in *Dale* soon initiated a dramatic change in the legal status of the right to expressive association.

D. Dale: The right reinvigorated

The issue in *Dale* was whether the Boy Scouts of America could revoke the membership of an assistant scoutmaster due to his acknowledged (and publicly known) homosexuality. James Dale had become active in scouting at the age of eight and had continued his involvement through age eighteen, ultimately achieving the rank of Eagle Scout.[42] He applied for adult membership in the Boy Scouts and was approved for the position of assistant scoutmaster for a Boy Scout troop. In 1989, Dale left home to attend college, and there first acknowledged his homosexuality. While at college, he attained a leadership position in a campus group advocat-

[38] *Hurley,* 515 U.S. at 572–73.
[39] *Id.* at 573.
[40] *Id.* at 580.
[41] *Id.* at 580–81.
[42] *Dale,* 530 U.S. at 644.

ing homosexual interests.[43] In July 1990, a newspaper published an interview that it had conducted with Dale at a seminar addressing the psychological and health needs of homosexual teenagers. In the article, which was accompanied by Dale's photograph and identified his leadership position with the campus advocacy group, Dale spoke about his efforts to help meet "homosexual teenagers' need for gay role models."[44]

Following the publication of the article, Dale received a letter from the local scouting council revoking his membership on the basis that the "the Boy Scouts 'specifically forbid membership to homosexuals.' "[45] Dale filed a complaint against the BSA in state court, alleging that the revocation of his membership had violated New Jersey's public accommodations statute.[46]

The trial court granted summary judgment in favor of the BSA. The court held, among other things, that the BSA's position with regard to homosexuality was clear and that forcing the BSA to allow Dale to be an adult member and scout leader would violate the BSA's right to expressive association.[47] The New Jersey Superior Court of Appeals, however, reversed.[48] With regard to the right to expressive association, the Court of Appeals, in a very *Roberts*-like opinion, first determined that forcing the BSA to allow Dale as a member would not significantly affect the BSA's ability to express its views or carry out its interests.[49] The court then distinguished *Hurley,* determining that it had involved "pure forms of speech" rather than expressive association, and that *Hurley's* reference to expressive association was dicta.[50] The court also followed *Roberts's* lead by applying a weak version of strict scrutiny and concluding that any infringement was justified by New Jersey's compelling interest in eradicating discrimination.[51]

The New Jersey Supreme Court affirmed.[52] The court found that the forced inclusion of Dale as a member would not significantly affect the

[43] *Id.* at 644–45.
[44] *Id.* at 645.
[45] *Id.*
[46] *Id.* The New Jersey public accommodations law prohibited, inter alia, discrimination in privileges of any place of public accommodation due to sexual orientation. N.J. Stat. Ann. § 10:5–4 (West Supp. 2000).
[47] *Dale,* 530 U.S. at 645–46.
[48] *Dale v. Boy Scouts of Am.,* 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998).
[49] *Id.* at 288. As a part of this analysis, the court expressed skepticism regarding whether the BSA's policy against homosexual members was, in fact, a public position taken by the organization. The court noted that, according to BSA rules and bylaws, the only membership requirements were age, gender, and willingness to adhere to the Scout Law and Scout Oath. The court also noted that, although the BSA had contended that its policy was that the requirements in the Scout Law and Oath that a scout be "morally straight" and "clean" prohibited homosexuality, the policy was of fairly recent vintage and had not been widely disseminated. *Id.* at 288–89.
[50] *Id.* at 291–92.
[51] *See id.* at 293.
[52] *Dale v. Boy Scouts of Am.,* 734 A.2d 1196 (N.J. 1999).

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ability of the BSA to disseminate its message, because the BSA did not associate to promote the message that homosexuality is immoral.[53] The court invoked *Roberts* for the proposition that "[s]tate laws against discrimination may take precedence over the right of expressive association because 'acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that the government has a compelling interest to prevent.' "[54] Finally, the court determined that any infringement on the BSA's right to expressive association was justified by New Jersey's compelling interest in preventing discrimination.[55]

The opinions of the New Jersey Superior Court of Appeals and the New Jersey Supreme Court were consistent with the expressive association doctrine that the U.S. Supreme Court had developed in *Roberts* and its progeny. However, in *Dale,* the U.S. Supreme Court reversed the lower courts' holdings in a 5–4 opinion written by Chief Justice William Rehnquist, who had succeeded Chief Justice Burger in 1986.

In *Dale,* the Court started off by noting that in *Roberts, Duarte,* and *New York State Club Association* it had applied the compelling interest test to public accommodations laws that allegedly infringed on associational rights. The Court, however, then emphasized that "forced inclusion of an unwanted person in a group infringes on the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[56] Then, in contrast to its rulings in the *Roberts* line of cases, in which the Court had independently evaluated whether the antidiscrimination laws in question truly infringed on the respective organizations' expressive activities, the majority opinion in *Dale* stated that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[57] The Court noted that the record contained evidence of the BSA's belief that homosexual conduct is not "morally straight," and declined further inquiry into the sincerity of that belief.[58]

In further contrast to the dismissive manner in which the Court in *Roberts* and its progeny had determined whether expressive association rights were impaired, the majority in *Dale* stated that deference should be given to an organization's view of what would impair its expression.[59] The Court concluded by analogizing the case to *Hurley*: "[T]he presence of Dale as an assistant scoutmaster would just as surely interfere with the

[53] *Id.* at 1225.
[54] *Id.* at 1223 (citing *Roberts,* 468 U.S. at 628).
[55] *Id.* at 1228.
[56] *Dale,* 530 U.S. at 647–48.
[57] *Id.* at 651.
[58] *Id.* at 651–52.
[59] *Id.* at 653.

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Boy Scouts' choice not to propound a point of view contrary to its beliefs."[60] In determining that Dale's inclusion would significantly affect the BSA's right of expressive association, the Court rejected the New Jersey Supreme Court's finding that there was no significant impairment because the purpose of the BSA's association was not to disseminate the belief that homosexuality is immoral. The U.S. Supreme Court found that (1) associations do not have to associate for the purpose of disseminating a specific message to be entitled to First Amendment protection; (2) even if the BSA discourages leaders from disseminating views on sexual issues, this does not negate the sincerity of its belief that homosexuality is immoral; and (3) the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association."[61]

The Court proceeded to apply the compelling interest test. The *Roberts* line of cases had suggested that the compelling interest test generally justified antidiscrimination laws challenged on expressive association grounds. In *Dale,* the Court gave the test short shrift, stating simply that "[t]he 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."[62] *Dale* left no doubt that the compelling interest test as used in *Roberts* and its progeny, through which a state's interest in eradicating discrimination trumped expressive association rights, had been repudiated. Even though *Dale* was a 5–4 decision, not even the dissenters argued for the use of the *Roberts*-style compelling interest test.[63] Rather, the dissenters argued that the BSA's anti–homosexual activity message was too vague, unpublicized, and irrelevant to the organization's core mission to warrant protection under the expressive association doctrine.

The majority opinion in *Dale* marks a substantial step toward the reinvigoration of expressive association and its recognition as a full-fledged First Amendment right. The right to expressive association had been treated by *Roberts* and its progeny as a second-class right, which could be infringed upon in most instances due to the narrow definition of an association's expressive interests and the lax nature of the compelling interest test that the Court used. *Dale,* in contrast, held that the expressive association right could be asserted by an organization even though the organization did not associate for the purpose of expressing the particular message in question, propounded that message only implicitly, and tolerated dissenting views. Moreover, under *Dale* the courts will no longer defer to a government's claim that its invasion of expressive association rights serves interests sufficiently compelling to justify its invasion, but will instead skeptically review such claims. This is quite a reversal from

[60] *Id.* at 654.
[61] *Id.* at 655–56.
[62] *Id.* at 659.
[63] *See id.* at 663–700 (Stevens, J., dissenting); *id.* at 700–2 (Souter, J., dissenting).

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the *Roberts* legacy of deference toward government and skepticism toward groups asserting their right to expressive association.

III. Reaction to *Dale*

Reaction to *Dale* and its possible implications has been mixed, and ranges across a wide spectrum of constitutional philosophy. On one extreme is legal scholar Richard Epstein, who applauds the Court for its reinvigorated enforcement of the right to expressive association, yet argues that the Court's opinion did not go far enough, and that the Court should have recognized that the state has no interest in counteracting discrimination by private groups that lack monopoly power.[64] According to Epstein, *Dale's* reasoning should be extended to nonexpressive organizations, including for-profit businesses not organized for expressive purposes: if the First Amendment applies, as the *Dale* opinion suggests, to all situations where the organization merely engages in expressive activity that could be impaired, then "every organization engages in expressive activity when it projects itself to its own members and to the rest of the world."[65]

Epstein argues for a broad associational freedom, rather than a narrow test that attempts to apply the government's interest in antidiscrimination legislation "to the literally thousands of organizations that engage in business, charitable, religious, or recreational endeavors, or some mixture thereof." Courts should recognize the unity between the common law rules that treat private property, freedom of contract, and freedom of speech as equals, and associational freedom should be seen as derivative from these rights. State regulation should only be exercised under traditional police power grounds, such as the prevention of monopolies.[66] Today, by contrast, property and contract rights are neglected by the courts relative to freedom of speech.

While Epstein argues that *Dale* did not go far enough, law professor Andrew Koppelman argues that the *Dale* opinion is "sheer lunacy."[67] Like Epstein, Koppelman agrees that under the Court's opinion in *Dale*, "[a]lmost any organization is eligible for the protection from antidiscrimination laws that the Court provides."[68] Koppelman contends that the Court's statement that an association need only engage in expressive

[64] See Richard A. Epstein, "The Constitutional Perils of Moderation: The Case of the Boy Scouts," *Southern California Law Review* 74 (2000): 120.

[65] *Id.* at 140.

[66] *Id.* at 139–42. Epstein recognizes that this approach would invalidate much of the Civil Rights Act, including Title VII, which bans certain categories of employment discrimination. However, he believes that his position would assist voluntary affirmative action, as well as other sex- and race-conscious decisions. *Id.* at 142

[67] Andrew Koppelman, "Signs of the Times: *Dale v. Boy Scouts of America* and the Changing Meaning of Nondiscrimination," *Cardozo Law Review* 23 (2002): 1819.

[68] *Id.* at 1821.

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activity that could be impaired in order to receive protection, coupled with its statement that it will not question the association's statement of its expressive purpose and will defer to the association's view of what would impair that purpose, means that "an expressive association claim is available to any entity that wants to discriminate at any time for any purpose."[69]

Others scholars contend that *Dale's* impact will not be so dramatic. Law professor Dale Carpenter argues that *Dale* will not have "the revolutionary consequences" that either its "harshest critics," such as Koppelman, or "most libertarian cheerleaders," such as Epstein, predict.[70] He asserts that the crucial distinction the Court will make after *Dale* in the area of expressive association will be akin to the approach suggested by Justice O'Connor's concurrence in *Roberts*. The Court will provide *Dale's* heightened protection to organizations whose activities are primarily expressive, while other groups whose activities are primarily commercial will receive a minimal level of protection.[71] Carpenter contends that this distinction is also somewhat analogous to the Court's treatment of core political and commercial speech.[72] He also argues that this distinction is consistent with the results in both *Roberts* and *Dale* because the Jaycees is primarily a commercial organization, while the BSA is primarily expressive. Carpenter concludes that "there is little doubt that a majority of the Court is now following Justice O'Connor's approach in delineating associational freedom," even though *Dale* did not articulate this explicitly.[73]

Other scholars have suggested that *Dale* does not signal a complete repudiation of the *Roberts* standard, but is, rather, an anomaly generated by the parties involved: the venerable institution of the BSA on the one hand, and the homosexual minority with its tenuous social and legal status on the other.[74] In particular, commentators who hold this view argue that the Court's ruling would have been different in a case concerning race or sex discrimination.[75] Some attribute this difference to the Court's majority and its lack of sympathy for gay rights, suggesting that

[69] *Id.* at 1822.

[70] Dale Carpenter, "Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach," *Minnesota Law Review* 85 (2001): 1516–17.

[71] *Id.* at 1571.

[72] *Id.* at 1568. Carpenter notes that content-based restrictions on core political speech are subject to strict scrutiny, while restrictions on commercial speech receive only intermediate scrutiny. *Id.*

[73] *Id.* at 1570. Carpenter advocates the addition of a category for "quasi-expressive" associations, which mix a significant degree of expressive and commercial activity, and would be granted protection consistent with the nature of the internal operation sought to be brought into compliance with the antidiscrimination law. *Id.* at 1576–77.

[74] *See* Erwin Chemerinsky and Catherine Fisk, "Perspectives on Constitutional Exemptions to Civil Rights Law: *Boys Scouts of America v. Dale*," *William and Mary Bill of Rights Journal* 9 (2001): 616–17; Darren Lenard Hutchinson, " 'Closet Case': *Boy Scouts of America v. Dale* and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility," *Tulane Law Review* 76 (2001): 106–20; Arthur S. Leonard, "*Boy Scouts of America v. Dale:* The 'Gay Rights Activist' as Constitutional Pariah," *Stanford Law and Policy Review* 12 (2001): 32.

[75] Chemerinsky & Fisk, *supra* note 74, at 617.

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the Court believes that eradicating discrimination against African Americans or women, but not gays, is a compelling government interest.

Others have suggested that the source of the distinction in expressive association cases between those that involved gays and those that did not is the Court's Fourteenth Amendment equal protection jurisprudence. For equal protection purposes, the Court engages in strict scrutiny of laws that classify by race (requiring that the classification at issue be narrowly tailored to achieve a compelling government interest), intermediate scrutiny of laws that classify by sex (requiring that the classification serve important government interests and be substantially related to the achievement of that goal), and rational basis scrutiny of laws that classify by sexual orientation (requiring merely that a classification be rationally related to a legitimate state interest and rest on grounds not wholly irrelevant to the achievement of the state's objective). Antidiscrimination laws will be protected from expressive association claims under the compelling interest test based on the degree of protection that the group facing discrimination receives under equal protection doctrine. It should be noted that scholars who hold such views are speculating, and nothing in *Dale* suggests that race discrimination cases would get treated differently than sexual orientation discrimination cases. Quite the contrary, the Court wrote that "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message."[76]

It seems likely that *Dale* does mark a turning point in the judicial treatment of the right of expressive association, regardless of which group is harmed by the discrimination at issue. In contrast to the limited and toothless right given lip service by the Court in *Roberts, Dale* establishes expressive association as a robust First Amendment right. I agree with Dale Carpenter that the right to expressive association is likely limited by the primarily expressive/primarily commercial dichotomy that Justice O'Connor enunciated in her concurrence in *Roberts*. Justice O'Connor's vote was necessary to secure the 5–4 majority in *Dale,* and *Dale*'s result is consistent with the application of the dichotomy in her *Roberts* concurrence, thus suggesting that *Dale* does not represent a change in her views. The defense of the right of expressive association is probably limited solely to nonprofit organizations, as it would be difficult to argue that a profit-making enterprise exists *primarily* for noncommercial purposes.

IV. Case Law Following *Dale*

The Supreme Court has not addressed the right of expressive association since *Dale*. However, the limited cases in the lower courts since *Dale* generally support the theory that *Dale* has ushered in a new era of broad

[76] *Dale,* 530 U.S. at 661.

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protection of the right to expressive association. In *White v. Lee* (2000), for example, the Ninth Circuit Court of Appeals relied in part on *Dale* in holding that the Department of Housing and Urban Development could not launch a civil rights investigation against homeowners who, for allegedly discriminatory reasons, organized opposition to a plan to turn a motel into a group home. The court cited *Dale* for the proposition that "[t]he right to expressive association includes the right to pursue, as a group, discriminatory policies that are antithetical to the concept of equality for all persons."[77]

In *Donaldson v. Farrakhan* (2002)[78] the Supreme Court of Massachusetts found that forcing a Nation of Islam mosque to admit a woman to a men-only religious meeting would significantly burden the organization's right of expressive association and was not justified by a compelling government interest. This decision belies the notion that *Dale*'s holding is applicable only to cases involving discrimination against homosexuals and that *Roberts*'s "forgiving" compelling interest test would otherwise apply. Had the Massachusetts Supreme Court relied on *Roberts* rather than *Dale,* the public accommodations statute would have prevailed as serving the compelling interest of eradicating discrimination against women.

Further evidence that the states'-style of inquiry is no longer viable after *Dale* was provided by the District of Columbia Court of Appeals in *Boy Scouts of America v. District of Columbia Commission on Human Rights* (2002).[79] This case, like *Dale,* involved the question of whether the BSA could deny membership to homosexuals. The D.C. Commission on Human Rights had found that the BSA could not claim an expressive association right to exclude homosexuals. The commission had tried to distinguish *Dale* by arguing that it had conducted its own detailed examination of the BSA's views with regard to homosexuality and concluded that the BSA did not truly express a position on the morality of homosexual relations.[80] On appeal by the BSA, the D.C. Court of Appeals rejected the commission's attempt to rely upon a *Roberts*-style detailed examination of the expressive position of the organization.[81] Instead, the court found *Dale* to be controlling and ruled in favor of the BSA.

There is, however, one case decided by the Third Circuit Court of Appeals that has some restrictive implications for the right of expressive association. In *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh* (2000),[82] a fraternity that had been stripped of its status as a recognized student organization following a drug raid raised the right of expressive association in a lawsuit against the university. The Third Circuit Court of

[77] *White v. Lee,* 227 F.3d 1214, 1227 (9th Cir. 2000).
[78] 762 N.E.2d 835 (Mass. 2002).
[79] 809 A.2d 1192 (App. D.C. 2002).
[80] *Id.* at 1200.
[81] *Id.* at 1200–1. The court similarly refused to credit an attempt by the commission to show that, unlike the plaintiff in *Dale,* the two complainants in its case were not "gay activists." *Id.* at 1201–3.
[82] 229 F.3d 435 (3d Cir. 2000).

Appeals, not surprisingly, rejected the fraternity's claim.[83] However, as part of its analysis, the court determined that the fraternity was not engaged in expressive activity sufficient to qualify for First Amendment protection.[84] In reaching this conclusion, the court engaged in an extensive analysis of the fraternity chapter's activities, finding that it did nothing to perpetuate the purported associational ideals of the national fraternity.[85] Therefore, the court held that the chapter was not engaged in expressive activity.[86] The court added that even if the fraternity had been engaged in expressive activity, the university's conduct would not have significantly infringed upon it.[87]

Although the Third Circuit's ultimate conclusion that the university's actions did not infringe on the fraternity's right of expressive association is correct, the court's determination that the fraternity was not engaged in expressive activity is belied by *Dale*. First, like *Roberts* but unlike *Dale,* the court analyzed the validity of the organization's expressive beliefs while ignoring its stated expressive purpose. Second, the court employed a highly restrictive definition of expressive behavior, which equated the fraternal organization at issue with a for-profit dance club. Such a restrictive definition seems inconsistent with *Dale's* broad-based definition of expressive activity.[88] While ultimately unnecessary to its conclusion, the Third Circuit's analysis in *Pi Lambda Phi* serves notice that the specter of *Roberts* still haunts the area of expressive association.

V. The Future of Expressive Association

Although the newly reinvigorated right of expressive association has seen only limited use in the short time since the Supreme Court's decision in *Dale,* it has enormous potential to affect the law in a variety of areas. One of these areas concerns the expressive association of religious organizations. Prior to *Dale,* religious associations burdened by antidiscrimination laws that conflicted with their religious beliefs were forced to rely on the First Amendment's Free Exercise Clause.[89] These claims were rarely successful, and with the Supreme Court's ruling in *Employment Division v. Smith* (1990)[90]—that religious organizations had no right to be exempted from neutral, generally applicable laws that burden their free exercise of religion—even this small chance of success faded.

After *Dale,* however, a religious association confronted with an antidiscrimination law that requires it to act in a way that inhibits its ability to

[83] *Id.* at 447.
[84] *Id.* at 443–45.
[85] *Id.* at 444.
[86] *Id.*
[87] *Id.* at 445–47.
[88] See *Dale,* 530 U.S. at 649–50.
[89] *See, e.g., Bob Jones Univ. v. United States,* 461 U.S. 574, 602 (1983).
[90] 494 U.S. 872 (1990).

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promote its beliefs should be able to raise expressive association rights as a defense. For example, contrary to pre-*Dale* precedent, church-run schools have a right to fire unmarried teachers who become pregnant if sex outside of marriage is frowned on by their sponsoring church.[91] Justice Scalia's concurring opinion in *Good News Club v. Milford Central School* (2001),[92] arguing that a public school's exclusion of a Christian student club from the use of school facilities impinges on the right of expressive association, is an indication that religious organizations will be among the beneficiaries of *Dale*.

Universities will also be a primary beneficiary of the newly reinvigorated right of expressive association. The right of expressive association may be used to protect a private university's speech code against state statutes such as California's "Leonard Law," which requires private schools to follow First Amendment requirements in regulating speech. A private university could conceivably win an expressive association case if it can show that it is committed to creating a campus environment that is inclusive and welcoming to minority students, even at the expense of free speech on campus.[93] The First Amendment, which only restricts governmental activity, exists to protect pluralism from government attempts to impose orthodoxy, not to impose a free speech orthodoxy on private institutions. Protecting the expressive association rights of universities may decrease free speech on particular campuses, but increase social and ideological pluralism overall by allowing universities to choose their identities and to attract like-minded faculty and students based on those identities.

If forced to make an explicit choice, many universities would undoubtedly choose to promote themselves as free speech havens, as many already have. Yale University, for example, has volunteered that it will not punish any speech on campus if that speech would be protected against government action by the First Amendment. Other universities would establish themselves as institutions devoted to particular religious and social ideologies, as many implicitly or explicitly already have. As law professor Randall Kennedy suggests, the proper response to private sector experimentation with speech rules is to "let a thousand flowers bloom."[94] Freedom of speech and expressive association must include the right of private institutions to determine what speech they will and will not countenance.

[91] *Cf. Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 348 (E.D.N.Y. 1998); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808 (N.D. Cal. 1992); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 271 (N.D. Iowa 1980).

[92] 533 U.S. 98 (2001).

[93] *See* Bernstein, "The Right of Expressive Association," *supra* note 25, at 640–41.

[94] Transcript of discussion in Gara LaMarche, ed., *Speech and Equality: Do We Really Have to Choose?* (New York: New York University Press, 1996), 75; see also Michael S. Greve, "The Libertarian Case for Speech Codes," *Reason*, July 1995; available online at http://reason.com/9507/GREVEcol.jul.shtml [accessed September 12, 2003].

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The expressive association right to enact speech codes is only pertinent in the few jurisdictions, such as California, where speech codes at private universities are illegal. A broader potential use for the right of expressive association by universities nationwide would be to protect affirmative action—that is, racial preferences in admission—from laws banning discrimination in educational institutions. The U.S. Supreme Court recently held that such preferences are generally allowed,[95] but the decision was 5–4, with one of the justices in the majority, Sandra Day O'Connor, rumored to be ready to retire soon. Moreover, while the Court's opinion permitted preferences, it did ban some commonly practiced admissions tactics, including giving all African American applicants a blanket edge in admissions, regardless of individual circumstances.

The right of expressive association, however, may provide a defense to private universities that seek to avoid any present or future restrictions on affirmative action. Under *Dale,* universities could assert that they have a commitment to the promotion of racial diversity and assistance to disadvantaged minorities, and that the prohibition of racial preferences would significantly burden their expressive association right.[96]

This approach is not perfect. Asserting a First Amendment defense against Title VI of the 1964 Civil Rights Act, which prohibits any institution that receives federal assistance from discriminating on the basis of race, color, or national origin, may be unavailing in the face of the Court's decision in *Grove City College v. Bell* (1984).[97] This case involved Title IX of the Education Amendments of 1972, which prohibit educational institutions that receive federal funds from discriminating on the basis of sex, thus remedying the omission of sex in Title VI. In *Grove City,* the Court held that since the college's financial aid office received federal funds through student loans, the college could not claim a First Amendment right to refuse to comply with Title IX regulations promulgated by the Department of Education. The Court determined that the First Amendment rights of the college were not infringed because the college could avoid the impact of Title IX at any time by simply refusing the federal student loans.[98] In theory, a court might similarly hold that statutory restrictions on affirmative action do not violate the First Amendment for the same reason. However, as I have argued elsewhere, *Grove City* may not in fact be applicable, especially because the negative consequences for universities that disobey federal guidelines have grown dramatically since the Court decided that case.[99]

[95] *Grutter v. Bollinger,* 123 S. Ct. 2325 (2003).

[96] *See* Bernstein, "The Right of Expressive Association," *supra* note 25, at 634.

[97] 465 U.S. 555 (1984).

[98] *Id.* at 575–76.

[99] *See* David E. Bernstein, *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws* (Washington, DC: Cato Institute Press, 2003). David E. Bernstein, "Sex Discrimination Laws Versus Civil Liberties," *University of Chicago Legal Forum* (1999): 152.

VI. Conclusion

The full magnitude of the change in the jurisprudence of the right of expressive association wrought by the Supreme Court's 2000 decision in *Dale* is still not clear. What is apparent, however, is that *Dale* failed to follow the *Roberts* line of cases and, instead, rejuvenated the right of expressive association. The right emerged from the decision in *Dale* as a robust shield for expressive associations against government attempts to directly or indirectly influence their ability to independently form and promote their messages. Further, while the lower court decisions are sparse and sometimes inconsistent, it appears that the Supreme Court's expansive definition of the right has application beyond the facts and circumstances in *Dale,* although the scope of that right is not as broad as some commentators have argued. Expressive association rights will limit the encroachment of antidiscrimination laws on the membership and employment policies of nonprofit associations, but will not provide a means for American businesses to evade these laws.

Much of the potential of the right of expressive association remains untapped. In particular, as interpreted by *Dale,* the right of expressive association has great possibilities for use by religious organizations and private universities faced with antidiscrimination laws that would interfere with their ability to promote their respective ideologies. Expressive association may also ultimately protect the affirmative action policies of private universities from government intrusion.

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