

The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law

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I. INTRODUCTION

The Boy Scouts of America have been fighting battles in state courts that likely will have important ramifications for American constitutional law. In one particularly salient case, *Boy Scouts of America v. Dale*,¹ the Supreme Court has granted certiorari to review a decision of the New Jersey Supreme Court, holding that state antidiscrimination law requires the Scouts to admit an openly gay man as an assistant Scoutmaster within the organization.² The New Jersey decision rejects the Scouts' claim to possess a constitutionally protected freedom to discriminate in choosing their members and leaders based on avowed sexual orientation.³ There are at least three possible reasons why the Supreme Court granted certiorari in the case. First, the application of discrimination laws to the Scouts squarely presents the question of the relationship between *Roberts v. United States Jaycees*,⁴ in which the Court held constitutional the use of state antidiscrimination law to mandate the inclusion of women in a national young men's service organization, and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,⁵ in which the Court invalidated a state court's application of antidiscrimination law that would have required the inclusion of a gay and lesbian group in a private parade. Second, the New Jersey ruling is in conflict with a number of court decisions that have exempted the Scouts' membership and leadership selection practices from antidiscrimination statutes.⁶ To be sure, the conflict is a conflict only in

1. 734 A.2d 1196 (N.J. 1999), *aff'g* 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *cert. granted*, 120 S. Ct. 865 (U.S. Jan. 14, 2000) (No. 99-699).

2. The *Dale* case was argued before the Supreme Court on April 26, 2000. Amicus briefs have been submitted to the Court by many organizations, including Gays and Lesbians for Individual Liberty.

3. See *Dale*, 734 A.2d at 1223-24.

4. 468 U.S. 609 (1984).

5. 515 U.S. 557 (1995).

6. *Dale* is not the first case in which an American official has held that an antidiscrimination law applied to the "Scouts' membership and leadership selection decisions," but it is currently the only one in which an appellate court has done so and has not been reversed. Over the course of the lengthy proceedings involved in *Curran*, California's intermediate appellate court had held in 1983 that state antidiscrimination law applied to the Scouts. See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 195 Cal. Rptr. 325 (Cal. App. 2 Dist. 1983). The Chicago Commission on Human Relations (CCHR) held in 1996 that the Chicago Area Council of the Scouts had violated the city's Human Rights Ordinance by barring homosexuals from professional scouting positions. In 1996, a Cook County Circuit Court judge affirmed the CCHR's ruling. See generally Marissa L. Goodman, Note: *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 868-74, 885-86, 889 (1999). See also Brief of Boy Scouts of America as Amicus Curiae in Support of Reversal at 2, *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (No. 94-749) ("[P]ublic accommodations laws in

results, not in the interpretation of federal constitutional law.⁷ But the absence of a direct conflict as to the meaning of federal law need not prevent the Supreme Court from exercising jurisdiction.⁸ Third, and perhaps most importantly, the Scouts are the best known youth organization for boys in the United States, with enormous symbolic importance in the nation's cultural life. Close to 4.8 million youths take part in their activities.⁹ If the Scouts have a constitutionally protected liberty to discriminate, then the New Jersey court's ruling works an immediate and direct infringement on that liberty, affecting the lives of the millions of Americans who currently participate in the affairs of the group and the many others who take an interest in its welfare. Without liberty to discriminate, the same law that requires the Scouts to admit a gay man may also require the organization to admit girls and atheists. If no such liberty exists, then legislators and other political actors who seek to further the cause of social equality should know that they are free to require the Scouts to comply with

California, Illinois, New Jersey, Florida, Oregon, Connecticut, Minnesota, Pennsylvania, Washington[,] D.C., Kansas and a number of cities have been invoked or are being invoked now to support actions against Boy Scout groups.”). For a perceptive account of some recent such conflicts, legal and other, involving homosexuality and the Scouts, see Tracy Thompson, *Scouting and New Terrain*, WASHINGTON POST, Aug. 2, 1998 (Magazine), at W06.

7. None of the courts in jurisdictions where the Scouts have prevailed have decided any federal constitutional questions. Rather than hold that the First Amendment requires that the Scouts be exempt from otherwise applicable antidiscrimination laws, the courts have found that the antidiscrimination laws do not even apply to the Scouts. See, e.g., *Curran*, 952 P.2d at 238-39.

8. In neither *Roberts* nor *Hurley* did the Court cite any conflicts in lower court decisions as justification for exercising jurisdiction. In *Roberts*, the appellants attempted to justify the Court's taking jurisdiction by noting the “novel and constitutionally significant” questions raised by the case. Appellants' Jurisdictional Statement at 10, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (No. 83-724). The Jaycees, who had prevailed in the Court of Appeals, welcomed the opportunity for Supreme Court review of the case. The Jaycees said that they were “seek[ing] a dispositive decision which will hopefully end years of persistent and continuing litigation challenging the Jaycees [sic] all male membership policy.” Appellee's Motion to Affirm at 2. In *Hurley*, the appellants “point[ed] not only to the effect a denial of certiorari w[ould] have on their First Amendment protections now and in the future, but note[d] the effect a denial w[ould] have on First Amendment expressions elsewhere.” Petition for Writ of Certiorari at 6, *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (No. 94-749). Opposing certiorari, the gay and lesbian group that had prevailed in the state courts strongly contended that no conflict existed between the Massachusetts Supreme Judicial Court's resolution of the federal constitutional questions at issue in the case and any other court's resolution of the same questions. See Respondent's Brief in Opposition to Petition for Writ of Certiorari at 2-6, *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (No. 94-749).

9. See *About the B.S.A.* (visited Jan. 18, 2000) <<http://www.bsa.scouting.org/nav/public.html>>. The purpose of the organization is “to provide an educational program for boys and young adults to build character, to train in the responsibilities of participating citizenship, and to develop personal fitness.” *Id.*

generally applicable public accommodations statutes in selecting leaders and members.

I believe that the Court is likely to sharply narrow or abandon the *Roberts* approach rather than simply to elaborate upon it. The approach is subject to criticism on a number of grounds, and it is probably out of tune with the sensibilities of many if not most of the current members of the Court. In this essay, I attempt to show how the interaction between freedom of association and other First Amendment doctrines should produce what amounts to a practical compromise on the broader questions of equality, autonomy, and the relationship between public and private that the Scouts cases exemplify to many activists and observers. Such a compromise, I believe, would simultaneously satisfy opponents of discrimination and preserve the Scouts' exercise of liberties that they regard as essential to their understanding of themselves and their mission.

The doctrinal claims advanced in this essay are modest and tentative, but their practical import is clear. The Scouts should be free to restrict their membership by the generous, though not all-inclusive, criteria for participation that they presently employ.¹⁰ This argument applies all the more strongly to the Scouts' desire to choose their leaders according to these criteria because leaders necessarily embody the expressive and educative purposes that lie at the heart of what is distinctive about many private associations. Yet even mere membership disputes should be decided in the organization's favor. Although the Boy Scouts of America is a large organization that aggressively solicits members in a relatively unselective manner, and although it provides experiences and activities that can be characterized as "services," the purposes of the organization differ fundamentally from those of organizations such as the Jaycees.

A number of strands of First Amendment doctrine can be brought together in support of this conclusion. The first strand is freedom of speech or expressive association. Under *Hurley* and even *Roberts* itself, the Scouts have a strong claim on this ground alone to the autonomy to decide who should be their members and leaders. Unlike the Jaycees and other unprotected organizations, the Scouts can show a strong relationship between their membership and leadership selection decisions and the expressive activities in which the organization indubitably engages. The second strand is intimate

10. The criteria that recent disputes have made immediately pertinent are threefold: a prospective member must be a boy, he must make a pledge to honor God, and he must refrain from openly identifying himself as homosexual. See *Dale v. Boy Scouts of Am.*, 784 A.2d 1196, 1203-05 (N.J. 1999).

association. Because they are organized in small local cell groups, the Scouts can state a plausible claim of entitlement to protections that the Court has accorded to other forms of intimate association. That the Court would grant the Scouts such an entitlement is, I believe, distinctly improbable. Nonetheless, this claim is likely to add to the force of the Scouts' other claims. The third strand is freedom of religion. Perhaps surprisingly to those who view the Scouts as a non-sectarian organization, I argue that the Scouts are entitled to the same autonomy that churches possess under the Free Exercise and Establishment Clauses in determining who may teach, lead, and belong in their organizations. For constitutional purposes, the Scouts are little different from an aggregation of church youth groups.

There are, of course, practical as well as theoretical limits to the Scouts' freedom. Two lines to be drawn are of especial significance. First is the line between government sponsorship and neutral distance from government. The Scouts' internal affairs should receive no protection where the Scouts are allied with government. Even if the Scouts did not expressly require of members that they adhere to what amounts to a minimal creed or exclude persons from participation in their organization on any other ground generally forbidden to state actors, the religious aspects of the Scouts' mission and character would mandate that government stand aside from sponsoring Scouting troops and providing analogous special benefits to the Scouts as an organization. Second is the line between decisions about the internal workings and character of the organization—decisions about membership, leadership, and discipline—and dealings with the outside world. In the latter category are commercial transactions in which the organization holds itself out to the public to sell Scouting gear and other wares for a profit. These dealings are not entitled to anything like the constitutional respect that should attach to decisions on who belongs to, or speaks for, the organization.

To say that the Scouts fall squarely within the class of associations that deserve broad freedom from governmental attempts to change their internal character, as I believe they do, says little as to who else might belong in that class. At the end of this essay, I offer a few suggestions on the considerations that courts should take into account in examining the application of public accommodations laws to organizations other than the Scouts.

II. STATE POWER TO ERADICATE PRIVATE EXCLUSION THAT PERPETUATES INEQUALITY: *ROBERTS V. UNITED STATES JAYCEES*

*Roberts v. United States Jaycees*¹¹ is the Supreme Court's leading contemporary decision on the relationship between freedom of association and the freedom of private groups to discriminate on nonracial grounds.¹² In *Roberts*, the Court rejected a prominent men's organization's claim to exemption from a state law that forbade discrimination based on sex.¹³ The Jaycees were a "nonprofit membership corporation," having been formed with organizational growth and civic improvement in mind.¹⁴ Which of these two goals was primary is unclear. Three identifiable purposes are discernible from the organization's bylaws: to inculcate in individual members "a spirit of genuine Americanism and civic interest;" "to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation;" and "to develop true friendship

11. 468 U.S. 609 (1984).

12. *Roberts* followed a long line of cases protecting the right to freedom of association in specific categories of situations. The germ of modern free association jurisprudence is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in which the Supreme Court invalidated an Alabama court order requiring the National Association for the Advancement of Colored People to produce a list of persons who belonged to the organization. See Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 1 (1964); NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 160 (1998) [hereinafter MEMBERSHIP AND MORALS]. The Court said that it was

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 Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Patterson, 357 U.S. at 460-61.

The holding in *Patterson* did not come from nowhere. Language on something like what we call freedom of association can be found in cases at least as old as *United States v. Cruikshank*, 92 U.S. 542, 552 (1875):

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

Id. Even here the right is not narrowly tied to mere political "assembly." See *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

13. See *Roberts*, 486 at 621-29.

14. *Id.* at 612.

and understanding among young men of all nations.”¹⁵ These three goals could be characterized as ideological or expressive, or as fostering certain intimacies. They could also be characterized as means of grooming young men for positions of prominence in civic and business affairs while enhancing their immediate economic prospects.¹⁶

Whatever the intentions of the founders, the Jaycees by 1984 were much more than a network of clubs for acquiring a certain kind of spirit, learning to achieve and take part in civic affairs, and making friends. The Jaycees organization had developed a repertoire of programs and activities that furnished its members with impressive career benefits. At the time of trial in summer of 1981, the national organization had about 295,000 members in 7,400 local chapters.¹⁷ Eleven thousand nine hundred fifteen of the 295,000 were associate members, most or all of whom were women and older men: regular membership was available only to men between the ages of eighteen and thirty-five.¹⁸ A Jaycees official estimated that women associates made up about two percent of the total membership.¹⁹ Local chapters, along with the national and state Jaycees organizations, regularly recruited new members.²⁰ A new member would pay a fee, then yearly dues. In return, he would receive admission to all activities of the state, local, and national organizations.²¹ Local chapters would use “program kits,” developed by staff at national headquarters, “to enhance individual development, community development, and members’ management skills. . . . [Included were] courses in public speaking and personal finances as well as community programs related to charity, sports and public health.”²² The national office sold

15. Brief for Appellee at 2, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (No. 83-724), *quoted in Roberts*, 468 U.S. at 612-13.

16. The second goal is probably the most ambiguous of the three. “Personal development” could mean “development as a friend and a human being—‘personal growth;’” but might it not also mean “career development?” The inclusion of “achievement” here seems to imply at least the latter. *Cf. United States Jaycees v. McClure*, 709 F.2d 1560, 1569 (8th Cir. 1983) (“The Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization.”), *overruled by Roberts*, 468 U.S. 609.

17. *See Roberts*, 468 U.S. at 613.

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.* at 613-14.

22. *Id.* at 614.

“personal products, including travel accessories, casual wear, pins, awards, and other gifts” to members.²³

Roberts originated in a dispute between the national Jaycees organization and two local Jaycees chapters.²⁴ After the Minneapolis and St. Paul chapters began admitting women as members, the national organization began imposing sanctions on the chapters for violating its bylaws, finally notifying them that the national board of directors would consider a motion to revoke their chapter charters.²⁵ That led the chapters to file discrimination charges with the Minnesota Department of Human Rights (MDHR) for violation of the Minnesota Human Rights Act.²⁶ The act forbade relying on any of a number of specified categories, including sex, to deny to anyone the enjoyment of goods and services furnished by a “place of public accommodation.”²⁷ The MDHR duly found that the Act had indeed been violated.²⁸ The Jaycees renewed a complaint it had filed in federal district court to prevent state officials from enforcing the Act.²⁹ The district court certified to the state supreme court the question whether the Jaycees were a place of public accommodation according to the Act, and the state court answered affirmatively.³⁰

As amended, the Jaycees’ complaint claimed not only that applying the Act to them violated the free speech and association rights of their male members, but that the state supreme court’s interpretation of the Act made it unconstitutionally vague and overbroad.³¹ The district court ruled in favor of the officials, but a divided panel of the Court of Appeals for the Eighth Circuit reversed, holding both that the Act was impermissibly vague and that it violated the organization’s First Amendment right to select its members.³²

The Supreme Court reversed the Court of Appeals.³³ Justice Brennan’s opinion for the Court began its discussion of the Jaycees’

23. *Id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.* at 614-15 (citing MINN. STAT. § 363.03, subd. 3 (1982)).

28. *See id.* at 615.

29. The initial complaint had been dismissed without prejudice, with the agreement of the parties; the district court had apparently decided to postpone proceeding on the complaint until after the delivery of a MDHR ruling adverse to the Jaycees. *See id.*

30. *See id.* at 616 (citing *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981)).

31. *See id.* at 615-16.

32. *See id.* at 616-17.

33. *See id.* at 612.

First Amendment claim with a justly famous summary of what free association means:

Our decisions have referred to constitutionally protected “freedom of association” in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

The intrinsic and instrumental features of constitutionally protected association may, of course, coincide. In particular, when the State interferes with individuals’ selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated. The Jaycees contend that this is such a case. Still, the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.³⁴

I shall presume Justice Brennan’s formulation is by turns masterful and maddening. By frankly acknowledging that some forms of association are only instrumentally valuable, as a constitutional matter—which is to say, not at all valuable in themselves; valuable only insofar as they serve some goal extrinsic to the sheer pleasure or good inherent in the act of associating—the opinion reminds us that the only regime that can protect liberty for long is a regime of ordered liberty, a regime in which some liberties are (sometimes) subordinated to the common good. By asserting forthrightly that other forms of association are intrinsically worthy of constitutional protection, the opinion reminds us just as forcefully that some liberties are so important that their subordination to other aims can rarely, if ever, be said to further our common good. Put otherwise, the common good for Americans, under the Constitution, consists in large measure in nurturing and protecting the exercise of irreducibly individual liberties, among which are liberties of association.³⁵

34. *Id.* at 617-18.

35. “[A]ssociational freedom is not merely a means to other valuable ends. It is also valuable for the many qualities of human life that the diverse activities of association routinely

But why are some associations intrinsically valuable? Here the reasoning of the opinion grows difficult to understand;³⁶ for the opinion seems uncertain whether the values at stake are truly intrinsic. To say that “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion” *because* “such relationships [safeguard] the individual freedom that is central to our constitutional scheme,” rather than to say that the intimate relationships are valuable in themselves, that the very choice of entering into such relationships constitutes the exercise of the freedom that is “central to our constitutional scheme,” muddies the waters needlessly.³⁷ It is not as if there is any freedom “behind” our free choices to enter into intimate relationships that makes the choices and the relationships valuable. If the Court meant to draw a distinction between freedom to enter into the relationships and the freedom to act “within” the relationships, such a distinction would seem irrelevant, at least from the point of view of the parties; for both freedoms would be involved in any choice undertaken in a concrete situation. Better simply to say that the choices and the relationships are valuable in themselves, that they exemplify the freedom that the Constitution protects.³⁸ That reformulation of course does not resolve the problem of determining which associational choices are intrinsically worthy of constitutional protection; but it does eliminate a redundancy that could well confuse attempts at analysis.

A second problem. The “instrumental features” of free association—why do they need to be understood as implicating association, as such, at all? In Justice Brennan’s formulation, even instrumental forms of association are indispensable—for practical purposes, they are to be treated as if they were “intrinsically valuable”—in a wide range of situations. But that is only because these forms are means of exercising or safeguarding other fundamental liberties. Why not analyze cases involving these “instrumental associations” simply by looking to the nature of the

entail.” Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION 3, 4 (Amy Gutmann ed., 1998) [hereinafter *An Introductory Essay*].

36. See Kent Greenawalt, *Freedom of Association and Religious Association*, in FREEDOM OF ASSOCIATION 109, 112-13 (Amy Gutmann ed., 1998) (describing Justice Brennan’s formulation concerning the intrinsic and instrumental aspects of protected association as “somewhat confusing”); ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 12, at 214 (“Brennan uses ‘intimate’ and ‘intrinsic’ association interchangeably.”).

37. *Roberts*, 468 U.S. at 617-18.

38. One worries that Justice Brennan forgot that some things are good even if they serve no worthwhile purpose extrinsic to themselves. To say otherwise would be to negate the very precondition for asserting that anything is valuable instrumentally, the notion that there must exist some real goods that the merely instrumental goods are meant to serve.

noninstrumental liberty at stake? Why not analyze a religious association claim as implicating only the Free Exercise Clause, or an expressive association claim as implicating only the Speech Clause? What else is an “expressive association,” indeed, but a group of people who get together for the purpose of saying something? The answer may be that an “association,” even an “instrumental association,” possesses a certain level of constitutional protection simply by virtue of its being an association; but this solution would cause its own problems.

For one, such a solution would weaken the limitations that the opinion seems to put on intimate association claims. These limitations, assuming that “pure” or “intrinsic” associational liberty was itself limited only to intimate association, would make the “pure” claims quite rare. But Justice Brennan widened the principle immensely: both forms of associational freedom “may be implicated” or may “coincide” “when the State interferes with individuals’ selection of those with whom they wish to join in a common endeavor.”³⁹ That seems to make every associational freedom case a case that potentially implicates “intimate association” values. Nearly every association exists for the sake of a “common endeavor.” But if this is true, then the distinction between intrinsic and instrumental freedom of association is so fluid as not to amount to a distinction.

These two related criticisms of the marvelous prefatory language in the *Roberts* opinion—first, that the opinion seems to have difficulty with the notion that some relationships, some choices, are valuable for themselves; second, that the opinion’s distinction between intrinsically valuable and instrumental association is easily susceptible to manipulation and confusion—can be applied to much of the rest of the opinion.⁴⁰ “[C]ertain kinds of personal bonds [that] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs” are valuable, apparently, because they “foster diversity and act as critical buffers

39. *Roberts*, 468 U.S. at 618.

40. One might say in Justice Brennan’s defense that the difficulties in the language are related to knotty problems intrinsic to the subject, and that the language, despite its opacity and occasional inconsistency, at least defends the principle that intrinsically valuable association extends to more than the few specific intimate choices that the Court has recognized in decisions as worthy of constitutional protection. It may be that Justice Brennan did not state this broader, more controversial principle as forcefully or as broadly as he should have. See George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION, *supra* note 35, at 37-38, 40; Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 119 (1986) (“the rationale . . . [of *Roberts*] fails adequately to acknowledge either the values of associational choice that are present even in ‘nonintimate’ organizations or the special importance such values assume for socially subordinate groups”).

between the individual and the power of the state.”⁴¹ If the personal bonds did not foster diversity, if in practice for some reason they did not act as “critical buffers,” would they be devoid of constitutional protection? The opinion adds that the “personal bonds” are constitutionally protected because “individuals draw much of their emotional enrichment from close ties with others.”⁴² The justifications are stated at a high enough level of generality that they appear radically divorced from any imaginable set of specific circumstances; yet it is only in specific circumstances that the contemplated personal bonds would matter to anyone. But perhaps the general language was intended to sweep all conceivable specific circumstances (foreseeable and unforeseeable) within the scope of constitutional protection? “Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”⁴³ If this was intended to articulate a Millian notion that absolute freedom to act as one chooses (limited only by the freedom of others) belongs to every human being, it was a puzzling way to go about it: for all kinds of human activities help us to define our identities, and government has a plainly obvious need to regulate very many of them.

In any event, Justice Brennan went on to make clear that he was not speaking of freedom for all times and all relationships.⁴⁴ For him, the kind of association that merits substantial constitutional protection must bear some degree of closeness to one particular, time-honored form of association. “The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family.”⁴⁵ And why family?⁴⁶

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one

41. *Roberts*, 468 U.S. at 618-19.

42. *Id.* at 619.

43. *Id.*

44. *See id.*

45. *Id.*

46. For whatever reason, the opinion never mentions *Roe v. Wade*, 410 U.S. 113 (1973) (holding that right to privacy encompasses a woman’s decision whether to terminate her pregnancy by abortion), or *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating statute banning distribution of contraceptives to unmarried persons in some circumstances, but not to similarly situated married persons), although it cites nearly every other substantive due process case under the sun, including *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating ban on use of contraceptives as applied to married persons).

shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.⁴⁷

It is the word "only" in this passage that gives sharp pertinence to what is otherwise a rather commonplace listing of the formal attributes of close relationships: its use implies that business associations and labor unions are much less likely to receive constitutional protection.⁴⁸ The opinion offers little guidance as to how one might identify in-between relationships, except that the range of such relationships is "broad," with "greater or lesser claims to constitutional protection from particular incursions," and that assessing these claims "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."⁴⁹ The opinion does not purport to "mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."⁵⁰ Put otherwise, *Roberts* offers little specific guidance to private organizations (or to prospective members of such organizations) in all cases other than those whose facts are closely analogous to those of *Roberts*.

The local chapters of the Jaycees, said Justice Brennan, were large and unselective, employing no criteria other than age or sex to recruit and admit members.⁵¹ Men and women who were not members regularly took part in all sorts of activities "central to the decision of many members to associate with one another."⁵² "In short," he said, "the local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers

47. *Roberts*, 468 U.S. at 619-20.

48. *See id.* at 620. Justice Brennan specifically mentions business enterprises as a type of association that probably would not meet this standard. *See id.* It seems reasonable that labor unions would be similarly viewed.

49. *Id.* at 620.

50. *Id.*

51. *See id.* at 621.

52. *Id.*

to that relationship.”⁵³ He concluded that the chapters “lack the distinctive characteristics that might afford constitutional protection to the decision of Jaycees members to exclude women.”⁵⁴

In considering the Jaycees’ claim to freedom of expressive association, Justice Brennan began by strongly suggesting that membership restrictions are fundamental to an association’s constitutional liberty.⁵⁵

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. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.⁵⁶

This reasoning seems eminently sound. Where what a private group says or otherwise expresses turns on who belongs to the group, the group should be free to exclude prospective members on bases that ordinarily would be impermissible. The First Amendment’s promise of full protection for unpopular speech, including unpopular modes of speaking chosen by the speaker (and targeted by the government) for their expressive quality, demands no less.⁵⁷

In keeping with this principle, Justice Brennan’s articulation of the test for evaluating infringements on freedom to associate seems to place a heavy burden on any potential infringer. “The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by 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.”⁵⁸ Nonetheless, he found that the state Human Rights Law met this seemingly demanding scrutiny:

53. *Id.*

54. *Id.*

55. *See id.* at 622-23.

56. *Id.* at 623.

57. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the First Amendment protects protester who burns American flag).

58. *Roberts*, 468 U.S. at 623. Compare the test laid out in *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (upholding conviction of anti-war protestor for burning draft card in violation of Universal Military Training and Service Act), for evaluating First Amendment challenges to government regulation of conduct that incidentally burdens expression:

[W]hen “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the

On its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria. Nor does the Jaycees contend that the Act has been applied in this case for the purpose of hampering the organization's ability to express its views. Instead, as the Minnesota Supreme Court explained, the Act reflects the State's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services. That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.⁵⁹

Justice Brennan then explained the history of state public accommodations laws, many of them enacted immediately after the Civil War, and enumerated the wrongs that the Minnesota statute effectively protected against.⁶⁰ The Court's language here is redolent of expressive activity, or of expressive effects of injury—"archaic and overbroad assumptions," "stereotypical notions," "individual dignity," "stigmatizing injury"—a series of slips that seem to give the lie to its claim that the Act was unrelated to the suppression of ideas or to viewpoint.⁶¹ According to Justice Brennan, the government's interest in ensuring equal access was not "limited to the provision of purely tangible goods and services."⁶² After making reference to the greater social trends that the Act exemplified and reflected, he turned to "the various commercial programs and benefits offered to members" by the Jaycees.⁶³ Three, it seems, were identifiable: leadership skills, business contacts, and employment promotions.⁶⁴

In applying the antidiscrimination statute to the Jaycees, said the Court, "the State has advanced those interests through the least

governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 376-77. The *O'Brien* test, unlike the *Roberts* test, requires only that the substantial governmental interest be legitimate. All nine Justices of the Court relied on the *O'Brien* test—although disagreeing on how it should be applied—in *Turner Broad. Sys. v. Federal Communications Comm'n*, 520 U.S. 180, 185-225 (1997) (upholding provisions of Cable Television Consumer Protection and Competition Act of 1992 requiring cable television systems to carry the signals of some local broadcast television stations). *See id.* (Kennedy, J., writing for the Court except as to a portion of Part II-A-1); *id.* at 225-29 (Breyer, J., concurring in part); *id.* at 229-58 (O'Connor, J., dissenting).

59. *Roberts*, 468 U.S. at 623-24 (citations omitted).

60. *See id.* at 624-25.

61. *Id.* at 625. For criticism of this aspect of the Court's opinion in *Roberts*, see Kateb, *supra* note 40, at 55-56.

62. *Roberts*, 468 U.S. at 625.

63. *Id.* at 626.

64. *See id.*

restrictive means of achieving its ends. Indeed, the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association."⁶⁵ The Court acknowledged that "a 'not insubstantial part' of the Jaycees' activities constitutes protected expression."⁶⁶ Nonetheless, the Court concluded that the Jaycees had failed to show anything more than that the Act would minimally impinge upon that expression:

There is no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members. Moreover, the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.⁶⁷

One might think at minimum that insofar as the Jaycees' creed promoted the interests of young men and not women, *that* element of the creed, at least, would require revising. The assertion that the "symbolic message" would probably not be impaired seems at least potentially plausible, though the Court offered no basis for this assertion other than that the Jaycees already invited women to share its views and participate in many of its activities—by itself, not overwhelming evidence. For the Court, the notion that women might have different views than current members or that the admission of women might change the organization's message seemed no more than a supposition unsupported by the record, resting on "unsupported generalizations" and "sexual stereotyping."⁶⁸ Yet surely male Jaycees would be more likely to engage in such stereotyping, defending their restrictive policy, than female Jaycees?⁶⁹

65. *Id.*

66. *Id.* (citation omitted).

67. *Id.* (citation omitted).

68. *Id.* at 628. For sharp and convincing criticism of this reasoning, see ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 12, at 194-96 (describing Court's view of associational voice as "crimped").

69. See Douglas O. Linder, Comment, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1892-93 (1984). Cf. Rhode, *supra* note 40, at 119 ("One problem with [Justice Brennan's] analysis was not simply its willingness to overlook a wealth of gender-gap studies supporting the Jaycees' argument; an even more fundamental difficulty was the implication that access to an all-male institution may depend on whether women are in fact

The Court returned to its least-restrictive-means analysis in such a way as to call into question the force of its earlier statement that the freedom to associate presupposes a freedom not to associate.⁷⁰

In any event, even if enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes. As we have explained, 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—wholly apart from the point of view such conduct may transmit.⁷¹

If eliminating discrimination is the goal, then banning it—restricting it completely—will plainly be the least restrictive means to the goal, insofar as the end itself entails the necessary “restriction” on male members' associational liberty. It is no wonder that the Act “respond[ed] precisely to the substantive problem which legitimately concern[ed] the State.”⁷² In the final section of the opinion, the Court examined and rejected the Jaycees' contentions that the Act was unconstitutionally vague and overbroad.⁷³

Justice O'Connor, concurring in part and concurring in the judgment, did not join the part of Justice Brennan's opinion that addressed the Jaycees' freedom of association claim.⁷⁴ As to the intimate-association branch of that claim, she agreed, at the very least, with his conclusion.⁷⁵

[T]his Court's cases concerning “marriage, procreation, contraception, family relationships, and child rearing and education[,]” . . . “while defying categorical description,” identify certain zones of privacy in which certain personal relationships or decisions are protected from government interference. Whatever the precise scope of the rights recognized in such cases, they do not encompass associational rights of a 295,000-member

less likely than men to endorse its existing values. If the price of admission is a promise of assimilation, that alternative surely will not be embraced by all feminists. Claims about ‘women's point of view’ in cases like *Jaycees* are analogous to arguments that have divided American feminism for decades.” (footnote omitted).

70. “At some points the Court speaks of the right of association as if it were inviolate. . . . At a later point, however, the Court takes the opposite tack.” William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 76 (1986).

71. *Roberts*, 468 U.S. at 628.

72. *Id.* at 629 (internal quotation marks omitted).

73. *See id.* at 629-31.

74. Justice Rehnquist concurred in the judgment without writing an opinion or joining an opinion. Neither Chief Justice Burger nor Justice Blackmun participated in the case, both having belonged to Minnesota Jaycees chapters in the past. *See ROSENBLUM, MEMBERSHIP AND MORALS, supra* note 12, at 389 n.22.

75. *See Roberts*, 468 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment).

organization whose activities are not “private” in any meaningful sense of that term.⁷⁶

As to the part of the Court’s opinion that dealt with expressive association, Justice O’Connor “part[ed] company with the Court:”⁷⁷

I believe the Court has adopted a test that unadvisedly casts doubt on the power of States to pursue the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society. At the same time, the Court has adopted an approach to the general problem presented by this case that accords insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment.⁷⁸

In short, Justice O’Connor argued that the Court’s approach was too protective of some associations and not protective enough with regard to others. As for the Court’s requirement that an organization claiming freedom of association “mak[e] a ‘substantial’ showing that the admission of unwelcome members ‘will change the message communicated by the group’s speech,’” “whatever it means, the focus on such a connection is objectionable.”⁷⁹

[W]ould the Court’s analysis of this case be different if, for example, the Jaycees membership had a steady history of opposing public issues thought (by the Court) to be favored by women? It might seem easy to conclude, in the latter case, that the admission of women to the Jaycees’ ranks would affect the content of the organization’s message, but I do not believe that should change the outcome of this case. 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.⁸⁰

Justice O’Connor would rather adopt a categorical approach, “establish[ing] at the threshold” whether an association’s “activities or purposes should engage the strong protections that the First Amendment extends to expressive associations.”⁸¹ “[A]n association engaged exclusively in protected expression” would enjoy a plenary privilege to discriminate as it pleased in selecting its members.⁸²

76. *Id.* (O’Connor, J., concurring in part and concurring in the judgment) (citations omitted).

77. See ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 12, at 166 (determining that Justice O’Connor’s “categorical approach was a wholesale rejection of the majority’s reasoning”).

78. *Roberts*, 468 U.S. at 632 (O’Connor, J., concurring in part and concurring in the judgment).

79. *Id.*

80. *Id.* at 633.

81. *Id.*

82. *Id.*

Protection of an association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." A ban on specific group voices on public affairs violates the most basic guarantee of the First Amendment—that citizens, not the government, control the content of public discussion.⁸³

"Commercial associations," by contrast, would be subject to something like plenary regulation of their membership selection choices.

[T]here is only minimal constitutional protection of the freedom of commercial association. There are, of course, some constitutional protections of commercial speech—speech intended and used to promote a commercial transaction with the speaker. But the State is free to impose any rational regulation on the commercial transaction itself. 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. A shopkeeper has no constitutional right to deal only with persons of one sex.⁸⁴

"Voices" and "shopkeepers": these ideal types correspond to the dichotomy between "spouse" and "fellow employee" that characterizes Justice Brennan's picture of the limits of intimate associations. Justice O'Connor recognized that her dichotomy would have fluid boundaries:

Many associations cannot readily be described as purely expressive or purely commercial. . . . The standard for deciding just how much of an association's involvement in commercial activity is enough to suspend the association's First Amendment right to control its membership cannot, therefore, be articulated with simple precision. Clearly the standard must accept the reality that even the most expressive of associations is likely to touch, in some way or other, matters of commerce. The standard must nevertheless give substance to the ideal of complete protection for purely expressive association, even while it readily permits state regulation of commercial affairs.⁸⁵

As a practical matter, it seems, Justice O'Connor's categorical approach would require judges to make reasonable determinations of fact and degree, of "predominance" and "substantiality," in order to

83. *Id.* at 633-34 (citations omitted).

84. *Id.* at 634.

85. *Id.* at 635.

determine whether an organization is to receive plenary protection of its membership choices or none at all.

In my view, an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard. An association must choose its market. Once it 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.⁸⁶

Distinguishing between commercial and expressive association, on this view, may be difficult at times but not impossible, provided that judges are sensitive to the varying ways in which associational conduct can express ideas. Particularly relevant for our purposes is Justice O'Connor's reference, in the only footnote of her concurring opinion, to the Girl Scouts and Boy Scouts.⁸⁷

Determining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive. It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. The 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. Lawyering to advance social goals may be speech, but ordinary commercial law practice is not. A group boycott or refusal to deal for political purposes may be speech, though a similar boycott for purposes of maintaining a cartel is not. Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.⁸⁸

Justice O'Connor's approach has the merit of simplicity and a libertarian absolutism that fits well with the overall purposes of the Free Speech Clause. But will the firm categories dissolve when

86. *Id.* at 635-36.

87. *See id.* at 636 n.* (citing GIRL SCOUTS OF THE U.S.A., *YOU MAKE THE DIFFERENCE* (1980); W. HILLCOURT, *THE OFFICIAL BOY SCOUT HANDBOOK* (1979); P. FUSSELL, *THE BOY SCOUT HANDBOOK AND OTHER OBSERVATIONS* 7-8 (1982)).

88. *Id.* at 636.

confronted by the ambiguity of most associational life?⁸⁹ *Roberts* itself might be a case in point.⁹⁰ Justice O'Connor described it as "a relatively easy case,"⁹¹ but proceeded to quote from the opinion of the Eighth Circuit Court of Appeals. Included within the quoted passage is this clause: "the advocacy of political and public causes, selected by the membership, is a not insubstantial part of what [the Jaycees] does."⁹² This did not deter her from determining that the Jaycees were unprotected.

Notwithstanding its protected expressive activities, the Jaycees . . . is, first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management. The organization claims that the training it offers its members gives them an advantage in business, and business firms do indeed sometimes pay the dues of individual memberships for their employees. Jaycees members hone their solicitation and management skills, under the direction and supervision of the organization, primarily through their active recruitment of new members. "One of the major activities of the Jaycees is the sale of memberships in the organization. It encourages continuous recruitment of members with the expressed goal of increasing membership. . . . The Jaycees itself refers to its members as customers and membership as a product it is selling. More than eighty percent of the national officers' time is dedicated to recruitment, and more than half of the available achievement awards are in part conditioned on achievement in recruitment." The organization encourages record-breaking performance in selling memberships. . . .

Recruitment and selling are commercial activities, even when conducted for training rather than for profit. The "not insubstantial" volume of protected Jaycees activity found by the Court of Appeals is simply not enough to preclude state regulation of the Jaycees' commercial activities. The State of Minnesota has a legitimate interest in ensuring

89. "The difficulties of her reasoning run deeper than overlap at the margins . . . , since a large set of exclusionary social and cultural groups do not fit either category. Moreover, O'Connor's typology is vulnerable to conflicting interpretations." ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 12, at 165. See also Linder, *supra* note 69, at 1894-95 ("O'Connor's standard for distinguishing between expressive and commercial associations certainly is no model of 'simple precision'—or precision of any sort."). Nonetheless, O'Connor's approach is preferable to that employed in the Court's opinion. See *id.* at 1896-97.

90. Cf. *Kateb*, *supra* note 40, at 56 (determining that "by sleight of hand, O'Connor transforms the Jaycees into a 'non-expressive' association . . . [She] engages in a remarkable bit of interest balancing, even at the expense of supposedly protected speech").

91. *Roberts*, 468 U.S. at 638 (O'Connor, J., concurring in part and concurring in the judgment). See also Rhode, *supra* note 40, at 121 ("In a society in which men obtain almost one-third of their jobs through personal contacts, and probably a higher percentage of prestigious positions, the commercial role of social affiliations should not be undervalued.") (footnotes omitted).

92. *Roberts*, 468 U.S. at 639 (quoting *United States Jaycees v. McClure*, 709 F.2d 1560, 1570 (8th Cir. 1983)) (O'Connor, J., concurring in part and concurring in the judgment).

nondiscriminatory access to the commercial opportunity presented by membership in the Jaycees.⁹³

“Not enough” implies more of a weighing—how much is enough? how can we tell?—than Justice O’Connor’s concurrence explicitly acknowledges. Weighing in the face of uncertainty need not be a vice,⁹⁴ but it is not what she purported to be doing. Perhaps Justice O’Connor was unwilling to follow the implications of the absolutist approach that her rhetoric appeared to endorse. “Leadership, management, solicitation, and marketing skills,” after all, “are not specific to business.”⁹⁵

Some major criticisms can also be made of the test articulated in the majority opinion in *Roberts*.⁹⁶ First, the test purports to apply strict scrutiny, but fails to do so, or the opinion does not face up to the implications of what the application of strict scrutiny should ordinarily mean.⁹⁷ If the Act justifiably survived strict scrutiny, it follows that the vital interest can only have been the elimination of the Jaycees’ exclusionary membership requirement: for no other goal would have been met by so tight a fit as to satisfy strict scrutiny. But that offers no guidance as to when the application of an antidiscrimination law to forbid a private association’s discrimination would ever *fail* strict scrutiny.

Second, the *Roberts* test chills activity that deserves constitutional protection. *Roberts* obliges courts to conduct a more or less formless balancing inquiry before determining whether an

93. *Id.* at 639-40 (citation omitted).

94. For Professor Gutmann, uncertainty as to whether the Jaycees were really a commercial organization need not require the state to refrain from interfering in their affairs. For her, rather—as is perhaps the case for Chief Justice Rehnquist and other advocates of a federal system in which significant authority to determine the contours of individual liberty is allocated to the states—uncertainty counsels in favor of deferring to the states on whether to regulate or not to regulate, resulting in a wholesome diversity, within limits, of governmental approaches to organizations like the Jaycees. See Gutmann, *An Introductory Essay*, *supra* note 35, at 14.

95. ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 12, at 166 (noting that both clergypersons and advocacy groups engage in “recruiting” activities).

96. For some trenchant recent critiques of *Roberts*, see generally Kateb, *supra* note 40, at 111-14; Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in FREEDOM OF ASSOCIATION, 75, (Amy Gutmann ed., 1998). For prominent examples of older critiques, see Rhode, *supra* note 40, at 117, and Linder, *supra* note 69, at 1888-91.

97. “It is established in our strict scrutiny jurisprudence that ‘a law cannot be regarded as protecting an interest “of the highest order” . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.’” Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (citation omitted). Cf. Linder, *supra* note 69, at 1889 (“What is noteworthy about Brennan’s test in *U.S. Jaycees* is that while the formulation may be the same as in other first amendment contexts, the test as applied seems substantially less speech-protective than in previous cases.”).

organization receives protection as an intrinsically valuable intimate or quasi-intimate association (or even as an “instrumental” association, if the difficult prefatory language in the opinion is meant as I understand it to mean). This analysis makes it impossible for an organization to predict in advance whether it will be protected.⁹⁸ *Roberts* certainly avoids the pitfalls of narrow formulations that would fail to capture the complex reality underlying most interactions between an association’s assertion of freedom to exclude and the operation of antidiscrimination laws. But *Roberts*’ vague language offers little guidance to lower courts or prospective litigants.⁹⁹ Because the kinds of interests it asks judges to balance are not easily comparable, it provides little assurance against arbitrary or unprincipled decisionmaking.¹⁰⁰

The opinion’s talk of “generalizations,” “stereotyping,” “archaic and overbroad assumptions,” “stereotypical notions,” and “stigma” makes it difficult to see how the Court itself was not impermissibly appraising the validity of the Jaycees’ attitudes and messages.¹⁰¹ To support the result in *Roberts*, it should have been unnecessary for the Court to do this. Instead, the Court indulged itself in a moralistic detour that if imitated by lower courts could provide them with nearly unbridled discretion to “balance” messages as they please.

Such discretion is particularly dangerous where judges are asked to assess whether an organization’s messages and purposes are integrally tied up with its exclusionary membership policies. For some organizations, exclusion is the key to a kind of separation from the outside world that lies at the heart of the expression that the

98. “Under [ad hoc balancing], the right to speak and publish is never clear, since it is never defined. Whether one had a right to speak or publish cannot be known until after the event and depends on the unpredictable weight which a court may someday give to ‘competing interests.’” Laurent B. Frantz, *The First Amendment in the Balance*, 71 *YALE L.J.* 1424, 1443 (1962).

99. *Cf.* Marshall, *supra* note 70, at 74. Perhaps the lack of clarity arises in part because the decisions were unanimous. If at least one Justice had dissented, perhaps the other Justices would have felt called upon to refine their reasoning. *See* Greenawalt, *supra* note 36, at 138-39 n.11 (“The Jaycees [were] going to lose in any event; perhaps the justices did not worry too much about formulating a constitutional test that made the Jaycees’ case appear stronger than it might otherwise have seemed.”).

100. *See* Rhode, *supra* note 40, at 126.

Associational liberty and equal opportunity are not commensurable values that can be calibrated and offset in neutral-principled fashion. Without a more focused analysis, we are left with the kind of decisionmaking that has labelled the Bohemian and Kiwanis clubs as private, and the Jaycees and Princeton eating clubs as public.

Id. (footnote omitted).

101. *Roberts*, 468 U.S. at 625.

organizations' members practice and believe in.¹⁰² An unsympathetic or simply ignorant judge, unaware of the traditions and common understandings that link the group's practices to its shared values as expressed and understood, is unlikely to perceive the link between message and exclusion except by a gift of rare imagination.¹⁰³ That requires not only sympathy (among other intellectual and spiritual gifts), but a scrupulous detachment from the posture of one who would take on the role of judging whether the messages in question are good and true ones. The Court's opinion in *Roberts* is not a model of this kind of detachment. Justice O'Connor's opinion, whatever else one might say about it, compares favorably with the majority opinion on this score; for her categorical approach simply eschews the question of the relationship between an "expressive" association's message and its exclusionary policies.

Although the close to per se approach advocated by Justice O'Connor is not without its difficulties, such an approach is in practice likely to confine the difficulties to the margins of the wide range of organizations in American life. An alternative per se test would resolve many of these difficulties. Such an alternative would apply case by case, activity by activity, to particular aspects of an association's conduct, allowing it to discriminate in internal organizational decisions but not in selling goods to the general public. To be sure, "balancing" would not be wholly banished from the analysis—even fundamental rights usually must be balanced against "compelling" state interests—but balancing would be confined and regulated in such a way as to make future application somewhat predictable. Whether this would result in significant changes in the direction of free-association doctrine is quite uncertain. State public accommodation laws would continue to apply even to private

102. See Rhode, *supra* note 40, at 118.

Missing from analysis in the leading associational privacy cases is also any acknowledgment of the values that separatism might serve, independent of an association's size or exclusivity. The dynamics of mixed and single-sex organizations differ, and separatism in some contexts may present opportunities for self-expression and collective exploration that would be inhibited by sexual integration.

Id.

103. This is especially likely in the case of groups whose self-understandings change over time according to principles not readily discernible or comprehensible to outsiders.

Any ad hoc balancing test is unlikely to account for two important aspects of religious group self-definition—the ability of the group freely to interpret, and its ability to change the interpretation of, its own texts, traditions, and narratives, and to abide by those interpretations in deciding who shall and shall not associate with the group.

Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 146 (1989).

organizations; and some substantive judicial scrutiny of a group's reasons for discriminating (albeit perhaps under the rubric of determining whether the group qualifies as an expressive association) would be required before a court could exempt the group from an otherwise generally applicable law.

The course of free-association doctrine after *Roberts* has been relatively uneventful. Three years after *Roberts*, the Court decided in *Board of Directors of Rotary Club International v. Rotary Club of Duarte*¹⁰⁴ that California's public accommodations law did not violate Rotary clubs' freedom of association. Rotary International was then "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."¹⁰⁵ About 900,000 men around the world were members.¹⁰⁶ Committees evaluated the fitness of prospective members for joining.¹⁰⁷ The general secretary of the organization said that "the exclusion of women results in an 'aspect of fellowship . . . that is enjoyed by the present male membership,' and also allows Rotary to operate effectively in foreign countries with varied cultures and social mores."¹⁰⁸ Women were allowed "to attend meetings, give speeches, and receive awards," and, if they were relatives of Rotary members, to form their own associations.¹⁰⁹ Young women between fourteen and twenty-eight were allowed to join other organizations sponsored by Rotary International.¹¹⁰

Like *Roberts*, *Duarte* arose from a conflict between a local club that chose to admit women and a national organization that retaliated by revoking the club's charter and terminating its membership.¹¹¹ The local club and two women members sued for an injunction against enforcement of Rotary International's policy against the club and for a declaration that the policy violated the state civil rights law.¹¹² Rotary International won in the trial court, but the California Court of Appeals reversed. After the California Supreme Court denied

104. 481 U.S. 537 (1987).

105. ROTARY MANUAL OF PROCEDURE (1981), quoted in *Duarte*, 481 U.S. at 539.

106. See *Duarte*, 481 U.S. at 539-40.

107. See *id.* at 540.

108. *Id.* at 541 (citation omitted).

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.* at 541-42.

certiorari, Rotary International appealed to the U.S. Supreme Court and lost.¹¹³

Justice Powell, writing for the Court, first found that “the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection.”¹¹⁴ The Court noted that the size of local clubs varied from under twenty to over 900, that about a tenth of the members of a typical club left during a typical year, that the organization envisioned and intended a continual flow of new recruits to its membership, and that “[m]any of the Rotary Clubs’ central activities are carried on in the presence of strangers.”¹¹⁵ Visitors were regularly invited to club meetings, joint activities with other groups were allowed, and clubs were encouraged to seek publicity concerning their activities from local newspapers.¹¹⁶

The International’s expressive association claim fared no better. Indeed, it seems that the International’s claim was a good deal weaker than the Jaycees’ claim: for “[a]s a matter of policy, Rotary Clubs do not take positions on ‘public questions,’ including political or international issues.”¹¹⁷ Although the clubs’ “commendable service activities [were] protected by the First Amendment[,] . . . the Unruh Act [California’s public accommodations statute] does not require the clubs to abandon or alter any of these activities.”¹¹⁸ Just as in *Jaycees*, the Court found that “[e]ven if the Unruh Act does work some slight infringement on Rotary members’ right of expressive association, that infringement is justified because it serves the State’s compelling interest in eliminating discrimination against women.”¹¹⁹

The most significant difference between *Roberts* and *Duarte* appears to be that the latter involved clubs of as few as twenty members. Chief Justice Burger having been replaced by Justice Scalia, the latter concurred in the judgment without writing an opinion, or joining any.¹²⁰ Justices Blackmun and O’Connor did not participate.¹²¹

In *New York State Club Association, Inc. v. City of New York*,¹²² the Court upheld the facial validity of an amendment to a New York

113. *See id.* at 542-44, 549.

114. *Id.* at 546.

115. *Id.* at 547.

116. *See id.* at 546-47.

117. *Id.* at 548.

118. *Id.*

119. *Id.* at 549.

120. *See id.* at 550 (Scalia, J., concurring in the judgment (without opinion)).

121. *See id.* at 550.

122. 487 U.S. 1 (1988).

City ordinance that forbade discrimination by clubs with more than 400 members if they provided regular meal service and regularly received payment from nonmembers for various services in furtherance of trade or business. The original ordinance made an exception for certain public educational facilities, along with “any institution, club or place of accommodation which proves that it is in its nature distinctly private.”¹²³ The amendment stated that any “institution, club or place of accommodation [that] has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business” was now a place of accommodation that “shall not be considered in its nature distinctly private.”¹²⁴ The amendment, however, created a new exemption to its partial elimination of the “distinctively private club” exemption: any such club would be “deemed to be in its nature distinctly private” if it was a benevolent order or religious corporation.¹²⁵ A consortium of private clubs brought suit against enforcement of the amended ordinance, claiming that it violated freedom of association, that it was facially overbroad, and that the new exemption violated equal protection.¹²⁶ After losing in the New York courts, the consortium appealed to the U.S. Supreme Court.¹²⁷

After holding that the consortium of 125 clubs that had brought suit against enforcement of the amended ordinance possessed standing to advance the interests of the member associations and their members,¹²⁸ the Court affirmed on the merits.¹²⁹ Because its suit presented a facial challenge to the ordinance, the New York association needed to surmount a substantial burden in order to

123. N.Y.C. ADMIN. CODE § 8-102(9) (1986), *quoted in* *New York State Club Assoc. v. City of New York*, 487 U.S. 1, 5 (1988).

124. *New York State Club Assoc.*, 487 U.S. at 6.

125. *Id.*

126. *See id.* at 7.

127. *See id.* at 7-8.

128. *See id.* at 8-10. In *Duarte*, Rotary International had been unable to assert any constitutionally protected entitlement to intimate association because it “had brought suit in its own right *against* one of its member clubs, and was not suing *on behalf of* any of its members.” *Id.* at 9 n.3. One might have thought that International had been asserting its member groups’ interests insofar as the member groups had wanted to belong to an organization with uniform rules on the admission of women. Perhaps the Court thought so too, because it proceeded in *Duarte* “to consider whether application of the Unruh Act violates the rights of members of local Rotary Clubs,” saying that it did this “[b]ecause the Court of Appeal held that the Duarte Rotary Club also is a business establishment subject to the provisions of the Unruh Act.” *Board of Dirs. of Rotary Club Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 n.4 (1987).

129. *See New York State Club Assoc.*, 487 U.S. at 8.

prevail: it was required to show “that the challenged law either ‘could never be applied in a valid manner’ or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it ‘may inhibit the constitutionally protected speech of third parties.’”¹³⁰ The consortium could not meet this heavy burden.¹³¹ As counsel for the consortium conceded at oral argument, the statute was constitutional as applied to at least some of the clubs.¹³² “The clubs that are covered under the Law . . . are comparable in size to the local chapters of the Jaycees that we found not to be protected private associations in *Roberts*, and they are considerably larger than many of the local clubs that were found to be unprotected in *Rotary*.”¹³³ And the Law did not “infringe[] upon every club member’s right of expressive association.”¹³⁴

On its face, Local Law 63 does not affect “in any significant way” the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs “to abandon or alter” any activities that are protected by the First Amendment. If a club seeks to exclude individuals who do not share the views that the club’s members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership.¹³⁵

It was possible, the Court said,

that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.¹³⁶

Here the consortium had not made this showing; for the record “contain[ed] no specific evidence on the characteristics of *any* club covered by the Law.”¹³⁷ The consortium had not shown, either, that the law was overbroad: the consortium had identified no club whose ability to associate or advocate would be impaired.¹³⁸ The equal

130. *Id.* at 11 (citations omitted).

131. *See id.* at 8.

132. *See id.* at 11-12.

133. *Id.* at 12.

134. *Id.* at 13.

135. *Id.* (citations omitted).

136. *Id.*

137. *Id.* at 14.

138. *See id.*

protection claim failed, too; the consortium had not shown that the exceptions in the ordinance were irrational.¹³⁹

In a footnote, the Court reminded the reader that it had previously “recognized the State’s ‘compelling interest’ in combating invidious discrimination.”¹⁴⁰ The discrimination proscribed by the ordinance included discrimination based on sexual orientation.¹⁴¹

Justice O’Connor, joined by Justice Kennedy, concurred in the opinion of the Court, “writ[ing] separately only to note that nothing in the Court’s opinion in any way undermines or denigrates the importance of any associational interests at stake.”¹⁴²

In a city as large and diverse as New York City, there surely will be organizations that fall within the potential reach of Local Law 63 and yet are deserving of constitutional protection. For example, in such a large city a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence. Similarly, there may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond. The associational rights of such organizations must be respected.¹⁴³

After restating the distinction articulated in her *Roberts* concurrence between commercial and expressive associations, Justice O’Connor noted that the New York law gave adequate opportunity for the clubs to raise constitutional challenges as the law was applied to them.¹⁴⁴

Justice Scalia concurred in the judgment of the Court, and in all of its opinion save the part that addressed the consortium’s equal protection claim (to which he would have given slightly more weight, examining the enactment for a plausible connection to its purported purpose). He noted that the opinion of the Court “assumes for purposes of its analysis, but does not hold, the existence of a constitutional right of private association for other than expressive or religious purposes.”¹⁴⁵ From this and from other aspects of Justice Scalia’s jurisprudence, we can infer that he would examine claims of

139. *See id.* at 18.

140. *Id.* at 14 n.5 (citing *Board of Dirs. of Rotary Club Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987)).

141. *See id.* at 4 n.1 (citing N.Y.C. ADMIN. CODE § 8-108.1 (1986)).

142. *Id.* at 18 (O’Connor, J., concurring).

143. *Id.* at 19 (O’Connor, J., concurring).

144. *See id.* at 19 (O’Connor, J., concurring).

145. *Id.* at 20 (Scalia, J., concurring in part and concurring in the judgment).

freedom of association to see whether they could be tightly tied to rights enumerated in the text of the First Amendment.¹⁴⁶

The Supreme Court has not explicitly refined its general approach to freedom of association since deciding *New York State Club Assoc.*¹⁴⁷ Only in *Hurley*, a case that was not primarily understood by the Court as a free-association case, did the Court implicitly de-emphasize the importance of the *Roberts* approach, in a decision that may have fateful implications for attempts to use antidiscrimination law to eliminate private exclusion of gays and others.

III. CONSTITUTIONAL PROTECTION FOR PRIVATE EXCLUSION THAT MAKES A COLLECTIVE POINT: *HURLEY V. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON*

In *Hurley*,¹⁴⁸ the Supreme Court unanimously reversed a judgment of the Massachusetts Supreme Judicial Court requiring the South Boston Allied War Veterans Council, an unincorporated association, to admit the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to take part in the Council's Saint Patrick's Day parade.¹⁴⁹ Applying the state's public accommodations statute, the Supreme Judicial Court had held that the Council's decision to exclude the GLIB from the parade was discrimination in violation of the statute.¹⁵⁰ Justice Souter, writing for the Supreme Court, said that organizing a parade constituted an inherently expressive activity, and that the state could not force a private speaker to include messages in its expression with which it disagreed.¹⁵¹ The First Amendment's

146. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J., joined here only by Rehnquist, C.J.).

147. One relevant decision that the Court could have reviewed in order to refine the approach, but did not, is *Louisiana Debating and Literary Assoc. v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995) (invalidating application of city public accommodations ordinance to exclusive private clubs, claiming to exist for purely private, social purposes, ranging in size from 325 to 1000 persons), *cert. denied*, 515 U.S. 1145 (1995); another is *Frank v. Ivy Club*, 576 A.2d 241 (N.J. 1990) (finding that the functional interdependence between eating clubs and university deprives the former of their private character under state anti-discrimination law and renders them public accommodations), *cert. denied sub nom. Tiger Inn v. Frank*, 498 U.S. 1073 (1991).

148. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

149. *See Irish-Am. Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1295 & n.7 (Mass. 1994).

150. *See id.* at 1297-98.

151. The issue presented in the case, said Justice Souter, was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Hurley*, 515 U.S. at 559. *Cf. id.* at 566 ("We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment.").

“fundamental rule of protection,” said the Court, is this: “a speaker has the autonomy to choose the content of his own message.”¹⁵²

The result in *Hurley* might well have been otherwise, had the record been interpreted slightly differently. Lawyers for the gay and lesbian group did not advance their best claim in briefing the case before the Supreme Court and at oral argument—the claim that the organizers of the parade were acting under state sponsorship, hence subject to federal and state constitutional limitations.¹⁵³ The Court treated these omissions as a waiver of the claim.¹⁵⁴ Yet the Court acknowledged that the parade had been formally sponsored by the city until 1947, when Mayor James Curley “granted” the Council “authority” to hold the parade, and that “[t]hrough 1992, the city [had] allowed the Council to use the city’s official seal, and provided printing services as well as direct funding.”¹⁵⁵

The year of 1992 was a pivotal year in the history of the parade. It was then that the GLIB commenced a suit in state court that resulted in an order requiring the Council to allow the GLIB to march in the parade.¹⁵⁶ No doubt displeased by the order, the organizers of the parade decided to eschew government sponsorship. In 1993, GLIB filed a second suit in state court against the Council, parade organizer John “Wacko” Hurley, and the City of Boston.¹⁵⁷ It was this second suit that directly led to the Supreme Court’s decision in *Hurley*. The trial court ruled in favor of the GLIB, holding that the parade was a public accommodation under Massachusetts law.¹⁵⁸ Crucial to this determination were the findings that the Council was a public accommodation and that it was unselective in admitting particular individuals and groups to participate in the parade.¹⁵⁹ The Council “had no written criteria and employed no particular procedures for admission, vot[ing] on new applications in batches, . . . occasionally admitt[ing] groups who simply showed up at the parade without having submitted an application.”¹⁶⁰ Nor did the Council “generally inquire into the specific messages or views of each applicant. . . . [The trial court] found the parade to be ‘eclectic,’ containing a wide variety of ‘patriotic, commercial, political, moral,

152. *Id.* at 573.

153. *See id.* at 566.

154. *See id.*

155. *Id.* at 560-61.

156. *See id.* at 561.

157. *See id.*

158. *See id.* at 562.

159. *See id.*

160. *Id.*

artistic, religious, athletic, public service, trade union, and eleemosynary themes,' as well as conflicting messages."¹⁶¹ That the Council had excluded two groups with strong and identifiable messages—the Ku Klux Klan and a group opposed to school busing policies—did not sway the trial court.¹⁶²

The Council contended that its "exclu[sion] of groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values,"¹⁶³ and, in the words of the trial court, that it had decided to exclude the GLIB because of the group's "values and its messages, i.e., its members' sexual orientation."¹⁶⁴ To the trial court, however, the Council's argument was "paradoxical": "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness."¹⁶⁵ The trial court saw no specific expressive purpose in the parade that would warrant First Amendment protection.¹⁶⁶ Under *Roberts*, any infringement on the Council's right to expressive association would be "incidental," "no greater than necessary to accomplish the statute's legitimate purpose of eradicating discrimination," because "the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation."¹⁶⁷ Accordingly, the trial court ruled that "GLIB is entitled to participate in the Parade on the same terms and conditions as other participants."¹⁶⁸ The trial court dismissed the GLIB's claims against the city and its constitutional claims against the Council.¹⁶⁹

161. *Id.* (citation omitted).

162. *See id.*

163. *Irish-Am. Gay, Lesbian & Bisexual Group v. City of Boston*, 636 N.E.2d 1293, 1295 (Mass. 1992).

164. *Id.* at 1295 n.8 (quoting trial court opinion) ("Hurley . . . indicated that the objection to GLIB's participation was based on the belief, although unsubstantiated, that its members were also members of ACT-UP and Queer Nation. The group's potential for being disorderly was offered as a reason for excluding it. The defendant's final position was that GLIB would be excluded because of its values and its messages, i.e., its members' sexual orientation.").

165. *Hurley*, 515 U.S. at 562 (citation omitted) (quoting trial court opinion). *Cf. Irish-Am. Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1295 (noting that trial court had found Hurley's explanations for excluding GLIB "inconsistent and changing" and quoting trial court as asserting that this demonstrated the "pretextual nature" of the explanations). Perhaps all the trial court meant was that a "proper" celebration should not violate state law; but that seems unlikely. *See id.* at 1305 (Nolan, J., dissenting) ("The judge's crude regulation of the content of the Veterans Council's speech is epitomized by the last sentence of his decision: 'Inclusiveness should be the hallmark of [the Veterans Council's] parade.'" (brackets in original)).

166. *See Hurley*, 515 U.S. at 563.

167. *Id.* (internal quotation marks omitted) (quoting trial court opinion (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628-629 (1984))).

168. *Id.* (internal quotation marks omitted) (quoting trial court opinion).

169. *See Irish-Am. Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1297.

After the Council appealed, the Massachusetts Supreme Judicial Court affirmed the judgment of the trial court.¹⁷⁰ Reviewing the lower court's findings of fact for clear error, the Supreme Judicial Court found no reason to dislodge the findings "that GLIB was excluded from the parade based on the sexual orientation of its members, that it was impossible to detect an expressive purpose in the parade, that there was no state action, and that the parade was a public accommodation" within the meaning of the pertinent state statutory provision.¹⁷¹ The defendants had argued in the trial court that applying the public accommodations law to the parade would violate their rights to expressive association; on appeal, they argued that it would violate their freedom of speech.¹⁷² The Supreme Judicial Court held that it "need not decide whether the free speech rights or the expressive association right, or both, might be implicated by the factual situation asserted by the defendants"¹⁷³ because the trial court had found that the parade had had no detectable expressive purpose; and this finding was not clearly erroneous.¹⁷⁴ The Supreme Judicial Court rejected further challenges to the public accommodations statute as void for vagueness and overbreadth.¹⁷⁵

170. *See id.* Upon losing in the trial court, the Council applied to the Supreme Judicial Court for direct appellate review, a procedure that circumvents the state's intermediate appellate court. The Supreme Judicial Court granted the Council's application. *See id.* at 1294 n.5.

171. *Hurley*, 515 U.S. at 564.

172. *See id.*

173. *Irish-Am. Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1299. The Supreme Judicial Court decided only the Council's claim that the forced inclusion of GLIB violated its federal constitutional rights of free speech and freedom of association. *See id.* at 1298-1300. The court held that the Council had waived other claims arising from the state and federal constitutions—among them, equal protection and religious liberty—by failing to raise them properly. *See id.* at 1298 n.15.

174. *See id.* at 250. *Cf. Hurley*, 515 U.S. at 564 (describing trial court's finding as an "assessment of the evidence"). This was so even though one group had been excluded from the parade "because of its antibusing message," and though the Klan had also been excluded. *Irish-Am. Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1296 n.10. The parade organizers contended that an antiabortion group "and a truck carrying antihomosexual signs" had also been excluded, "and that the message of NORAID [Northern Ireland Aid] was limited." *Id.* Even assuming these claims were true, the court said, "we perceive no legal relevance of this fact to the findings of the judge or to the conclusion we reach." *Id.*

The court distinguished *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993), in which the district court had held that a private group had a constitutional right to exclude a gay pride organization from participation in New York City's St. Patrick's Day Parade, as involving a parade that had in fact been used as expression. The New York Parade, the Supreme Judicial Court said, had employed a selective admission process and adopted rules to prevent parade participants "from using that parade as a forum to express views inconsistent with the views of the Ancient Order of Hibernians or the Roman Catholic Church." 636 N.E.2d at 1299.

175. *See Irish-Am. Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1299-1300.

Justice Nolan dissented from the Supreme Judicial Court's decision.¹⁷⁶ In his eyes, the Council's parade would have been protected by the First Amendment even if it had had no message,¹⁷⁷ but in any event the trial judge had clearly erred in finding the parade devoid of expressive purpose.¹⁷⁸

Under either a pure speech or associational theory, the State's purpose of eliminating discrimination on the basis of sexual orientation, according to the dissent, could be achieved by more narrowly drawn means, such as ordering admission of individuals regardless of sexual preference, without taking the further step of prohibiting the Council from editing the views expressed in their parade.¹⁷⁹

For Justice Nolan, "GLIB's message [was] separable from its members' status as homosexuals or bisexuals;"¹⁸⁰ it was clear error for the trial judge to equate exclusion on the basis of GLIB's message with exclusion on the basis of its members' sexual orientation, given "overwhelming evidence . . . that GLIB was excluded because of its message, and not because of its members' sexual preference."¹⁸¹ He would have held that Massachusetts' public accommodations law had not even been violated.¹⁸²

After noting that GLIB had waived its constitutional claims against Hurley and the Council by failing to present them, the Supreme Court articulated a strikingly more probing approach to examining the facts of the case than the Supreme Judicial Court had taken.¹⁸³ In short, the Court would not defer to the factual findings of the trial judge:

[O]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. . . . [T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for

176. See *id.* at 1301 (Nolan, J., dissenting).

177. See *id.* at 1303 (Nolan, J., dissenting).

178. See *id.* (Nolan, J., dissenting).

179. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 565 (1995) (citing *Irish-Am. Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1302, 1304 (Nolan, J., dissenting)).

180. *Irish-Am. Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1304 (Nolan, J., dissenting).

181. *Id.* 1304 (Nolan, J., dissenting). "Conversely, the only evidence which supports a finding of discrimination was that many of GLIB's members are homosexual and GLIB was excluded, and that the Veterans Council had, in the past, proffered different reasons for its decision to exclude GLIB." *Id.* at 1304-05 (Nolan, J., dissenting).

182. See *id.* at 1305 (Nolan, J., dissenting).

183. See *Hurley*, 515 U.S. at 567.

ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. . . . [T]hough we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct, our obligation is to "make an independent examination of the whole record,' . . . so as to assure ourselves that th[is] judgment does not constitute a forbidden intrusion on the field of free expression."¹⁸⁴

A trial court's determination that conduct is not expressive is entitled to no deference.¹⁸⁵ This is an eminently sensible rule. First, whether a particular brand of conduct is expression is almost invariably a question of law applied to specific facts. Second, trial judges who disagree with the substantive views of speakers are more likely to find that their conduct is not tied to expression because they have difficulty entering the mind of the speaker and imagining how the speaker's beliefs could relate to his or her conduct. While it may well be true that vigorous appellate review of judicial factfinding is no less desirable in many other constitutional contexts, in First Amendment cases the need to conduct *de novo* review is especially evident.

For Justice Souter, "the word 'parade' . . . indicate[s] marchers who are making some sort of collective point, not just to each other but to bystanders along the way . . . Parades are thus a form of expression, not just motion . . ."¹⁸⁶ The point need not be the kind that one makes in a newspaper editorial or campaign speech:

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that "symbolism is a primitive but effective way of communicating ideas," our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even "marching, walking or parading" in uniforms displaying the swastika. As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.¹⁸⁷

The Boston parade was no less protected expression because its lacked relative selectivity, said the Court.

184. *Id.* at 567-68 (citations omitted).

185. *See id.*

186. *Id.* at 568.

187. *Id.* at 569 (citation omitted).

[W]e agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication.¹⁸⁸

The GLIB's "participation as a unit in the parade," the Court found, "was equally expressive."¹⁸⁹ The group, in fact, had been formed

for the very purpose of marching in [the parade], as the trial court found, in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York [St. Patrick's Day] parade.¹⁹⁰

The Court found that Massachusetts' public accommodations statute was "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination,"¹⁹¹ for public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments."¹⁹² The Massachusetts statute "d[id] not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."¹⁹³ However, the Court found, "the Massachusetts law ha[d] been applied in a peculiar way."¹⁹⁴ The Court's explanation of the peculiarity, with its careful, restrained language, allows readers of the opinion to reach differing conclusions about *Hurley's* possible applicability to cases such as *Dale*.

[The statute's] enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council

188. *Id.* at 569-70.

189. *Id.* at 570.

190. *Id.*

191. *Id.* at 572.

192. *Id.* (citing *New York State Club Assoc. v. City of New York*, 487 U.S. 1, 11-16 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609, 624-26 (1984); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-262 (1964)).

193. *Id.*

194. *Id.*

has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.¹⁹⁵

The Court found it easy to decide the question that its framing of the disagreement presented: the constitutionality of forcing the parade organizers to admit GLIB as a unit carrying its own banner:

Since 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 . . . [T]he state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.¹⁹⁶

Because this autonomy necessarily includes "choices of what to say and what to leave unsaid,"¹⁹⁷ it took only a short step to reach the conclusion that the state could not require the Council to admit the GLIB to the parade.

Let us pause for a moment and think carefully about the language in which the Court put its observations. The language quite precisely applies the powerful logic of its underlying theoretical position—a speaker is free to choose the content of his message; parades are messages; hence the organizers of a parade are free to exclude anyone they wish from the parade on account of some message that his or her presence might convey—to a quite narrow class of cases: cases where a "contingent of protected individuals with a message" try to invoke the aid of government to require collective speakers to include them in their speech.¹⁹⁸ The language does not indicate that the logic will not extend to other cases, but it does not say that it will, either. The Court did not need to talk about other cases, of course, in order to decide *Hurley*. But neither did the Court "need" to say that no exclusion of openly gay individuals, on

195. *Id.* at 572.

196. *Id.* at 572-73. *Cf. id.* at 578 ("When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.")

197. *Id.* at 573 (citations omitted).

198. *See id.* at 573.

account of their homosexuality “as such,” was at issue in *Hurley*. Nor did the Court quite need to assert that it was rejecting a judicial approach to anti-discrimination law that would allow “any contingent of protected individuals with a message” to force itself on a private parade—a formulation that carefully leaves open whether the Court would reject an approach that would allow mere “protected individuals,” gay or openly gay, to require a group to admit them to a parade.

But *Hurley*’s broad understanding of what a “message” is seems to commit the Court to a direction that will lead it beyond the holding of *Hurley* in the future. Surely the participation of an openly gay individual, as much as that of any “participating unit,” could affect the parade organizer’s intended message. It might be a different matter if the individual carried no banner, wore no expressive sweatshirt; in short, if he or she said nothing about his sexuality during the parade. In that case, the participation of the individual would convey a message about homosexuality only to friends and acquaintances, perhaps to others, who knew of his identity. Such a circumstance would seem to present a different and more difficult question. Yet if the organizers were to say, “we do not want to send the message that homosexuality is a good thing, or that we believe in it, to anyone, hence we exclude homosexuals; so also might others want to exclude adulterers or drunkards or convicts,” it would be hard to avoid characterizing their purpose (whatever the justice of the organizers’ comparisons) as expressive.

The Court’s occasionally elegant discussion of why the logic of its position applies to the Boston parade—why the parade is expression, and exclusion from the parade is expression, so that forced inclusion in the parade would constitute forced expression—gives one no reason to believe that the logic is limited to the forced inclusion of groups as against individuals. “Rather like a composer,” the Court said, “the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.”¹⁹⁹ The mere fact that the Council “decided to exclude a message it did not like from the communication it chose to make . . . is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.”²⁰⁰ The expression that the

199. *Id.* at 574.

200. *Id.*

Council rejected by excluding the GLIB “was not difficult to identify.”²⁰¹

Although GLIB’s point (like the Council’s) is not wholly articulate, a contingent marching behind the organization’s banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade’s organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB’s message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.²⁰²

Disbelieving in certain facts about sexuality and objecting to “unqualified social acceptance” of gays: these are messages, said the Court. The GLIB was a group whose very “presence” would muddle this message, by bearing witness to the facts and by suggesting that nonheterosexuals are entitled to unqualified social acceptance. Hence, Massachusetts could not prevent the Council from excluding GLIB. These principles, suitably qualified, seem just as applicable to gay and lesbian individuals.

Near the very end of its opinion in *Hurley*, the Court provided a cursory response to GLIB’s invocation of *Roberts*.

[In] *New York State Club Association* . . . we turned back a facial challenge to a state antidiscrimination statute on the assumption that the expressive associational character of a dining club with over 400 members could be sufficiently attenuated to permit application of the law even to such a private organization, but we also recognized that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships. In other words, although the association provided public benefits to which a State could ensure equal access, it was also engaged in expressive activity; compelled access to the benefit, which was upheld, did not trespass on the organization’s message itself. If we were to analyze this case strictly along those lines, GLIB would lose. Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could

201. *Id.*

202. *Id.* at 574-75.

exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.²⁰³

Considered “strictly along th[e] lines” of *Roberts*, *Duarte*, and *New York State Club Association*, the GLIB would still lose. But the Court's analysis “along those lines” was merely hypothetical, providing an alternative holding to sustain its reversal of the judgment below; its discussion of the three association cases was not necessary to its decision of the case before it. Now, superfluity need not imply irrelevance, let alone falsity; and by citing *Roberts* and the other cases, the Court reminded us that their language and logic are indeed helpful to the understanding and decision of contemporary cases. But the Court did so almost as an afterthought.

The last sentence of the quoted paragraph could well signal a radical departure from the *Roberts* approach.²⁰⁴ The Court in *Roberts*, remember, had said that infringements on the right to associate for expressive purposes could “be justified by 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.”²⁰⁵ But *Hurley* did not apply this test, at least not in full. “Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision”²⁰⁶—assuming, that is, that there existed a state interest “unrelated to the suppression of ideas”²⁰⁷ that might generally be furthered by mandated access—GLIB would lose. Another way of putting this is to say that GLIB would lose even if it invoked a generally applicable rule mandating access that on its face sought to further a strong state interest unrelated to the separation of expression. The Court did not say that before reaching this result it would need to evaluate whether some means less restrictive of associational liberty might not adequately further the assumed state interest. Instead, the Court simply asserted that “GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by

203. *Id.* at 580-81 (citations omitted).

204. One case following *Hurley* that does not even cite *Roberts* is *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995), in which the court held that the city could not bar Louis Farrakhan's group from using the city's convention center to hold an event for men only.

205. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

206. *Hurley*, 515 U.S. at 580.

207. *Roberts*, 468 U.S. at 623.

the club's existing members."²⁰⁸ This language seems redolent of the *per se* (or close to *per se*) rule, allowing expressive associations plenary power to select their members, for which Justice O'Connor argued in her concurrence in *Roberts*—with one qualification. The qualification is that the language preserves *Roberts*' requirement that the reviewing court inquire whether the applicant for membership indeed espouses views "at odds" with the views of the current membership; in parade cases, the requirement means that the court must inquire whether a group constitutes an expressive contingent bearing its own message. Despite the qualification, this language turns the *Roberts* test into a simple inquiry in three steps: Does the organization have a message? Does the excluded party have a message ("bearing witness" to one's identity will do)? Do the two messages conflict?²⁰⁹ Affirmative answers to these three questions would seem to require the invalidation of any government efforts to require the organization to include the excluded party.

Hurley's cursory treatment of the *Roberts* cases, especially that opaque final sentence, may contain too little to allow us to come to any important conclusions about the continuing vitality of these cases.²¹⁰ The language that I have read as possibly instituting a three-part test may represent nothing more than a slipshod effort to harmonize the holdings of *Hurley* and *Roberts*. Perhaps Justice Souter meant only that in all relevant respects a parade is like a private club constitutionally entitled to discriminate against those who do not share its views; perhaps he did not mean to alter the content of the *Roberts* test. But his failure to articulate with clarity the operation of the test, and his eagerness to conclude that the requirements of *Roberts* had been satisfied, do suggest a move away at least from the

208. *Hurley*, 515 U.S. at 580-81.

209. In parade cases such as *Hurley*, a court might not need even to ask the third question: the mere fact that GLIB had an expressive purpose seems to have been sufficient in the Court's eyes to forbid requiring the Council to admit GLIB to participate in the parade. Or maybe the third question in parade cases would be reduced to no more than "are the two messages different?"

210. For thoughtful reflection on what *Hurley* bodes for the *Roberts* doctrine, see William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411, 2458 (1997) ("Doctrinally, the queerest feature of the opinion is the way the Court's governing precedent, *Roberts*, disappeared into a legal closet. . . . The state courts followed *Roberts*'s analytical framework; the Supreme Court scarcely bothered to cite the precedent."). See also *id.* at 2459-60 ("Contrast the Court's sharp-eyed discernment of an utterly occluded idea in the Boston parade case with the Court's blindness to the expressive idea in the Jaycees case: Business is for guys. A disturbing implication of this contrast is that the Court reflexively considered the message in *Roberts* so off-limits that it denied the possibility of a message, while it considered the message in *Hurley* so obvious that it overrode findings of fact to insist that it must have been the message all along.").

spirit of *Roberts*, and from its suspicion of the motives of those claiming the right to exclude. In *Hurley*, the suspicion is concentrated on the motives of those who would require inclusion.

Hurley also contains a second puzzling feature, an omission as potentially radical as the Court's failure to apply the *Roberts* test with care: the Court did not explicitly state that it was applying a compelling-interest test to analyze whether the state's restriction on speech passed constitutional muster. The court did say that the purpose of the public accommodations statute was

to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation. . . . When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.²¹¹

We might paraphrase these remarks as follows: as applied, the statute had no legitimate purpose, let alone an important or compelling purpose. This reading of *Hurley*—a reading that has the opinion applying an implicit compelling-interest test—seems plausible. Otherwise we have the Court applying something like a *per se* rule to “content-based” restrictions on speech in parades. One nonetheless wonders why the Court did not at least identify as compelling—something it had repeatedly done in the *Roberts* line of cases—the state's interest in eliminating discrimination. To the extent that the Court spoke in *Hurley* of the societal interest in mitigating the effects of a heritage of discrimination and exclusion, it repudiated any notion that a restriction on speech, broadly understood as the Court understood it in *Hurley*, could ever be justified as serving such an objective.

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.²¹²

211. *Hurley*, 515 U.S. at 578.

212. *Id.* at 579.

IV. EXCLUSION BASED UPON INDIVIDUAL STATUS: *DALE V. BOY SCOUTS OF AMERICA*

The *Dale*²¹³ case lies at the crossroads between *Roberts* and *Hurley*, where legislative protection for individuals from discrimination based on their status runs up against the Constitution's protection of private expression. Justice Nolan, dissenting from the Massachusetts decision that the U.S. Supreme Court overturned in *Hurley*, observed that the dispute involved in *Hurley* did not lie precisely at that crossroads; for it "[wa]s distinguishable from those that involve exclusion of individuals whose message and protected status may be inseparable."²¹⁴ The latter kind of dispute, he noted, had been at issue in *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor, Bd. of Comm'rs, & Chief of Police of Thurmont*, where the court rejected the attempt of a private African-American group to use antidiscrimination law to force the Ku Klux Klan to allow the group's members to take part in a Klan parade.²¹⁵ In *Hurley*, Justice Nolan said,

[T]he mere presence of homosexuals or bisexuals in the parade likely would not frustrate any message of the Veterans Council. This is so because GLIB's message is separable from its members' status as homosexuals or bisexuals. Thus, the presence of homosexuals or bisexuals, not outwardly identifiable as such, in the parade would likely not affect any message of the Veterans Council, while the presence of those same individuals marching as an identifiable group—the Irish-American Gay, Lesbian and Bisexual Group of Boston—would.²¹⁶

Although Justice Nolan accused the Supreme Judicial Court majority of impermissibly disfavoring the parade organizers' speech based on the content of their message, his dissent nonetheless acknowledges that judges cannot avoid inquiring into the relationship between an organization's expressive purposes and exclusionary conduct that the organization claims is related to those purposes.²¹⁷ How can judges undertake this difficult task without making the kinds of mistakes that the trial court made in *Hurley*? How can they

213. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

214. *Irish-Am. Gay, Lesbian and Bisexual Group v. City of Boston*, 636 N.E.2d 1293, 1304 (Nolan, J., dissenting) (citation omitted).

215. 700 F. Supp. 281 (D. Md. 1988).

216. *Irish-Am. Gay, Lesbian and Bisexual Group*, 636 N.E.2d at 1304 (Nolan, J., dissenting).

217. Justice Nolan did not seem to expect that the result of the inquiry would be anything more certain than a probabilistic judgment: "the mere presence of homosexuals or bisexuals in the parade would *likely* not frustrate any message of the Veterans Council." *Id.* (Nolan, J., dissenting) (emphasis added).

distinguish status and message, especially when claims of expressive reasons for exclusions may be pretexts for prejudice on account of status? Answering these questions is not easy. The task is perhaps all the more difficult in cases of exclusion based on sexual orientation, in which contested assumptions about the relationships among status, conduct, and identity heavily influence how we assess the legitimacy of specific justifications for specific exclusions in various specific situations.

The *Dale* case began with a series of events raising precisely the questions framed by Justice Nolan. Assistant Scoutmaster James Dale, Eagle Scout and student at Rutgers University, was expelled from Scouting by the Monmouth Scouting Council in 1990, a month after a Scouting official read a local newspaper article identifying Dale as copresident of the Rutgers Lesbian/Gay Alliance.²¹⁸ Dale wrote back to ask why.²¹⁹ He was initially informed that Scouting's standards for leadership forbade membership to homosexuals,²²⁰ but a later letter, this time from the BSA's legal counsel, said that the Scouts "[d]id not admit avowed homosexuals to membership in the organization."²²¹ According to the executive of the local Council who initially wrote to Dale, the (confidential) expulsion did not mean that Dale had been "stripped of any awards he had earned as a youth;" Dale, however, interpreted the expulsion to mean that he had lost all of the awards, including his standing as an Eagle Scout.²²²

The Scouts contend that their requirements of cleanness and moral straightness, which appear in the Boy Scout Law and Boy Scout Oath,²²³ are inconsistent with homosexuality.²²⁴ Thus known or

218. See *Dale*, 734 A.2d at 1205.

219. See *id.*

220. See *id.*

221. *Id.*

222. See *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 276 (N.J. Super. App. Div. 1998).

223. The Boy Scout Law is as follows: "A Scout is: Trustworthy Obedient Loyal Cheerful Helpful Thrifty Friendly Brave Courteous Clean Kind Reverent." *Id.* The Boy Scout Oath is as follows: "On my honor I will do my best To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." *Id.* at 274. A separate Declaration of Religious Principle, included in the BSA bylaws, says that although the organization is nonsectarian, all members must recognize an obligation to God. See *id.* at 274-75. Compare the Boy Scout Oath and Law with the Girl Scout Promise ("On my honor, I will try: To serve God and my country, To help people at all times, And to live by the Girl Scout Law.") and the Girl Scout Law ("I will do my best to be honest and fair, friendly and helpful, considerate and caring, courageous and strong, and responsible for what I say and do, and to respect myself and others, respect authority, use resources wisely, make the world a better place, and be a sister to every Girl Scout."). Girl Scouts of the U.S.A. Organization, *Program* (visited Jan. 18, 2000) <<http://www.gsusa.org/>>.

224. See *Dale*, 706 A.2d at 276.

avowed homosexuals, or those who advocate to youths in the organization that homosexual conduct is morally straight or clean, may not be registered as adult leaders.²²⁵ The 1990 Boy Scout Handbook says that “[f]or the followers of most religions, sex should take place only between married couples,” and that “[a]n understanding of wholesome sexual behavior can bring you lifelong happiness. . . . You owe it to yourself to enrich your life by learning what is right,” but not, apparently, anything more specific than that.²²⁶ The earliest policy statement concerning homosexual members that the Scouts offered into evidence in *Dale* was a statement from 1978.²²⁷ It said that persons openly declaring themselves as homosexuals were barred from participating as volunteer scout leaders, unit members, or BSA employees.²²⁸

In a January 1993 policy statement, the Scouts offered a much fuller account of their views on homosexuality:

The Boy Scouts of America does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts. The reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.

Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law.

....

The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.

We do not believe that homosexuals provide a role model consistent with these expectations.

Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.²²⁹

It was in light of these views, presumably, that the local official who expelled Dale could say that Dale “demonstrated his failure to live by the Scout Oath and Law by publicly avowing that he was a homosexual.”²³⁰

Dale sued both the national BSA and the Monmouth Council in the Chancery Division of the New Jersey Superior Court for

225. *See id.*

226. *Id.*

227. *See id.*

228. *See id.*

229. *Id.* at 276-77.

230. *Id.* at 275.

reinstatement and damages under both New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and state common law.²³¹ The trial judge found that Dale was a "sexually active homosexual."²³² The judge found that the BSA had applied its exclusionary policy in accordance with its understanding of moral straightness and cleanness.²³³ The judge then found that the LAD did not apply to the Scouts.²³⁴ Moreover, said the judge, the First Amendment's guarantee of freedom of expressive association protected the Scouts from being required to accept Dale as an adult leader, given the Scouts' historic belief that homosexual conduct was morally wrong.²³⁵ The judge granted summary judgment in favor of the Scouts on all of Dale's claims.²³⁶

Dale appealed in March of 1998, the Appellate Division of the New Jersey Superior Court held that the Scouts had violated the LAD by removing Dale from leadership in the Scouts and revoking his membership, and that the First Amendment did not preclude the application of the LAD to the Scouts.²³⁷ In finding that the LAD applied to the Scouts, the court extrapolated from well established precedent holding that places of public accommodation subject to the statute include organizations that have no fixed abode.²³⁸ The LAD has prohibited discrimination on account of affectional or sexual orientation since 1991.²³⁹ According to the statute, "[a]ffectional or sexual orientation' means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation."²⁴⁰

231. *See id.* at 277.

232. *Id.* at 277. The Appellate Division said that the trial judge "determined that the parties had stipulated that plaintiff was 'a sexually active homosexual.'" *Id.* This formulation seems to indicate doubt as to the accuracy of the trial court's characterization of the stipulation. The parties did agree that no issues of material fact were disputed. *See id.* The New Jersey Supreme Court simply stated that the trial judge had found that Dale was sexually active. *See Dale*, 734 A.2d at 1206.

233. *See Dale*, 706 A.2d at 277.

234. *See id.*

235. *See id.*

236. *See id.*

237. *See id.* at 283.

238. *See National Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 338 A.2d 198 (N.J. 1974).

239. *See Dale*, 706 A.2d at 277. "Although plaintiff's membership was revoked in 1990, . . . he later sought reinstatement in reliance on the LAD amendment. Defendants do not contend the 'affectional or sexual orientation' provision of the LAD is inapplicable." *Id.* at 278 n.1.

240. *Id.* at 277-78 (quoting N.J.S.A. 10:5-5(n)(n)).

Several other courts, the Appellate Division noted, had declined to apply anti-discrimination enactments to the Scouts.²⁴¹ Connecticut's supreme court had held that its public accommodations statute applied to the Scouts, but only when they denied access to goods and services, not when they deprived a woman of the opportunity to serve as a Scoutmaster.²⁴²

The Appellate Division noted that the BSA "invites the public at large to join its ranks, and is dependent upon the broad-based participation of members of the general public."²⁴³ A Scout publication entitled "A Representative Membership" says that

Our federal charter sets forth our obligation to serve boys. Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. The National Council and Executive Board have always taken the position that Scouting should be made available for all boys who meet entrance age requirements.²⁴⁴

Advertisements and public promotion "encourage[s] new membership;" the national organization had hired public relations firms and placed ads on television in national campaigns.²⁴⁵ In the words of one BSA spokesman, "I think of scouting as a product and we've got to get the product into the hands of as many consumers as we can."²⁴⁶ "Considering the undisputed invitation for membership in its literature to 'all boys,'" the court said, "we deem the BSA's 'selectivity' criteria inconsequential."²⁴⁷ The fact that the BSA's

241. See *id.* at 278-79 (citing *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267 (7th Cir. 1993)) (denying membership to a boy who would not affirm belief in God required by Scout Oath and holding BSA is not a public accommodation under Title II of the Civil Rights Act of 1964), *cert. denied*, 510 U.S. 1012 (1993); *Seabourn v. Coronado Area Council BSA*, 891 P.2d 385 (Kan. 1995) (holding that BSA is not a public accommodation under Kansas Act Against Discrimination, and that members-leader status could be revoked when an adult professed atheism).

A relevant case not cited in *Dale* is *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465 (Or. 1976) (holding that state public accommodations law does not apply to Scouts). Cf. *Mankes v. Boy Scouts of Am., Inc.*, 137 F.R.D. 409, 411 (S.D. Fla. 1991) (dismissing claim against Scouts for "violation of state and local law" for lack of diversity jurisdiction and for failure to join indispensable nondiverse party).

242. See *Quinnipiac Council BSA v. Commission on Human Rights & Opportunities*, 548 A.2d 352, 359, 359-60 (Conn. 1987). In *Dale*, by contrast, the Appellate Division held forthrightly, and more than reasonably, that the LAD, which applies to the "denial of accommodations, advantages, facilities, or privileges," is broader than the Connecticut statute. See *Dale*, 706 A.2d at 283 (citing N.J.S.A. 10:5-12f(i)). "Defendants do not argue persuasively that serving as an assistant scoutmaster does not constitute an advantage or privilege." *Id.*

243. *Dale*, 706 A.2d at 280 (citations and quotation marks omitted).

244. *Id.* at 281 (emphasis omitted).

245. See *id.*

246. *Id.* at 281-82.

247. *Id.* at 282.

criteria for adult membership were more strict did not exempt “the BSA organization as a whole” from the operation of the statute.²⁴⁸ “In any event,” said the court, “selectivity for membership is not necessarily dispositive.”²⁴⁹ The BSA offered accommodations having many attributes in common with places and activities enumerated in the LAD as subject to its protections.²⁵⁰

The court also noted “the BSA’s historic partnership with various public entities and public service organizations.”²⁵¹

Local BSA units are chartered by public schools, parent-teacher associations, firehouses, local civic associations, and the United States Army, Navy, Air Force and National Guard. The BSA’s “learning for life” program has been installed in many public school classrooms throughout the country. Many troops meet in public facilities. These relationships benefit the BSA. The BSA in turn provides essential services through its scouts to the public and quasi-public organizations. This close relationship underscores the BSA’s fundamental public character.²⁵²

The court did not ponder whether its quite sensible observation as to chartering should have more force as applied to individual units than to the BSA as a whole. Similarly, the court did not consider whether it would be better to hold that BSA’s “learning for life” program should be considered a public accommodation than to hold that the program makes the entire BSA a public accommodation. As for the fact that the troops meet in public facilities, this seems quite irrelevant, without more, as to whether they take on a public character.²⁵³

The court summarily disposed of three possible exceptions to the LAD, holding that none applied.²⁵⁴ The first two are for “any institution . . . which is in its nature distinctly private, and for any educational facility operated or maintained by a bona fide religious or sectarian institution.”²⁵⁵ The first exception, the court noted, is

248. *Id.*

249. *Id.*

250. *See id.* (citing *Fraser v. Robin Dee Day Camp*, 210 A.2d 208, 212 (N.J. 1965)).

251. *Id.*

252. *Id.* at 282-83.

253. *See, e.g.,* *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (invalidating school board’s decision to forbid church to use school premises to show film where permission had been denied solely because the film dealt with an otherwise permissible subject from a religious standpoint); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university, having made its facilities generally available for activities of registered student groups, may not close its facilities to a registered group desiring to use the facilities for religious worship and religious discussion without violating Free Speech Clause).

254. *See Dale*, 706 A.2d at 283.

255. N.J.S.A. 10:5-5(l), *quoted in Dale*, 706 A.2d at 283.

“merely the other side of the ‘public accommodation’ coin;” it has no independent meaning of its own.²⁵⁶ This reasoning seems unobjectionable. As to the second exception, however, the court seemed to misunderstand the difference between what the words “religious” and “sectarian” mean to courts and what they can mean to private actors. “The BSA is expressly nonsectarian. Even if its requirement that members profess a belief in God were sufficient to render it a bona fide religious or sectarian institution, it does not qualify as an ‘educational facility.’”²⁵⁷ If a “requirement that members profess a belief in God” is not religious or sectarian, then such a requirement would not violate the Establishment Clause if imposed by the state; but after *Torcaso v. Watkins*²⁵⁸ and *Lee v. Weisman*²⁵⁹ the Scouts’ requirement surely would.²⁶⁰

The court asserted without elaboration that the BSA was not an educational facility, seemingly relying on the “plain meaning” of “educational” and “facility.” Plain meaning would seem less plausible as a hermeneutic method here than in many other circumstances. First, “educational” is not so plain as one might think. It need not mean “pertaining to the kind of education that one gets at a school.” The court had just gone out of its way to make specific mention of the Scouts’ educational character. Second, the court had been faithfully following the teaching of New Jersey precedent that rejects any wooden invocation of a “plain-meaning” approach to

256. *Dale*, 706 A.2d at 293 (citation and quotation marks omitted).

257. *Id.*

258. 367 U.S. 488 (1961) (holding state may not require persons to declare their belief in God in order to qualify to serve in public office).

259. 505 U.S. 577 (1992) (holding that public school principals may not invite clergypersons to offer prayers as part of official graduation ceremonies).

260. It is of course plausible that the New Jersey legislature meant by “an educational facility operated or maintained by a religious or sectarian institution” only a church or a parochial school, but that is hardly the only obvious reading; and to favor some self-evidently religious institutions (say parochial schools) over others (say ecumenical, “barely sectarian” schools) would raise substantial Establishment Clause problems. All sorts of religious groups call themselves nonsectarian or nondenominational or open to all, and by their own lights they are; but this in itself says nothing as to their legal or constitutional status. For monotheists who share the Boy Scouts’ basic presuppositions, the Scouts’ “non-sectarianism” might be thin gruel indeed; but not for the atheists (to enumerate a conspicuous example that perhaps should have occurred to the court) who object strongly to the Scouts’ religion as not quite nonsectarian enough. *Cf.* *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 329 (4th Cir. 1997) (relying on First Amendment in eschewing interference in dispute between minister and interfaith nonprofit corporation created and funded by “[m]ore than twenty religious groups . . . to advance the jointly shared religious purposes of its members”) (internal quotation marks omitted).

resolve questions of statutory interpretation—especially when it comes to the interpretation of words such as “place” and “facility.”²⁶¹

The third exception protects “the right of a natural parent or one *in loco parentis* to direct the education and upbringing of a child under his control.”²⁶² No doubt this exemption was intended to avoid violating the constitutional holdings of *Pierce v. Society of Sisters*²⁶³ and *Wisconsin v. Yoder*,²⁶⁴ both of which protect parents’ right to direct the upbringing and education of their children. The court pointed out, rightly enough, that the BSA did not act *in loco parentis* when it took on responsibility for children in their activities as Scouts. But the right protected in *Pierce* and *Yoder* is not merely the right to educate and bring up a child by oneself, whether as a parent or *in loco parentis*.

Having held that the LAD applied, the Appellate Division affirmed the trial court’s dismissal of Dale’s common-law claims as duplicative,²⁶⁵ and proceeded to consider the Scouts’ First Amendment defense. The court discussed *Roberts* at considerable length.²⁶⁶ Under *Roberts*, *Duarte*, and *New York State Club Association*, said the court, “the organization or club asserting the freedom [to discriminate in selection of members] has a substantial burden of demonstrating a strong relationship between its expressive activities and its discriminatory practice. Any lesser showing invites scuttling of the state’s antidiscrimination laws based on pretextual expressive claims.”²⁶⁷ New Jersey, the court reminded its readers, “prides itself on being in ‘the vanguard in the fight to eradicate . . . unlawful discrimination of all types . . .’”²⁶⁸ Quoting *Roberts*, the court said that in adding affectional and sexual orientation to the categories of classifications on the basis of which discrimination would be

261. See *Dale*, 706 A.2d at 279 (“To have the LAD’s reach turn on the definition of place is irrational because places do not discriminate; people who own and operate places do.”). The court went on to point out that in *National Org. for Women v. Little League Baseball, Inc.*, 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974), *aff’d*, 333 A.2d 198 (N.J. 1974), the court had said that the term at issue in that case—the statutory noun “place”—“was one ‘of convenience, not limitation.’” *Dale*, 706 A.2d at 279.

262. N.J.S.A. 10:5-5(1), *quoted in Dale*, 706 A.2d at 283.

263. 268 U.S. 510, 534-35 (1925) (invalidating state law requiring parents to educate their children in public schools through the eighth grade unless they fell within narrow exceptions).

264. 406 U.S. 205 (1972) (invalidating state’s compulsory education law as applied to Amish asserting religious objection to public schooling past the eighth grade). See *Dale*, 706 A.2d at 283.

265. See *Dale*, 706 A.2d at 283-84.

266. See *id.* at 285-88.

267. *Id.* at 287.

268. *Id.* (quoting *Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465, 478 (N.J. 1978)) (ellipses in original).

prohibited, the New Jersey legislature had “implicit[ly] recogni[zed] that discrimination based on ‘archaic’ and ‘stereotypical notions’ about homosexuals that bears no relationship to reality cannot be countenanced.”²⁶⁹

Assuming (“[f]or purposes of discussion”) that the BSA’s expression of its fundamental tenets and carrying out of its social, educational, and civic activities was constitutionally protected, the court

start[ed] with the undisputed fact that the BSA’s collective ‘expressive purpose’ is not to condemn homosexuality. Its reason to be is not to provide a public forum for its members to espouse the benefits of heterosexuality and the ‘evils’ of the homosexual lifestyle. . . . Motivation to advance such antigay views was not what ‘brought [the original members] together.’²⁷⁰

Examining the BSA’s “Congressional Charter, bylaws, rules and regulations, and handbooks,” the court found traditional views, among other things, but no proscription of homosexuality, among the BSA’s “mission, purposes, and fundamental beliefs.”²⁷¹ It did say, though, that the BSA trains and educates boys in, among other things, “sexual responsibility.”²⁷² The court held that granting Dale “access to the accommodations afforded by scouting will not affect ‘in any significant way’ BSA’s ability to express these views and to carry out these activities.”²⁷³ The court said that “it cannot convincingly be argued” that the LAD’s application would “impede[] the BSA’s ability to express its collective views on scouting . . . The LAD does not in any manner require the BSA to abandon or alter any of its laudable activities and programs.”²⁷⁴ The court did not consider how application of the LAD to the Scouts might affect how the organization communicates its understanding of sexual responsibility—among other values and virtues that to the Scouts might have obviously sexual implications.

There is absolutely no evidence before us, empirical or otherwise, supporting a conclusion that a gay scoutmaster, solely because he is a homosexual, does not possess the strength of character necessary to properly care for, or to impart BSA humanitarian ideals to the young boys in his charge. Nothing before us even suggests that a male, simply because

269. *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984)).

270. *Id.* at 288 (quoting *Roberts*, 468 U.S. at 623) (brackets in original).

271. *Id.*

272. *See id.*

273. *Id.* (quoting *Roberts*, 468 U.S. at 623).

274. *Id.*

he is gay, will somehow undermine BSA's fundamental beliefs and teachings.²⁷⁵

As to the Scouts' argument that homosexuality is contrary to moral straightness and cleanness: the court discounted this evidence because "this focus on 'morally straight' and 'clean' as a basis for excluding avowed homosexual scoutmasters is only of recent vintage."²⁷⁶ Not only that, the court said, but the 1978 statement argues only that the BSA is a private organization (hence entitled to exclude), not that homosexuality is incompatible with straightness or cleanness.²⁷⁷ Since the court did not quote any of the statements that it mentioned the Scouts issued between 1978 and 1993,²⁷⁸ one is unclear about the significance of the 1978 statement.²⁷⁹ The court went on to note that the BSA did issue a position statement 11 months after expelling Dale that expressly stated that homosexual conduct is inconsistent with the Scout Oath and Scout Law.²⁸⁰ "We cannot accept the proposition that this 'Position Statement,' issued for the first time seventy-six years after Congress granted the BSA its Charter, represents a collective 'expression' of ideals and beliefs that brought the boy scouts together."²⁸¹ This appears to be a reference to the "impair the ability of the original members to express only those views that brought them together" passage in *Roberts*.²⁸²

Read in context, the *Roberts* passage does not mean quite what the New Jersey court appears to have thought it means. "Original members" is not identical to "the original founders of the organization;" it seems to mean, rather, "the members who were

275. *Id.* at 289.

276. *Id.* Before examining this evidence, the court stated that "[t]he only reference to homosexuality we could find in the voluminous record is the Scoutmaster's Handbook." *Id.* at 289 n.3. That reference is to a passage directing the scoutmaster to abstain from teaching scouts on matters of sex and family life and instructing him in what to do if he discovers any of his charges engaged in sexual activity with one another. *See id.* But the rest of the opinion makes clear that other references to homosexuality appear in the record. Perhaps the court meant by "record" only the "Charter, bylaws, rules and regulations, and handbooks." *Id.* at 288.

277. *See id.* at 290.

278. *See id.* at 276.

279. In *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998), the California Supreme Court noted that the Scouts' general counsel had issued a statement in 1983 asserting that "the Boy Scouts of America has determined that homosexuality and Scouting are not compatible." *Id.* at 225 n.5 (quoting a 1983 statement by the BSA Legal Counsel) (internal quotation marks omitted). The court also quoted from a 1978 "memorandum" that includes the following statements: "We do not believe that homosexuality and leadership in Scouting are appropriate. . . . We do not feel that membership of [individuals who openly declare themselves to be homosexual] is in the best interests of Scouting." *Id.* at 225 n.7.

280. *See Dale*, 706 A.2d at 290.

281. *Id.*

282. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

members before the persons excluded from membership tried to become members.” Such a reading reflects the common-sense understanding, and constitutional guarantee, that individuals and organizations are entitled to change (or develop, or strive better to articulate) their ideals and beliefs.²⁸³ One should not be surprised, in any event, that fresh articulations of collective ideals should arise in the light of new legal rules that require persons and organizations to articulate those ideals and beliefs in a specified way if they are to be free to act on them; and this is not evidence of “insincerity.” For the court to cite evidence of attempts to comply with the new rules as evidence of no more than an attempt to evade compliance, is to forbid the organization (unless it is an uncommonly prescient one) the ability to show that its prohibition is an expression of its sincerely held belief. Such a rule would make it impossible for the organization to show what the court asked the Scouts to show.

Coincidentally, these 1991 and 1993 “Position Statements” were expressed by the BSA during a time when their anti-gay policy was subject to judicial challenge in California. . . . It is therefore not unrealistic to view these “Position Statements” as a litigation stance taken by the BSA rather than an expression of a fundamental belief concerning its purposes.²⁸⁴

As it turns out, the court had a less speculative argument to offer:

In any event, aside from the undebatable fact that this so-called “position” was not even set forth in a written document when plaintiff was expelled, it is undisputed that such policy has not been incorporated into the BSA’s bylaws, rules, regulations and handbooks. It was not contained in plaintiff’s application for the adult scoutmaster position. As far as we can determine from the record, the “Position Statement” has not been disseminated throughout the BSA hierarchy and, except during litigation, has not been presented to the public as representative of BSA’s official position. Indeed, the appendix is rife with affidavits from past and present boy scouts and adult leaders stating that during their tenure they had no knowledge that such a policy even existed.²⁸⁵

The court noted that “a substantial percentage of church groups who sponsor local boy scout troops” oppose the Scouts’ policy on homosexuality.²⁸⁶ That only homosexual persons are subject to

283. *See, e.g.*, *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 144 (1987).

284. *Dale*, 706 A.2d at 290 (citations omitted).

285. *Id.* The Appellate Division did not say whether the trial judge had made factual findings as to the affidavits or whether other Scouts had said they had been aware of the policy.

286. *Id.* Take, for instance, the comment of retired United Methodist Bishop Melvin Wheatly, Jr.: “BSA’s discrimination against homosexuals . . . is inconsistent with the clearly expressed condemnation by The United Methodist Church of discrimination on the basis of

expulsion, while others who favor including them are not, said the court, “belie[s] the BSA’s argument that its collective purpose is to ‘exclude individuals who do not share the views that the club’s members wished to promote.’”²⁸⁷

The court attempted to distinguish *Hurley* as “protecting a form of pure speech, the collective expressive views of the parade itself.”²⁸⁸ The court seems to have meant by this that the parade was itself speech: “Significantly, the Court did not undertake a freedom of expressive association analysis [in *Hurley*] under the *Roberts* trilogy of cases[,] . . . no doubt because of the Court’s initial recognition in its analysis that the Parade itself constituted expression.”²⁸⁹ Noting that *Hurley* “appears to preserve the holding and analysis of the *Roberts* trilogy of cases,”²⁹⁰ the court argued that *Roberts* provided the closer analogy.

Unlike a parade, where the “marchers . . . are making some sort of collective point,” the BSA is a national organization focusing its energy and resources on activities aimed at the physical, moral and spiritual development of boys and young men. The public accommodation law implicated here simply demands access to those activities; it does not attempt, directly or indirectly, to hamper the BSA’s ability to carry out these activities or express its views respecting their benefits.²⁹¹

Apparently “physical, moral and spiritual development” did not express “a collective point.”²⁹²

In the penultimate paragraph of its opinion, the court criticized the Scouts in such a way as to call into serious question its attempt to argue that the exercise of the organization’s First Amendment rights was not at stake in the case.

Finally, we cannot accept the proposition that plaintiff’s public declaration that he is gay in and of itself constitutes “expressive activity” sufficient to forfeit his entitlement to membership in the BSA. The BSA’s argument that this “message” given by plaintiff’s declaration conflicts with the BSA “morally straight” and “clean” policies falters, when one considers other scout laws to which scouts promise to subscribe. The scout

sexual orientation . . . [and] offends the human dignity of such [homosexual] persons.” *Id.* at 290-91 (quoting certification of Bishop Wheatly).

287. *Id.* at 291 (citation omitted).

288. *Id.* at 292.

289. *Id.* (internal quotation marks omitted). The Court in *Hurley* did, of course, undertake a brief *Roberts* analysis. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 580-81 (1995).

290. *Dale*, 708 A.2d at 293.

291. *Id.* (ellipses in original) (citation omitted).

292. *Id.*

promises to be “trustworthy,” that is, to tell the truth. “Honesty is part of his code of conduct. People can depend always on him.” A scout also promises to be “brave,” that is, to have the courage “to stand for what he thinks is right even if others laugh at him or threaten him.” In our view, there is a patent inconsistency in the notion that a gay scout leader who keeps his “secret” hidden may remain in scouting and the one who adheres to the scout laws by being honest and courageous enough to declare his homosexuality publicly must be expelled.²⁹³

By rejecting the Scouts’ reading of their own laws as flawed by “patent inconsistency,” the court asserted a surprising power to tell the Scouts that they had got their own message wrong.²⁹⁴ There is some irony in the court’s assertion (perhaps the court was speaking tongue in cheek?) that the Scouts’ moral code *requires* a disclosure of one’s sexual orientation. The court had claimed that the Scouts’ code did not clearly proscribe homosexuality.²⁹⁵ Here, however, the court had no difficulty interpreting “honesty” and “bravery” to require a second vision of sexual morality: the straightness that consists of telling the truth to others about one’s sexual orientation. The court went further, however. “We also cannot accept the proposition that the BSA has a constitutional privilege of excluding a gay person when the sole basis for the exclusion is the gay’s exercise of his own First Amendment right to speak honestly about himself.”²⁹⁶ In acknowledging, however, that the Scouts’ basis for excluding James Dale was his exercise of a First Amendment right (a right to speak “honestly,” no less), the court conceded the conclusion that it had just tried tenaciously to deny—the conclusion that Dale’s self-identifying speech was speech, “content,” that the Scouts might well want to exclude from their own speech or “content.”

Judge Landau, concurring and dissenting, would have held that the Boy Scouts are a place of “public accommodation” and that the Scouts were not entitled to revoke Dale’s membership.²⁹⁷ As an original matter, he would have interpreted the LAD more narrowly; but in twenty-four years, he was persuaded, “judicial interpretation has generally transformed organizations which extend an open

293. *Id.*

294. There is, of course, a “patent inconsistency” of the same sort whenever a group that espouses honesty also condemns conduct that a dishonest member may find it easy to hide. Presumably a Scout who is wholly untrustworthy, disloyal, or discourteous will remain a Scout so long as he hides his offenses, even though “the one who adheres to the scout laws by being honest and courageous enough to declare” them “must be expelled.” *Id.*

295. *See id.* at 288-90, 293.

296. *Id.* at 293.

297. *Id.* at 273-74 (Landau, J., concurring and dissenting).

invitation to public membership as broad as that of the Boy Scouts into places of public accommodation for purposes of statutes such as the LAD.”²⁹⁸ He read the facts rather differently than the majority did.

What has been lost in the majority’s opinion is our traditional focus upon the special facts of the case on appeal. James Dale, who excelled as a Boy Scout, has been prominently publicized as an avowed, practicing homosexual and also as a leader in organizational activities given to the promotion of the interests of gay and lesbian students. He wants to continue his scouting career in a leadership capacity as a volunteer scoutmaster or assistant scoutmaster. Concerned that accepting an avowed homosexual as a scoutmaster would signify endorsement of such a lifestyle in contradiction to their declared policies against extramarital sex and homosexual activity, the Boy Scouts went beyond refusing Dale a volunteer leadership post. They also revoked his Boy Scout membership. These facts require us to address two separate issues, restriction of membership and restriction of leadership. As a “place” of public accommodation, the Boy Scouts should not have revoked Dale’s membership. I must concur with the majority in that regard.²⁹⁹

That last sentence was all Judge Landau had to offer on whether the Scouts should or could have expelled Dale from membership—puzzlingly so, in light of the vein in which the dissenter argued for the rest of his brief opinion. Judge Landau began by citing the 1993 position statement.³⁰⁰ He drew a different conclusion from the statement than did the majority. Given how many Scouts there are in the country—as many as ninety million persons have been members since its founding—“[s]urely the Boy Scouts are aware that, statistically, a number of these must have been gay. There obviously has been no antigay witch hunt in the Boy Scout movement.”³⁰¹ What is the Scouts’ message? “The defendants’ consistent theme is evident; scouting condemns homosexual practice as morally unacceptable, and so acts negatively with respect to its open avowal because it is inconsistent with one of the expressed moral policies of the organization.”³⁰² Where the majority saw patent inconsistency, the dissenter saw a “consistent theme.”³⁰³ In light of that, he straightforwardly applied *Hurley*:

298. *Id.* at 294 (Landau, J., concurring and dissenting).

299. *Id.* (Landau, J., concurring and dissenting).

300. *See id.* (Landau, J., concurring and dissenting).

301. *Id.* (Landau, J., concurring and dissenting).

302. *Id.* (Landau, J., concurring and dissenting).

303. *Id.* (Landau, J., concurring and dissenting).

If their perception of the immorality of homosexuality is in fact an important part of the Boy Scouts' institutional message to young Scouts, what Jim Dale openly professes and exemplifies clearly flies in the face of that view. When we force the Boy Scouts to permit him to serve as a volunteer leader, we force them equally to endorse his symbolic, if not openly articulated, message. I believe that this violates the right of expressive association guaranteed by the First Amendment of the United States Constitution. Even when a membership association provides public benefits to which this State may insure equal access under the LAD, such compelled access to membership does not carry with it a right to "trespass on the organization's message itself." We may not compel the Boy Scouts to alter a message which they wish to convey by including messages more acceptable to others. This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs.³⁰⁴

The LAD, then, is unconstitutional as applied to openly homosexual men seeking leadership positions in organizations such as the Scouts. Judge Landau did not say this explicitly, but it follows from what he did say.

Judge Landau saw *Roberts* as irrelevant to whether the state could require the Scouts to admit Dale as a leader.³⁰⁵

[In *Roberts*], only admission to Jaycee membership was the issue. Of course, the Boy Scouts were not organized for the primary purpose of advancing an antigay agenda. However, nothing in *Roberts* prevents an organization from advocating its view that a gay lifestyle is immoral and undesirable without requiring it to provide a platform for competing advocacy, express or implicit. Indeed, as *Hurley* demonstrates, the First Amendment guarantees the Boy Scouts that right of unfettered advocacy.³⁰⁶

Roberts, on this view, is a case that governs private associations' power to restrict membership, but goes no further than membership; *Hurley* is a leadership or "collective message" case. The tension between *Roberts* and *Hurley* is unexplored. Exploring that tension would lead the dissenter to go farther in his dissent. For if an "avowed homosexual," on account of the expressive effect of his mere presence, can be barred from leadership in a group, why not from membership? Despite hesitating to venture into these deeper waters, Judge Landau sharply criticized the reasoning of the majority in *Dale*:

304. *Id.* at 294-95 (Landau, J., concurring and dissenting) (citations omitted) (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 580 (1995)).

305. *See id.* at 295 (Landau, J., concurring and dissenting).

306. *Id.* (Landau, J., concurring and dissenting).

To the extent the majority opinion questions the fundamental nature of the Boy Scouts' profession of an organizational view on homosexuality, there are two equally dispositive responses. First, it is not for this court to tell the Boy Scouts what to believe or what to profess. That is an internal matter. Their consistent litigation stand in cases like this, and the representations of their governing officials are enough for me. There has been no contravening intervention by opposing Boy Scout groups, although other, non-affiliated, amici curiae are abundantly represented in this appeal.

Secondly, when limited to the First Amendment issue of the expressive effect of elevating Dale to an adult leadership role (as distinct from his admission to or retention of Boy Scout membership), whether or not the Boy Scouts' stand on homosexuality is fundamental to that organization's creation is entirely irrelevant.³⁰⁷

In short, Judge Landau's opinion suggests that two decisions made by the majority had the effect of curtailing the Scouts' exercise of their constitutional right to express their organizational message.³⁰⁸ The first decision was to view skeptically the Scouts' claim as to their view on homosexuality.³⁰⁹ The second decision was to accord expressive association protection only to views fundamental to the creation of the organization.³¹⁰

After the Scouts appealed, the New Jersey Supreme Court unanimously affirmed the judgment of the Appellate Division.³¹¹ In a lengthy, thorough opinion, Chief Justice Deborah Poritz, writing for the court, largely repeated the analysis of the Appellate Division majority, breaking little new ground in the process.³¹² The court's LAD analysis was for the most part unexceptionable, given the wide scope the court had accorded the statute in the past.³¹³ Discrimination, the court repeated, is a "cancer,"³¹⁴ which "threatens not only the rights and proper privileges of the inhabitants of [New Jersey,] but

307. *Id.* (Landau, J., concurring and dissenting).

308. *See id.* (Landau, J., concurring and dissenting).

309. *See id.* (Landau, J., concurring and dissenting).

310. *See id.* (Landau, J., concurring and dissenting).

311. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1200 (N.J. 1999).

312. Justice Alan Handler wrote a separate opinion.

313. On occasion, the court's treatment of the LAD seems remarkably wooden. For instance, the court suggested that the Scouts waived their right to contest the claim that membership in the Scouts is a "privilege of [a] place of public accommodation" under the LAD by telling Dale, in the letter that purported to revoke his membership, that membership in the group was a "privilege." *Dale*, 734 A.2d at 1218 (citations omitted). One presumes that the group meant "privilege, not a right," not that it meant "privilege" as a term of art of public accommodations law.

314. *Id.* at 1208 (citations omitted).

menaces the institutions and foundation of a free democratic State;³¹⁵ the aim of the statute was “to root out” discrimination.³¹⁶ The Scouts engaged in “broad public solicitation,” using a variety of media to invite boys to join the organization.³¹⁷ Surprisingly, the court emphasized the fact that the Scouts wear uniforms, which the court called “perhaps the most powerful invitation of all, albeit an implied one”—a “recruiting tool.”³¹⁸ The court did not mention the possibility that the uniforms might be constitutionally protected speech.³¹⁹ The court was probably on surer ground in noting the Scouts’ “close relationships with federal and state governmental bodies and with other recognized public accommodations”³²⁰ and in emphasizing the Scouts’ lack of selectivity in choosing members.³²¹ In only a “few instances,” the court said, did the record show that “the Oath and Law have been used to exclude a prospective member; in practice, they present no real impediment to joining Boy Scouts.”³²² The Scouts had not shown that the organization “does anything but accept at face value a scout’s affirmation of the Oath and Law.”³²³ “Most important” to non-selectivity, said the court, was the fact that the organization “does not limit its membership to individuals who belong to a particular religion or subscribe to a specific set of moral beliefs.”³²⁴ Finally, the court noted, the Scouts teach its members to respect and defend the rights of others with differing beliefs.³²⁵ “By its own teachings then,” the court concluded, the organization was “inclusive, not selective, in its membership practices.”³²⁶

One of the oddest things about the New Jersey high court’s opinion is the curious manner in which it characterizes some of the facts. For instance, according to the court, the Scouts do not “endorse any specific set of moral beliefs.”³²⁷ As authority for this proposition,

315. *Id.*

316. *See id.*

317. *Id.* at 1211.

318. *Id.*

319. *See, e.g.,* *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 505 (1969) (“[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.”).

320. *Dale*, 734 A.2d at 1211.

321. *See id.* at 1215-17.

322. *Id.* at 1216.

323. *Id.*

324. *Id.*

325. *See id.*

326. *Id.*

327. *Id.* at 1203. The court nonetheless described Dale as “an exemplary scout.” *Id.* at 1204. Whether a Scout is exemplary, it would seem, is not a moral question in the court’s eyes. Or if it is, it has no specific connection to any particular moral beliefs.

the court quoted from a passage from the Scouts' handbook for scoutmasters to the effect that morality concerns what is sanctioned by one's conscience and that courage to do what one's heart and head tell one to do is right.³²⁸ Noting that the Scouts espouse no particular religion, the court went on to observe that some of the religious groups that sponsor Scouting units differ as to the morality of homosexuality.³²⁹ Moreover, the court said, the Scouts encourage their leaders to refrain from discussing sexual topics with their charges, on the ground that boys should learn about sexuality and family life from their parents.³³⁰ This evidence would appear to support the claim that the Scouts tolerate members with a variety of views, some of them conflicting, on at least some fundamental moral questions—but not that the Scouts endorse no view on such questions themselves.³³¹

Given the U.S. Supreme Court's willingness to ignore lower court factual findings in First Amendment cases, it may well be that the New Jersey high court's puzzling treatment of the facts in the case will have little or no influence on the Court's deliberations. The Court is likely to scrutinize with care the evidentiary and procedural obstacles raised by the New Jersey courts to the Scouts' claim to having long held a consistent view on homosexuality. As Judge Landau suggested in his dissent from the Appellate Division's opinion, a court can deploy selective skepticism about an organization's claims concerning what it believes to deprive the organization of constitutional protection for action related to those beliefs.³³² Such an approach relieves the court of the duty imposed by *Roberts* of weighing the burden on expression imposed by the legal rule forbidding the action against the interests served by the rule. As Judge Landau also suggested, a court can also violate an organization's rights by selectively identifying some views as fundamental to the organization's creation and ignoring others as latecomers.³³³

What the Court will almost certainly not ignore is the New Jersey Supreme Court's crabbed view of associational expression and

328. *See id.* at 1203.

329. *See id.*

330. *See id.*

331. Nor does this evidence quite support Justice Handler's claim that "tolerance concerning homosexuality is implicit in Boy Scouts' own message." *Id.* at 1241 (Handler, J., concurring).

332. *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 294-95 (N.J. Super. Ct. App. Div. 1997) (Landau, J., concurring and dissenting).

333. *See id.* (Landau, J., concurring and dissenting).

the freedom not to speak.³³⁴ The court found that the LAD did not violate the Scouts' right to expressive association because it lacked "a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views."³³⁵ Two of the reasons given for this assertion seem flimsy: that the Scouts "do not associate for the purpose of disseminating the belief that homosexuality is immoral" and that the organization "discourages its leaders from disseminating *any* views on sexual issues."³³⁶ A group may hold a belief without existing for the purpose of disseminating it, yet the belief may be important to the group's maintenance and development. A group that discourages the dissemination of views on homosexuality may reasonably think that open avowals of homosexual orientation will have the not so subtle effect of fostering social tolerance of homosexuality. The court appears here to have ignored Justice O'Connor's suggestion that attempts at quiet persuasion—including tacit understandings as to certain potentially divisive subjects—are as much expression as words that loudly announce their messages. The court's third reason is at least potentially stronger: that the Scouts' sponsors and members differ on the morality and significance of homosexuality and homosexual orientation.³³⁷ The court did not, however, explain the significance of this disagreement for First Amendment purposes. Most organizations, including churches and political parties, include members and leaders who differ on all sorts of questions. The court would appear to require that a "single view" on homosexuality "function[] as a unifying associational goal of the organization,"³³⁸ but if unanimity on a view is required for a court to ascribe the view to a group, then few organizations will pass the test.

334. The New Jersey court's treatment of the Scout's intimate association claim seems unobjectionable. The court emphasized local troops' nonselectivity. *See Dale*, 734 A.2d at 1221. As for leaders, whom the Scouts concededly were more selective in choosing, "leaders do not substitute for the boys' parents; nor do they have private or intimate relationships with troop members." *Id.* The court followed *Roberts* and *Duarte* in emphasizing Scouting troops' willingness to include new members and their practice of "inviting or allowing nonmembers to attend certain troop meetings." *Id.* at 1222.

335. *Id.* at 1223.

336. *Id.*

337. *See id.* at 1223-24. The high court did not in fact provide evidence that religious groups and individuals differ as to whether homosexuality is moral; but evidence on this point is widely available and well known. All the court did was to quote two statements from religious groups as to whether the Scouts should be admitted. Neither statement spoke to the moral significance of homosexual orientation or sexual relationships. *See id.* at 1224-25.

338. *Dale*, 734 A.2d at 1225.

The court refused to credit the position papers that the Scouts had produced on the question of homosexuality.³³⁹ The 1978 paper, the court, said, had never been disseminated to members.³⁴⁰ Other papers, written after Dale's expulsion, the court rejected as "self-serving," without explaining why.³⁴¹ If the implication is that the papers should not be credited because the Scouts may have written them for the purpose of prevailing in the *Dale* litigation, then the court should have required more by way of showing this before reaching such a conclusion. Presumably organizations are entitled to clarify, and also to change, their views.³⁴² That a member sues the group should not disable the group from clarifying or changing its view as to an issue that is relevant to the member's suit. The court might have done better to say that the later papers were not evidence of the reasons for Dale's expulsion in 1990. That, however, would not have disposed of the question of what to do if the organization decided in 2000 to reaffirm its expulsion of Dale (or "re-expel" him) based on new, or newly clarified, grounds.

Because the court did not ascribe opposition to homosexuality to the Scouts, it was relatively easy for the court to explain Dale's expulsion as "discrimination based solely on his status as an openly gay man."³⁴³ Discrimination of this sort, the court said, was unprotected, because it was grounded in "assumptions in respect of status that are not a part of the group members' shared expressive purpose."³⁴⁴ Dale, the court said, had merely identified himself as gay in the article that led the Scouts to expel him; he did not "identify himself as a Boy Scout leader or member, nor d[id] he express an opinion about any of Boys Scouts' policies, or suggest that Boy Scouts should allow him openly to advocate acceptance of homosexuality."³⁴⁵ The claim betrays an uneasiness about the implications of the court's earlier claim that the Scouts' opposition to

339. *See id.* at 1224 n.12.

340. *See id.*

341. *See id.*

342. The court's characterization of the position papers as "self-serving" seems especially questionable in light of the fact that the LAD did not cover sexual orientation until 1991. The court offered no reason why the papers written after Dale's expulsion could not be understood as responses to the change in the LAD rather than to Dale's suit. The papers may well have been "self-protective," in the sense that they were created in order to minimize liabilities arising from a change in legal rules by providing fresh material that might later be used to show why the organization's activities do not violate the new rules; but "self-protective" efforts of this sort are routine in all organizations.

343. *Dale*, 734 A.2d at 1225.

344. *Id.* (citations omitted).

345. *Id.* (footnote omitted).

homosexuality was a hidden position made public only for litigation purposes. Justice Handler's concurrence, however, shows that Dale did more than merely announce that he was gay.³⁴⁶ The concurrence provides quotations from the newspaper article that led to Dale's expulsion. The quotations from the article, entitled "Seminar Addresses Needs of Homosexual Teens," have Dale, "co-president of the Rutgers University Lesbian/Gay Alliance," acknowledging his "double life" in high school and "admitting his homosexuality" only in college.³⁴⁷ Dale is quoted as saying that he was "looking for a role model, someone who was gay and accepting of [him]."³⁴⁸ The article says that Dale "wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network of friends."³⁴⁹ This language suggests that Dale was, at the very least, encouraging closet gay listeners to cease leading a "double life," to accept their orientation rather than attempt to deny it, and to seek a community that would support them in their attempt to acknowledge who they truly were. Words well spoken, to be sure, but one is hard pressed to describe them as simply an acknowledgment that the speaker is gay—especially in light of the speaker's identity (co-president of the "Alliance") and the forum (a seminar addressing the needs of homosexual teens), both of which make it exceedingly likely that listeners were invited to regard the speaker's story as exemplary.³⁵⁰

Perhaps the court was not persuaded by its own characterization of the record; for the court proceeded to attempt to show that the Scouts' policy was internally contradictory. It is hard to see how this is not a criticism of the Scouting organization's understanding of itself and an attempt to remake the organization's "goals and philosophy" (to use the court's words) in the court's image of what an acceptable version of those things would be.

Perhaps more revealing is the contradiction between Boy Scouts' current litigation posture on homosexual members and the organization's general philosophy on open membership. Boy Scouts has been firmly committed to a diverse and "representative" membership. . . .

346. *See id.* at 1239-40 (Handler, J., concurring).

347. *Id.* at 1239 (Handler, J., concurring).

348. *Id.* at 1240 (Handler, J., concurring).

349. *Id.* (Handler, J., concurring) (quoting Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark), July 8, 1990, s. 2, at 11).

350. The court seems to have attached some significance to the fact that Dale did not identify himself as a Scout or say that he was opposed to Scout policy. *See id.* at 1225, 1239-40 (Handler, J., concurring). Anyone who knew Dale was a Scoutmaster and read the article would have been able to put two and two together.

When contrasted with its “all-inclusive” policy, Boy Scouts’ litigation stance on homosexuality appears antithetical to the organization’s goals and philosophy. The exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts’ commitment to a diverse and “representative” membership. Moreover, this exclusionary practice contradicts Boy Scouts’ overarching objective to reach “all eligible youth.” We are satisfied that Boy Scouts’ expulsion of Dale is *based on little more than prejudice* and not on a unified Boy Scout position; in other words, Dale’s expulsion is not justified by the need to preserve the organization’s expressive rights.³⁵¹

The court’s account of why the Scouts expelled Dale attempts to have it both ways. The court’s approach is appealing. On the one hand, what the Scouts did to Dale is simply based on prejudice—prejudice that can be ascribed to the Scouts. On the other hand, this “prejudice” is not “a unified position.”³⁵² In that sense, it cannot be ascribed to the Scouts at all. Thus a court may explain to itself organizational conduct that to the court must seem almost inexplicable (why would any reasonable person discriminate against someone who avows his homosexual status?) while segregating its explanation of the conduct from its understanding of the organization’s goals and philosophy.

As in *Roberts*, the distinction between views, which get constitutional protection, and “stereotypes,” which are constitutionally disfavored, is prominent in *Dale*. “[D]iscrimination based on ‘archaic’ and ‘stereotypical notions’ about homosexuals that bears no relationship to reality cannot be countenanced.”³⁵³ The stereotypes held by the Scouts, then, are not only archaic but false (“bears no relationship to reality”). At the same time, the LAD eliminates sexual orientation “without regard to an organization’s viewpoint.”³⁵⁴ These propositions are logically compatible only if a stereotype is not in fact a viewpoint. The court correctly cited *Roberts* for the proposition that laws that serve the compelling interest of eliminating discrimination are valid even if they work some infringement on an organization’s right of expressive association.³⁵⁵

One can make a strong case that by characterizing viewpoints with which it disagrees as “stereotypes” and deciding that “stereotypes” lack constitutional protection as bases for action, the New Jersey court itself engaged in impermissible viewpoint

351. *Id.* at 1226 (emphasis added).

352. *Id.*

353. *Id.* at 1227.

354. *Id.* at 1228.

355. *See id.* at 1223.

discrimination. If so, the court might well have been justified in thinking that it was merely pursuing one of the logical implications of *Roberts*. Perhaps the court really thought that certain individuals within the Scouting leadership—persons who harbor an irrational prejudice against homosexuality—were responsible for Dale’s expulsion, and that their bigotry cannot be ascribed to the organization for purposes of according it constitutional protection. To baldly state this conclusion, however, would require the court to shore it up with factual assertions about the beliefs of the leaders in question and to commit itself on the crucial constitutional question of the significance of dissent within a private organization for determining whether the organization’s liberty to control its membership and internal structure should be diminished in some way. One of the key problems in *Dale* is the largely hidden methodology (or, perhaps, non-methodology) whereby the court decided when the leaders of the organization were speaking for the organization and when they were not. Left unchecked, a court can disfavor views it dislikes by neglecting to ascribe the views to the organization.

The court confined its discussion of *Hurley* to four paragraphs, two of which simply summarized the facts and holding of the case.³⁵⁶ In attempting to distinguish *Hurley*, the court relied heavily on its prior characterization of the particulars of Dale’s self-revelation.³⁵⁷

Dale’s status as a scout leader is not equivalent to a group marching in a parade. Dale does not come to Boy Scout meetings “carrying a banner.” Dale has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts’ policies. *Cf. Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 253 (Cal. 1998) (Kennard, J., concurring) (proclaiming that Boys [sic] Scouts would have valid First Amendment defense if California’s antidiscrimination law applied because Curran sought “membership in order to promote . . . [his] views”). Additionally, there is no indication that Dale intends to actively “teach” anything whatsoever about homosexuality as a scout leader, or that he will do other than Boy Scouts instructs him to do—refer boys to their parents on matters of religion and sex.³⁵⁸

The court appears to have misrepresented the record here. In the seminar for homosexual teens, Dale did not simply “refer boys to their parents” on whether to lead a double life, seek an accepting gay role model, or find a community of supportive friends. The court had earlier said that opposing homosexuality was not one of the purposes

356. *See id.* at 1228-29.

357. *See id.* at 1229.

358. *Id.*

of the Scouts.³⁵⁹ But the court's exaggerated claims as to what Dale in fact said appear to imply that if Dale had indeed promoted homosexuality (whatever that might mean to the court), the Scouts could expel him. In any event, the court concluded, membership in the Scouts has less to do with expression than parades do:

Nor is Boy Scout leadership a form of "pure speech" akin to a parade. As the *Hurley* Court explained, "the word 'parade' [is used] to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." Unlike a marcher in a parade, Dale does not participate in Boy Scouts "to make a point" about sexuality, but rather because of his respect for and belief in the organization. And unlike a parade, where the "speech itself . . . [is] the public accommodation," permitting Dale to remain in a leadership position in no way prevents Boy Scouts from "invok[ing] its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." We reject the notion that Dale's presence in the organization is symbolic of Boy Scouts' endorsement of homosexuality. On these facts, we do not find forced speech.³⁶⁰

The court's attempt to distinguish *Hurley* is not wholly convincing. Serving as a leader in the Scouts may not be "pure speech," but it has powerfully expressive aspects. The silent example of an openly gay leader may have a powerful influence on boys who have never encountered a positive gay role model. That is a reason, of course, for criticizing the Scouts' policy—not for claiming that the presence of leaders in the group is not expressive. One may suspect that Dale sought to participate in the Scouts as an avowed gay leader for a number of reasons, at least some of which had something to do with making a point about the contributions that openly homosexual men and boys can make to the Scouts and society. Contrary to the court's conclusory assertion, Dale's example would have shaped the Scouts' expression in powerful ways. It may or may not have been symbolic of "endorsement," but it certainly would have sent a message of tolerance and inclusion for gays.

The New Jersey Supreme Court's fundamental error in *Dale* may have been its inability to perceive that tolerance and inclusion are aspects of a viewpoint as much as the prejudice that the court roundly condemned. If so, then Justice Handler's discussion of the First Amendment in his concurrence exemplifies this problem.³⁶¹ The

359. *See id.* at 1223, 1225.

360. *Id.* at 1229 (brackets in original) (citations omitted).

361. In the first part of his concurrence, Justice Handler thoroughly canvassed the court's LAD jurisprudence, emphasizing the importance of selectivity to whether a group can claim

concurrency wrestles forthrightly with what it calls “the distinctive interdependence of expression and identity for lesbians and gay men, and the effect of that merger of speech and status on an organization’s First Amendment freedom of expressive association.”³⁶² The Supreme Court’s cases on expressive association, said Justice Handler, make “an identifiable demarcation between a person’s status and expression.”³⁶³ The cases do so, he said, because “‘unsupported generalizations’ and stereotypes based on a person’s identity are not permissible means of ascertaining the particular views of that person.”³⁶⁴ Like Chief Justice Poritz, Justice Handler put “status-based stereotypes” in a different category than “actual expression.” For him the former could be a protected ground for excluding a potential member only “in certain narrowly prescribed circumstances.”³⁶⁵ Language from the *Roberts* line of cases is certainly available to support this distinction.³⁶⁶ On Justice Handler’s view, groups who seek to exclude based on status bear a heavy burden in showing that their efforts at exclusion are constitutionally protected.³⁶⁷

Thus, for example, when an organization has a unifying purpose that motivates its members to join together as an association or group, i.e., a core purpose, and the inclusion of a particular person would be inconsistent or incompatible with that purpose, the expressive association rights of the organization would support the exclusion. A “specific expressive purpose” is frequently, although not necessarily, the core or primary purpose of an organization. Such a central purpose, if compromised, would most evidently inhibit an association’s ability to effectively advocate its viewpoints. The critical point is that a “specific expressive purpose” must be clear, particular, and consistent.³⁶⁸

protected status under the statute and observing that the Scouts are none too selective in practice. *See id.* at 1230-35 (Handler, J., concurring). “The reality is that Boy Scouts rarely, if ever, denies membership based on any selection criteria other than age or gender.” *Id.* at 1234 (Handler, J., concurring).

362. *Id.* at 1235-36 (Handler, J., concurring).

363. *Id.* at 1236 (Handler, J., concurring) (citing *Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987); *New York State Club Assoc. v. City of New York*, 487 U.S. 1, 13 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984)).

364. *Id.* at 1236 (Handler, J., concurring) (quoting *Roberts*, 468 U.S. at 628).

365. *Id.* (Handler, J., concurring).

366. *See, e.g., New York State Club Assoc.*, 487 U.S. at 13 (“It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.”).

367. *See Dale*, 734 A.2d at 1236-37 (Handler, J., concurring).

368. *Id.* (Handler, J., concurring) (citation omitted). Justice Handler, who also argued that the Scouts in fact had no clear and consistent message on homosexuality, perhaps was most

The irony of this approach, as Justice O'Connor pointed out in *Roberts*, is that it gives a group liberty to exclude according to the content of the group's speech.³⁶⁹ But it was precisely this approach, Justice Handler contended, that the U.S. Supreme Court had employed in *Hurley*.³⁷⁰ First, the Court had specifically noted that the parade organizers in that case had not tried to exclude any individual gay, lesbian, or bisexual as such.³⁷¹ Second, the Court had determined that GLIB was formed not only to show that homosexuals of Irish descent existed but to celebrate their identities and support their fellows who wished to march in the New York Saint Patrick's Day parade.³⁷² Third, the Court had determined "that the parade itself is a 'form of expression, not just motion.'"³⁷³ Justice Handler concluded that the Court's "extrapolation from the record of a basis for concluding that GLIB had sought to engage in expression that was conspicuously and unmistakably separate from simply serving to identify its members" was "fundamental" to the Court's analysis.³⁷⁴ Hence "[t]he Supreme Court's description of that expression as distinct from status was central to its *Hurley* holding."³⁷⁵

Having neatly distinguished the precise holding of *Hurley*, Justice Handler tried to suggest that the general presumption favoring exclusion that the Court had employed in *Hurley* was inapposite in *Dale*.³⁷⁶ Homosexual status, he suggested, differs in important ways from race or sex.³⁷⁷

This case does not squarely fall within the paradigm suggested by those authorities defining the contours of the expressive association right because the speech here is so closely intertwined with the identity of the speaker. Thus, as the Court recognizes, while Boy Scouts frames its expulsion of Dale as grounded on an objection to his expression of his homosexuality,

persuasive on this point when he noted that the Scouts had "repeatedly renewed the charters of religious organizations adhering to a view that homosexuality is moral." *Id.* at 1241 (Handler, J., concurring). Not only that, but the Scouts had chartered a large number of units sponsored by public entities. *See id.* (Handler, J., concurring).

369. *See Roberts*, 468 U.S. at 633-34 (O'Connor, J., concurring in part).

370. *See Dale*, 734 A.2d at 1237 (Handler, J., concurring).

371. *See id.* (Handler, J., concurring).

372. *See id.* (Handler, J., concurring).

373. *Id.* (Handler, J., concurring) (quoting *Irish-Am. Gay, Lesbian and Bisexual Group v. Hurley*, 515 U.S. 557, 568 (1995)).

374. *Id.* (Handler, J., concurring).

375. *Id.* (Handler, J., concurring).

376. *See id.* at 1237-38 (Handler, J., concurring).

377. *See id.* (Handler, J., concurring).

that exclusion is tantamount to one based on Dale's status as a homosexual.³⁷⁸

What follows from this? Is exclusion based on status protected because of its connection to speech about status? Justice Handler would say No. Arguing that the Court had recognized the "speciousness of drawing a distinction between discrimination grounded in expression versus status in this context," he quoted at length from a dissent from denial of certiorari by Justice Brennan.³⁷⁹ Justice Brennan had argued that a gay person's self-identifying speech can be "realistically impossible to separate" from status.³⁸⁰

Status and expression, on this view, intersect when a gay person identifies himself or herself. Indeed, self-identification of this sort "not only describes, but performs, the action named."³⁸¹ Justice Handler quoted scholars who argue that gay or lesbian self-identification does not simply reveal identity, as if it were merely the communication of some pre-existing sexual identity that the communication leaves wholly unchanged, but that it realizes or constructs identity.³⁸² The word and the act and what they signify here are intertwined. All this might lead one to think that the Scouts are right in attaching significance (though maybe the wrong kind) to whether a boy says that he is gay or not. Justice Handler did not, however, hold that the Scouts have a constitutional right to act upon a view of this sort. The fundamental optic through which he viewed gay self-identification is not the lens of free speech, but of antidiscrimination law, for purposes of which "the relevance of self-

378. *Id.* (Handler, J., concurring). Here Justice Handler cited *Able v. United States*, 880 F. Supp. 968, 973 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996), a case involving a challenge to the United States military's policy excluding avowed homosexuals from service. In a parenthetical note, Handler quoted the district court for the proposition that persons in the armed forces who avow their status "have done no more than acknowledge who they are, that is, their status," and that such speech "implicates the First Amendment value of promoting individual dignity and integrity." *Dale*, 734 A.2d at 1238 (Handler, J., concurring).

379. *Id.* (Handler, J., concurring).

380. *Id.* (Handler, J., concurring) (quoting *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1009 (1985) (Brennan, J., dissenting from denial of cert.)). One might draw a different conclusion from what the district court said in *Able* and what Justice Brennan said in *Rowland*. One might think that if avowal of status is protected speech, so should exclusion based on avowed status.

381. *Id.* (Handler, J., concurring) (quoting Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 550 (1998) (footnote omitted)).

382. *See id.* (Handler, J., concurring) (citing Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443, 468 (1998) ("Self-realization [] is what speech (including expressive activity) makes possible."); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993) ("Self-identifying speech does not merely reflect or communicate one's identity; it is a major factor in constructing identity.")).

identifying speech is not so much in realizing identity, as in its singular role in revealing identity.”³⁸³

The importance of self-identifying speech inheres in its legal effect—that is, in the functional capacity of such speech to disclose or clarify the status of a person when that status is entitled to protection against discrimination. A person covered by the LAD has the right to enjoy his or her protected status without suffering discrimination because of who he or she is. If the very means of making those characteristics known—self-identification—can legitimately justify discrimination against that person, then the antidiscrimination protections of the LAD are illusory.³⁸⁴

Justice Handler proceeded to compare gay identity to religious identity. Both, he noted, “are unknowable unless the person self-identifies.”³⁸⁵ Both Justice Handler and Chief Justice Poritz neglected to say what the implications of the court’s decision would be for girls and atheists, but one can take the comparison as something of a sign that the court may require the Scouts to admit persons who refuse to take the Oath.

Implausibly, Justice Handler claimed—immediately after quoting from the article that cost Dale his place in the Scouts—that Dale had not expressed “more general views on the morality, social implications, history, or etiology of homosexuality in his role as a Boy Scout leader[] which directly conflicted with Boy Scouts’ stated positions.”³⁸⁶ Perhaps the qualification “in his role as a Boy Scout leader” is meant to indicate that some of Dale’s speech about homosexuality occurred when he was, so to speak, off-duty; if so, one doubts that the Scouts regard their leaders’ “roles” in quite this way.³⁸⁷

In a coda of sorts to his concurrence, Justice Handler argued that it was “impermissible” to use status stereotypes “to import additional meaning to self-identifying speech.”³⁸⁸ Some of this no more than repeated Justice Handler’s earlier claims. But then he began to speak about the particular “stereotypes” that he said the court was renouncing.³⁸⁹ First was the notion that homosexuals are inherently

383. *Id.* (Handler, J., concurring)

384. *Id.* (Handler, J., concurring).

385. *Id.* at 1238-39 (Handler, J., concurring).

386. *Id.* at 1240 (Handler, J., concurring).

387. *See, e.g.*, 1972 Scoutmasters’ Handbook (quoted in *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 276) (N.J. Super. Ct. App. Div. 1998) (“You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons. . . . What you are speaks louder than what you say. This ranges from simple things like wearing a uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.”).

388. *Dale*, 734 A.2d at 1241-42 (Handler, J., concurring).

389. *See id.* at 1242-43 (Handler, J., concurring).

immoral; second was the notion that homosexuals are more likely than others to molest children.³⁹⁰ Ideas of this sort, he said, were to “be rejected;” “patently false; “unfounded.”³⁹¹ Then he criticized the trial court for reasoning that because most or all of the states criminalized sodomy at the time of the founding of the Scouts, the Scouts had an implicit policy at the founding against “active homosexuality.”³⁹² The simple answer to the trial court’s argument is that even if it is sound it would not resolve what the Scouts should be required to do for persons who merely acknowledge their homosexual status to others. But Justice Handler, who sought to demolish the assumptions that he thought lay behind the argument, went further.³⁹³

Sodomy laws, as applied against homosexuals, reflect the same stereotypical thinking that we now recognize as invidious, including untenable assumptions about the morality of homosexuals, that have long been *superseded and overcome*. In successfully defending the constitutionality of its sodomy statute, for example, the State of Georgia relied on the stereotypes of homosexuals as immoral people and child molesters. That same sodomy statute was later struck down as unconstitutional under the Georgia State Constitution. The 1979 repudiation of New Jersey’s sodomy statutes is further evidence of *the evolution in social thinking about homosexuality*.

Sodomy laws and their implicit moral assumptions about homosexuals very much parallel miscegenation statutes, which were grounded in similar stereotypical notions concerning the morality of African Americans. Miscegenation laws, which existed in many states at Boy Scouts’ founding in 1910, were grounded in antiquated notions of race and morality and were considered valid “measures designed to maintain White Supremacy” until declared unconstitutional by the United States Supreme Court. The indefensibility of basing contemporary moral views regarding race on those laws is obvious. The same is true of placing current reliance on the

390. *See id.* (Handler, J., concurring).

391. *Id.* at 1243 (Handler, J., concurring).

392. *Id.* at 1244 (Handler, J., concurring) (quoting from opinion of trial court) (“it is unthinkable that in a society where there was universal governmental condemnation of the act of sodomy as a crime, that the BSA could or would tolerate active homosexuality if discovered in any of its members”).

393. *See id.* (Handler, J., concurring). To Justice Handler, the trial judge’s resort to the sodomy laws showed that the trial judge had equated homosexual status with homosexual conduct. *See id.* at 1244 n.6 (Handler, J., concurring). That would be true if the trial judge did not believe that the Scouts expelled Dale because they thought he was sexually active. But perhaps this is not the case. The stipulation on which the trial judge’s decision was based, according to the Appellate Division, said that Dale was a “sexually active homosexual.” *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 277 (N.J. Super. Ct. App. Div. 1998).

archaic moral views underlying sodomy laws, which are *totally inconsistent with present day conceptions* of homosexuality.³⁹⁴

The logic of the argument is plausible, though not overwhelming, at least when one tones down the language; “totally inconsistent” seems a little strong only fourteen years after *Bowers v. Hardwick*.³⁹⁵ Put otherwise, the argument demonstrates that it is by no means certain that the Scouts retain a 1910 or 1960 understanding of sodomy; the argument does not demonstrate with certainty that the Scouts have discarded the old understanding. The argument is a little less plausible when it gets to the subject of homosexuality and “traditional moral values.”

It is not tenable to conclude that because at one time “traditional moral values” were based on unsupportable stereotypes about homosexuals, those values have survived and endured unchanged in contemporary times. It is similarly untenable to conclude, in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts—a federally chartered and nationally recognized organization with significant ties to governmental institutions and public entities that fully adhere to contemporary laws rejecting anachronistic stereotypes about homosexuality—remains entrenched in the social mores that existed at the time of its inception.

Stereotypes cannot be invoked to extend the meaning of self-identifying expression of one’s own sexual orientation, and thereby become a vehicle for discrimination against homosexuals. Such stereotypes, *baseless assumptions*, and *unsupported generalizations* reflecting a *discredited* view of homosexuality as criminal, immoral and improper are discordant with current law and public policy. Accordingly, they cannot serve to define contemporary social mores and morality. Boy Scouts’ adherence to “traditional moral values,” its “belief in moral values,” and its uncontroverted purpose to “encourage the moral development of its members,” remain undisturbed and undeterred by Dale’s open avowal of his homosexuality.³⁹⁶

Justice Handler, of course, was not intending primarily to inveigh against baseless assumptions on the ground that they were baseless. His point instead was to call into question the Scouts’ factual claim that the traditional values for which they have always stood and continue to stand are values that do not include gays. Such a claim may be fundamentally problematic in a time of rapid social change

394. *Dale*, 734 A.2d at 1244 (Handler, J., concurring) (emphasis added) (citations and footnote omitted) (discussing *Powell v. State*, 510 S.E.2d 18, 25-26 (Ga. 1998)).

395. 478 U.S. 186 (1986).

396. *Dale*, 734 A.2d at 1244-45 (Handler, J., concurring) (emphasis added) (citation omitted).

when a great deal is up for grabs and much of what recently was thought traditional and desirable is now thought laughable. The argument on this particular point, however, is less plausible than the argument about sodomy because state laws against sodomy, as applied to gays, have largely been repealed or invalidated.

The words and phrases emphasized above make clear the assumptions in light of which Justice Handler's claim about traditional values make a great deal of sense. The assumptions are grounded in a vision of moral progress that is relentless, unidirectional, and clearly discernible (despite the nagging problem that present-day notions as to what is obviously good or moral may be superseded tomorrow by still more current notions). One is inclined to agree with Justice Handler about many of the details of the vision (for after all one finds it hard not to believe that moral progress is possible for humankind and that it has to some extent occurred of late), though not (one likes to think) with the attitude he employs toward those who disagree. The tone is more that of the hectoring headmaster, lecturing boorish, complacent boys, than of the inquisitor seeking heretics to convert or punish. But the intolerance, if I may use that word, is strong. Like the best kind of intolerance, it is not particularly aware that it is intolerant—that alternative visions are available.

Were it not for its puzzling abuse of the record in some prominent places, the New Jersey Supreme Court's decision in *Dale* would be relatively unremarkable. Both Chief Justice Poritz's and Justice Handler's opinions are plausible and coherent readings of *Roberts* that limit *Hurley* narrowly—as a fair reading of the letter of *Hurley* might allow a court to do. The opinions give short shrift to some crucial arguments in the Scouts' favor—their free exercise claim, for instance—but do not, on the whole, represent anything like an unfaithful reading of the U.S. Supreme Court's fluid free association jurisprudence. That said, the opinions share many of the principal faults of *Roberts*. The writers arrogate to themselves the power to determine what the Scouts mean by what they say and characterize evidence to the contrary as evidence only of prejudice. They describe the Scouts as acting on impermissibly false or outdated ideas and in the same breath claim that the Scouts' ideas are not viewpoints (or that the Scouts do not in fact hold to them).

*Curran v. Mount Diablo Council of the Boy Scouts of America*³⁹⁷ provides a sharp contemporary contrast to *Dale*, albeit without

397. 952 P.2d 218 (Cal. 1998).

attending directly to the federal questions decided in the latter case. In *Curran*, a majority of the members of the California Supreme Court entirely avoided those questions by interpreting the state's public accommodations act, the Unruh Act,³⁹⁸ not to apply to the Scouts. Timothy Curran, also a former Eagle Scout, applied for a position as an assistant scoutmaster and was rejected after a Scouting official read a newspaper article identifying him as a self-described gay youth activist.³⁹⁹ Curran's suit began in the 1980s; it was delayed by an appellate court remand and by a stay pending the Supreme Court's disposition of *Duarte*.⁴⁰⁰ The Supreme Court of California noted in a footnote that Curran had not claimed that the Scouts were state actors, and that the Scouts had not claimed that their federal charter exempted them from state law.⁴⁰¹ The trial court held that the Unruh Act applied to the Scouts,⁴⁰² that the Scouts had failed to show that its application to them would violate their rights to intimate association, but that it would violate their right to expressive association.⁴⁰³ The Scouts, held the trial court, had demonstrated a nexus between their exclusion and the system of beliefs that defined the organization.⁴⁰⁴ The California Court of Appeal affirmed, holding that the Unruh Act did not apply to the Scouts and that the Act would violate the Scouts' right of intimate association, as well as their right of expressive association, if applied to them.⁴⁰⁵

Affirming the judgment of the Court of Appeals, the California Supreme Court did not purport to reach any federal constitutional questions. Chief Justice George wrote the opinion of the court:⁴⁰⁶

“[N]o prior decision has interpreted the ‘business establishments’ language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members.”⁴⁰⁷

The court's language demonstrates an acute background awareness of the strictures of *Roberts* and subsequent cases.

398. See CAL CIV. CODE § 51 (West 1998). The Act has been interpreted by judicial decision to forbid discrimination based on sexual orientation. See *Curran*, 952 P.2d at 239 (Mosk, J., concurring in the result).

399. See *id.* at 219, 221.

400. See *id.* at 222.

401. See *id.* at 223 n.4.

402. See *id.* at 222.

403. See *id.* at 225.

404. See *id.*

405. See *id.* at 227.

406. See *id.* at 239.

407. *Id.* at 236.

[W]e do not believe that the circumstance that the Boy Scouts is generally nonselective in its admission policies, and affords membership to a large segment of the public, is itself sufficient to demonstrate that the organization reasonably can be characterized as the functional equivalent of a traditional place of public accommodation or amusement. The record establishes that the Boy Scouts is an organization whose primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose. Unlike membership in the Boys' Club of Santa Cruz, Inc. [which the court had held in a prior case was covered by the Act], membership in the Boy Scouts is not simply a ticket of admission to a recreational facility that is open to a large segment of the public and has all the attributes of a place of public amusement. Scouts meet regularly in small groups (often in private homes) that are intended to foster close friendship, trust and loyalty, and scouts are required to participate in a variety of activities, ceremonies, and rituals that are designed to teach the moral principles to which the organization subscribes.⁴⁰⁸

The court significantly qualified its holding that the Scouts were exempt from the Act, indicating that it had “no doubt”—as the Scouts' counsel had conceded at oral argument—that the Act prohibited discrimination in “actual business transactions with nonmembers engaged in by the Boy Scouts in its retail stores and elsewhere.”⁴⁰⁹ Nonetheless, “[t]hose business transactions are distinct from the Scouts' core functions and do not demonstrate that the organization has become a commercial purveyor of the primary incidents and benefits of membership in the organization.”⁴¹⁰ It emphasized that its holding as to the applicability of the Unruh Act did not mean that the Scouts necessarily had power to discriminate based on

race, or on other constitutionally suspect grounds, with impunity. The Unruh Civil Rights Act is not the only legislative measure that is aimed at curbing discrimination on the basis of race, and in other contexts courts have upheld the imposition of a variety of sanctions—including the denial of tax-exempt status—upon an otherwise qualified nonprofit entity that engages in racial discrimination.⁴¹¹

The court concluded that the applicability of the Act to the Scouts presented “a policy issue that lies within the province of the

408. *Id.*

409. *Id.* at 238 (footnote omitted).

410. *Id.*

411. *Id.* at 239 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983) (holding that Internal Revenue Service's denial of tax-exempt status to schools and colleges that discriminate based on race, as applied to religious schools and colleges, neither exceeds statutory authority nor violates Constitution)).

legislative, rather than the judicial, branch . . . [s]ubject, of course, to constitutional constraints.”⁴¹²

Four justices wrote concurring opinions.⁴¹³ Two raised constitutional concerns.⁴¹⁴ Justice Kennard, who also joined the opinion of the court, noted that the majority opinion had not cited the rule of statutory construction that favors avoiding constitutional problems.⁴¹⁵ She identified this canon as a basis for her agreeing with the majority.⁴¹⁶

[I]t is highly doubtful that a state may, consistent with the First Amendment guarantees of freedom of speech and of association, compel an organization like the Boy Scouts to accept as a member someone who actively opposes one of that organization’s basic precepts and who seeks membership in order to promote those contrary views.⁴¹⁷

She described as “compelling” the argument that requiring the Scouts to accept “anyone . . . who espouses views contrary to its guiding precepts” would be unconstitutional.⁴¹⁸ For her, *Roberts* was distinguishable, and *Hurley* directly relevant, precisely for this reason.⁴¹⁹ She cited the part of *Hurley* that applied the *Roberts* analysis, describing this language as providing an alternative basis for the result in that case.⁴²⁰ Construing the Unruh Act to avoid a likely unconstitutional result, she noted, was in keeping with Professor

412. *Id.*

413. *See id.* at 218.

414. For Justice Mosk, Curran “is the very kind of person whom [the Council] should receive most eagerly—a person whom it has itself honored as an Eagle Scout.” *Id.* at 240 (Mosk, J., concurring in the result). But the Act, he said, did not apply to the Scouts. His lengthy concurrence argued for overruling some recent decisions construing the Act that applied the act beyond “areas of activity encompassing proprietor-patron relationships—which involve the providing of goods or services, nongratiotously, for a price or fee, in the course of relatively noncontinuous, nonpersonal, and nonsocial dealings.” *Id.* at 251 (Mosk, J., concurring).

Justice Werdegar worried that the court’s decisions provided no guidance for organizations seeking to determine whether the Act applied to them. *See id.* at 259-60 (Werdegar, J., concurring). She criticized the majority for “suggest[ing that] an organization can be broken down into its constituent functions for the purpose of deciding whether the act applies.” *Id.* at 258 (Werdegar, J., concurring). The court’s “piecemeal mode of analysis,” she said, failed to comport with the text of the statute and invited future litigation. *Id.* at 259 (Werdegar, J., concurring).

415. *See id.* at 253 (Kennard, J., concurring).

416. *See id.* (Kennard, J., concurring).

417. *Id.* (Kennard, J., concurring).

418. *Id.* at 254 (Kennard, J., concurring).

419. *See id.* at 254-55 (Kennard, J., concurring).

420. *See id.* at 255 (Kennard, J., concurring) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 580-581 (1995)).

William Eskridge's suggestion that antidiscrimination laws be construed cautiously in light of *Hurley*.⁴²¹

Justice Brown's concurrence said that

recogniz[ing] a distinction between an organization's formulation and implementation of membership policies and its commercial activities . . . is not only consistent with the statutory language and legislative intent but, for the reasons cogently expressed by Justice Kennard in her concurrence, imperative when those policies implicate expressive association and free speech. Any definition of business establishment that failed to make such an accommodation would raise serious constitutional questions as to application of the act.⁴²²

Curran controlled the result in two other cases that came before California's supreme court in 1998. In *Randall v. Orange County Council, Boy Scouts of America*,⁴²³ the plaintiff boys had been barred from participating in Scouting on account of their "failure or refusal to participate in religion-related elements of the scout program and because of [their] refusal to affirm a belief in God."⁴²⁴ In *Yeaw v. Boy Scouts of America*,⁴²⁵ a case in which a girl sued the Scouts for admission to a troop, the supreme court dismissed review and remanded the case without writing an opinion.

This essay does not try to resolve the questions of statutory interpretation involved in both *Dale* and *Curran*. It does, however, advance some approaches to tackling the knotty constitutional problem that *Dale* confronted head-on and *Curran* avoided. I argue that a number of vital constitutional doctrines protect the Scouts' right to consider sexual orientation, religion, and sex in choosing leaders and members.⁴²⁶

421. See *id.* at 256-57 (Kennard, J., concurring) (quoting Eskridge, *supra* note 210, at 2462-63).

422. *Id.* at 261 (Brown, J., concurring in the judgment). Justice Brown also expressed agreement with Justice Werdegar's criticism of the court's Unruh Act jurisprudence and "fully endorse[d] [Justice Mosk's] statutory analysis and the conclusions which flow from it." *Id.* at 260 (Brown, J., concurring).

423. 952 P.2d 261 (Cal. 1998).

424. *Id.* at 262. Initially, the Council said that the plaintiffs could remain in their "den" but could not advance in Scouting ranks until they promised to do their duty to God as part of the Cub Scout Promise. At trial, however, officials of the Council and of the national organization "stated that the boys may not participate at all as Cub Scouts if they do not believe in God, because a state of disbelief is inconsistent with the Cub Scout Promise to perform a duty to God." *Id.* at 263.

425. 77 Cal. Rptr. 2d 705 (Cal. 1998).

426. That the Scouts have a right to discriminate, as I believe they do, says nothing about whether it is right or good for the Scouts to discriminate. This essay explores only the former question.

My argument does not linger long on *Roberts*, whose staying power, it seems, is substantially in doubt, despite its having been a 7-0 decision.⁴²⁷ Sixteen years after the case was decided, only three of the Justices of that day remain on the Court; of those three, only Justice Stevens joined Justice Brennan's opinion.⁴²⁸ *Hurley*, by contrast—also a unanimous decision—exhibits a libertarian rhetoric that is quite at odds with the tenor of *Roberts*. And none of the Justices who decided *Hurley* have left the Court.

It is not just freedom of speech and the logic of *Hurley* that should compel protection for the Scouts' choices concerning leadership and membership. At least two other important First Amendment doctrines point in the same direction: the freedom of intimate association and the liberty of churches to make decisions about who teaches and who belongs in their congregations. This is so even though the Scouts, like the Jaycees, hold themselves out as offering a service to a wide, largely undifferentiated public; for the Scouts' "services" consist largely in the inculcation of a set of distinctive principles and a way of looking at the world. I consider the constitutional doctrines in turn.

V. THE LIBERTY OF AN ASSOCIATION TO EXCLUDE PROSPECTIVE MEMBERS AND LEADERS

A. *Freedom of Speech (Expressive Association): When Who I Am Is All I Want to Say*

After *Hurley*, the forced admission into the Scouts of persons who advocate the acceptance of homosexuality—leaders or members—can with relative ease be characterized as an unconstitutional infringement on private associations' freedom to speak as they choose. That principle might be sufficient to decide *Dale*, given the peculiar facts of that case—a case where the plaintiff seeks to be a leader, not a member, within the group, and where he aggressively advocates a position on the question of homosexuality that is directly contrary to the position taken by the Scouts.⁴²⁹ It

427. "For someone evaluating the two opinions [in *Roberts*], the numbers are a bit misleading." Greenawalt, *supra* note 36, at 138-39 n.11.

428. Former Justice Rehnquist, now Chief Justice Rehnquist, and Justice O'Connor remain also. Prior to *Duarte*, Justice Scalia replaced Chief Justice Burger; prior to *New York State Club Assoc.*, Justice Kennedy replaced Justice Powell. Since then, Justices Souter, Thomas, Ginsburg, and Breyer have joined the Court.

429. The New Jersey appellate courts' attempt to recharacterize the Scouts' speech as indifferent to homosexuality is likely to fail, not only because the courts' characterizations seem incompatible even with the record as described by the courts, but because "the fundamental rule

should make no difference whether proscriptions on homosexuality are at the “center” of the Scouts’ message, if only because reliable determinations of centrality are difficult if not impossible for judges to make.⁴³⁰ Nor should it make a difference that the Scouts have chosen to speak subtly and carefully about homosexuality, rather than loudly and noisily.⁴³¹ It is not only “clear, particular, and consistent” speech that deserves protection; communication that is diffuse or elliptical can be just as valuable.⁴³² Modes of communication are inseparable from the substance of what they communicate. That is why forcing someone to alter the form of her speech in order to win constitutional protection for her communication differs little from making constitutional protection for the communication contingent on its substance. In both cases state coercion is employed to shape the

of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message [not the State].” *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). The American Civil Liberties Union said it well, in the amicus curiae brief that it submitted to the Supreme Court in *Hurley*:

In *United States v. Ballard*, 322 U.S. 78, 86-87 (1944), for example, this Court explicitly ruled that the First Amendment bars judicial inquiry into the substantive coherence and content of an individual’s religious assertions. Similarly, in *Cohen v. California*, 403 U.S. 15 (1971), this Court rejected the notion that the existence of alternative means of conveying a message justifies the government in forbidding a speaker to use a particularly offensive mode of discourse. The *Cohen* Court explicitly noted that the speaker is master of his or her message. . . .

When the Massachusetts judiciary second-guessed the speaker in this case to assure itself that the speaker’s “true” message—which the Massachusetts courts determined was no message at all—would not be compromised by the forced inclusion of a contingent of unwanted marchers, it started down a dangerous road. If the state is free to recharacterize a speaker’s “true” message in an effort to uphold its regulation of speech or association, the potential for censorship is vastly increased. Thus, in deciding what the sponsor of a parade intends to say, the assertions of a parade’s sponsors about the parade’s intended message must be taken as determinative.

Motion for Leave to File and Brief Amicus Curiae of the American Civil Liberties Union in Support of Neither Party, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (No. 94-749) (citations omitted), available in LEXIS, U.S. Supreme Court Briefs.

430. *Cf. Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) (holding that prohibition on peyote use is not unconstitutional as applied to church members who ingest peyote in religious services) (“What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is ‘central’ to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’”) (citation omitted).

431. A plausible explanation for why the BSA treads softly in expressing its opposition to homosexuality is that it wishes to avoid needless controversies with individual troops or Councils that may not share its enthusiasm for its rule on homosexuality. Even if no controversies were foreseeable, the Scouts still might want to remain relatively quiet about the subject. That this decision is prudent, that it aids the organization’s material interests, makes it no less a decision about what to say and how to say it that deserves constitutional protection.

432. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1237 (N.J. 1999).

content of a private party's communication. Employing coercion to induce a person to speak, of course, violates her rights as much as does forbidding her to speak.⁴³³

The choice of who will be a leader in an organization like the Scouts will always be "inherently expressive." The same goes, probably, for the prospective member who chooses to say that there is nothing wrong with homosexuality and that the Scouts' policy should be changed, or who cannot conscientiously affirm a pledge to honor God with his life. But what, for instance, of the boy who simply acknowledges (avows) that he is gay? That is a harder case, but it would be little more than a narrow extension of *Hurley* to hold that groups may forbid the admission of individual members who say something unwelcome even when the disfavored remark is no more than an acknowledgment—or assertion—of one's identity.⁴³⁴

This reasoning, by itself, would not protect the Boy Scouts from the forced admission of girls, which protection one supposes they would like very much to have; girls need not say anything to disclose their identity. Her mere presence would be sufficient to identify her as belonging to the excluded class. What "message" does being a girl send?

Justice O'Connor's metaphor of "voices" provides something of an answer to this question.⁴³⁵ The metaphor reminds us that girls and boys each do have distinctive things to say, alone and together; the

433. See *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."); see also *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that the right to speak and the right to refrain from speaking are complimentary rights under the First Amendment); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (invalidating Florida statute requiring newspapers, whenever they criticize candidates for nomination or election to public office, to print replies to the criticisms in their pages by the candidates themselves); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 642 (1943) (compelling public school students to salute the American flag violates First Amendment). *But see* *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973) (upholding city Human Relations Ordinance as applied against newspaper that put help-wanted employment advertisements in columns classified by sex, where employment advertised was subject to anti-discrimination provisions of ordinance). Compare *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980), where the Court unanimously rejected a claim that the First Amendment (among other constitutional provisions) barred a state from requiring a shopping mall owner to permit students to distribute literature on mall premises. In *Hurley*, the Court sharply distinguished *PruneYard* as not involving a threat to "[t]he principle of speaker's autonomy." *Hurley*, 515 U.S. at 580.

434. The stigma that such a boy would suffer from rejection, however, would likely be substantial, and in some circumstances—say, if a boy's orientation were to be disclosed to his fellow Scouts against his will—one can certainly imagine that even the Court would view the case in a light quite favorable to the boy.

435. See *Roberts v. United States Jaycees*, 468 U.S. 609, 633, 634, 636 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

metaphor also reminds us (we think of a choir) that sometimes separation produces marvelous harmonies, although at other times it is better for all to be together. The enterprise that is Boy Scouting is designed to further a distinctive vision of male excellence by molding boys into young men of a specific sort. That the exclusion of girls might be essential to the enterprise hardly seems implausible. On Justice O'Connor's theory, the Scouts would in any event have absolute freedom to exclude (except perhaps on racial grounds)—all in the name of preserving a distinctive voice, of speaking in a particular manner inseparable from the substance of what is spoken.⁴³⁶

This way of regarding expression, as a manifestation of voice more than as a conveyance of a discrete “message” separable from voice, provides some support to what may be the weakest link in the Scouts' defenses. The weak link is this: if the Scouts' stated policy is characterized as an exclusion of those who promote the view that homosexuality is compatible with good male character, then the Scouts have not chosen to enforce their policy uniformly. A number of individual Scouts disagree with the national organization concerning its exclusionary policies, yet they have not been expelled from the group.⁴³⁷ If the Scouts expel avowed homosexuals on account of their message, why do they not expel heterosexuals who espouse the same message? Must not the difference in treatment betray a discriminatory intent in practice? The Scouts' best answer to this question comes precisely from an insight articulated by some prominent scholars and repeated by Justice Handler: the line between status and expression is a thin and watery one. An assertion of identity bridges the gap between the two.⁴³⁸ For many of us,

436. *Cf. Hurley*, 515 U.S. at 569-70 (“[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”). On the relationship between membership and voice, see generally ROSENBLUM, *MEMBERSHIP AND MORALS*, *supra* note 12, at 191-238. For her, “voluntary association typically precedes expression;” to assume “that voice precedes association” is to have it backwards. *Id.* at 205.

437. *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 294 (N.J. Super. Ct. App. Div. 1998) (referencing the fact that over 90 million boys have participated in the scouts since its inception and though statistically some of these members must have been gay, none of those members were expelled).

438. *See, e.g.,* Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 123-26 (1998) (defining the gay speaker's “coming out” as inseparable from gay identity); Eskridge, *supra* note 210, at 2442-43; Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1716-19 (1993) (discussing how communication of one's identity is the creation of identity which leads to legal consequences). Many advocates would disagree, at least in part, with the implication that I draw from this insight—the implication that because avowals of identity with regard to sexual

assertions of identity not only affirm deep convictions about who we are but allow us to develop and modify our past conceptions. Assertions of identity are thus imaginative constructions.⁴³⁹ Hence exclusions of “avowed homosexuals” can be no less distinctively expressive than exclusions of those who avow the goodness, or the moral indifferentness, of homosexual conduct or status, or countless other ideas. To assert one’s identity as gay is of course to convey an idea quite distinct from advocacy for tolerance or acceptance of homosexuals. The Scouts may disapprove of the former idea more than the latter, or they may not. In either case they are entitled to reject one wholeheartedly and not the other.

This insight is somewhat at odds with the spirit, but probably not the letter, of *Roberts*, whose “tests” are singularly manipulable. Hence the Supreme Court, assuming that it reverses *Dale*, need not explicitly abandon any particular category employed in *Roberts*, but the Court will probably have to rearrange or recharacterize some of the categories. It would not be difficult for the Court to conclude that the Scouts have shown a strong relationship between their membership and leadership selection decisions and their expressive activities in light of the Scouts’ historic commitment to teaching boys moral character.

Despite the state’s compelling interest in eliminating discrimination against gays, the Court might say that the means chosen to achieve it in *Dale* are not “unrelated to the suppression of ideas,” because the LAD explicitly defines “sexual orientation” by reference to expression.⁴⁴⁰ Or the Court might reason that a less restrictive means of achieving the interest is available—for instance, a statute that forbade an organization from ferreting out the sexual orientations of members and prospective members so as to determine whether to expel them. These options would probably require the Court to say (or at least to imply) that identity speech is speech that an organization can rely on in deciding whether to expel a participant.

orientation are expression, an organization’s exclusion of those who bear that identity can be expressive conduct entitled to full First Amendment protection.

439. By the same token, the autobiography—a potentially much more rich and deep “assertion of identity,” presented in the form of a narrative or story, an account of an unfolding development—is no less an imaginative construction, no less a mode of “expression,” than the novel or poem.

440. *Dale*, 706 A.2d at 277-78 (quoting N.J.S.A. 10:54). The statute defines “affectional or sexual orientation” as “male or female heterosexuality, homosexuality, or bisexuality by inclination, practice, identity, or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.” *See id.*

The Court might try to avoid some of the larger issues involved in *Dale* by ignoring the factual assertions made by the New Jersey appellate courts and resting its decision on the breadth of Dale's particular assertions as an advocate for acceptance of gay identity. The Court could say that the Scouts are entitled to choose their leaders as they please and abstain from deciding any questions about members. But the larger issues will recur. By aggressively characterizing the facts as they have, the New Jersey courts have invited the Court to decide the larger issues. It is more likely that the Court will at least seriously consider moving in the direction of Justice O'Connor's rule of plenary autonomy for at least some organizations in some instances.

B. Freedom of Intimate Association: Families and Schools—and Little Else?

As a practical matter, the Scouts would do well not to rely primarily on the protection of the constitutional doctrine of protection for intimate associations. That is not to say that the Scouts might not have a good case in theory. As a national organization of cells or "troops" in which boys have substantial opportunities to receive individual attention from adults, the Boy Scouts can plausibly be viewed as a consortium of intimate associations organized for the cultivation of individual moral character. One adult participates for every three to four boys who do;⁴⁴¹ and to many boys, especially those without fathers, the experience could be quite close to the experience of family, which the Court has repeatedly accorded special constitutional protection.

The Scouts' emphasis on moral education lends additional support to any intimate association argument. When Justice Brennan, writing in *Roberts*, said that "[t]he Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State,"⁴⁴² he cited as authority for this

441. See "What is Cub Scouting?", "What is Boy Scouting?" (visited Feb. 28, 1999) <<http://www.bsa.scouting.org/nav/public.html>> (as of December 31, 1998, over half a million adults participate in activities involving roughly two million "Tiger Cub Teams," Cub Scouts, and "Webelos"; a little over half a million adults participate in activities involving roughly one million Boy Scouts and "Varsity Scouts").

442. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *but cf. id.* at 623 ("The right to associate for expressive purposes is not, however, absolute.").

proposition none other than *Meyer v. Nebraska*⁴⁴³ and *Pierce v. Society of Sisters*.⁴⁴⁴ In *Meyer* and *Pierce*, the Court did not consider the size or the selectivity of the schools affected by government intrusion when it invalidated the state statutes at issue in those cases.⁴⁴⁵ Hence all Scouting units, one could argue, should be entitled to full constitutional protection regardless of whether a particular unit is small or large.

It would not be much of an extension of *Meyer* and *Pierce* to characterize the Scouts' exclusion of girls, especially in light of ongoing debates over the virtues and defects of single-sex schools,⁴⁴⁶ as the exercise of the constitutionally protected liberty to choose the education that one thinks is best for one's children. The same would go for exclusions of atheists, even of "avowed" gays, provided that one keeps one's eye on the expressive and moral dimensions of affirming one's identity as homosexual. Decisions such as *Runyon v. McCrary*⁴⁴⁷ and *Bob Jones Univ. v. United States*,⁴⁴⁸ however, call this line of reasoning into doubt. Even assuming the import of those two decisions could be limited to discrimination based upon race, the Scouts would have to contend with the Supreme Court's recent reluctance to widen the scope of constitutional protection for decisions that can be characterized as intimate and personal.⁴⁴⁹ Lower

443. 262 U.S. 390, 399 (1923) (invalidating state law that forbade teachers in all schools, public and private, to teach subjects in languages other than English before the eighth grade).

444. 268 U.S. 510 (1925) (invalidating state law requiring parents to educate their children in public schools through the eighth grade unless they fell within narrow exceptions).

445. How to reconcile this aspect of *Meyer* and *Pierce* with the attention that *Roberts* seems to give to selectivity and size? First, remember that selectivity and size are only two among a number of factors enumerated in *Roberts* as relevant to whether an association is intimate for constitutional purposes. See *Roberts*, 468 U.S. at 620. Second, recall that educational enterprises can manifest their selectivity in ways other than formal admission criteria. An institution with demanding curriculum requirements or a reputation for a lack of congeniality will deter many prospective students from applying to the place for admission; hence the phenomenon of "self-selection."

446. See, e.g., Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741 (1992).

447. 427 U.S. 160, 178 (1976) (upholding application of 42 U.S.C. § 1981, barring racial discrimination in the making of private contracts, to private nonsectarian schools).

448. 461 U.S. 574 (1983) (upholding the Internal Revenue Service's denial of tax-exempt status to schools and colleges that discriminate based on race, as applied to religious schools and colleges).

449. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding ban on assisted suicide); *Bowers v. Hardwick*, 478 U.S. 186 (1986). See also *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (upholding city ordinance restricting access of teenagers to dance halls) ("[C]oming together to engage in recreational dancing . . . qualifies neither as a form of 'intimate association' nor as a form of 'expressive association' as those terms were described in *Roberts*.").

[T]he *Roberts* dicta suggesting that an exclusive organization may claim a right of intimate association rings rather hollow after [*Bowers*] It is hard to fathom how

courts seem to have shared this reluctance.⁴⁵⁰ It can plausibly be argued that few associations beyond the traditional family relationship are included within the Court's current conception of what constitutes a constitutionally protected mode of associating.⁴⁵¹

These difficulties aside, the Scouts would need to show that they possess standing to assert intimate-association claims on behalf of their constituent members. Because the national organization exists primarily to foster and facilitate these associations, it would seem puzzling to hold that the national organization should not have standing. Schools, after all, generally have standing to assert free association claims on behalf of their patrons;⁴⁵² so why not analogous organizations? Current doctrine, however, offers no assurances on this point. If *Duarte* and *New York State Club Assoc.* are read together to hold that consortiums of potential intimate associations do not have standing to assert the interests of members when suing or sued by their members, then national groups such as the Scouts may claim constitutional protection for their attempts to promulgate and enforce

either the Kiwanis or even a small bridge club can claim a right of intimate association if two consenting adults engaged in an intimate sexual encounter within their own home cannot. It would seem that the Court in either *Roberts*, *Hardwick*, or perhaps both, is being more than slightly disingenuous.

Marshall, *supra* note 70, at 81 (footnote omitted). Because *Bowers* suggests "that the state interest in 'morality' may also serve as a justifying rationale for antidiscrimination requirements," *id.* at 96 n.168, it is advocates of conservative social mores, of all people, who might have the strongest of reasons to seek to overrule the decision. For a comprehensive vision of constitutionally protected intimate association that sweeps more broadly than the Court's current conception, see Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

450. See, e.g., *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 242-44 (6th Cir. 1990) (holding 42 U.S.C. § 1981 constitutional as applied to an all-male fraternal association); *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1191-96 (9th Cir. 1988) (rejecting facial challenge to county regulation that required escort services to obtain licenses and banned "sexually oriented" services); *Tillman v. City of West Point*, 953 F. Supp. 145, 151 (N.D. Miss. 1996) (rejecting freedom-of-association claim made by former city police officer who claimed to have been fired on account of his friendship with convict), *aff'd without published opinion*, 109 F.3d 765 (5th Cir. 1997). But see *Louisiana Debating and Literary Assoc. v. City of New Orleans*, 42 F.3d 1483, 1498-1500 (5th Cir. 1995) (invalidating application of city public accommodations ordinance to exclusive private clubs, claiming to exist for purely private, social purposes, ranging in size from 325 to 1000 persons), *cert. denied*, 515 U.S. 1145 (1995).

451. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (upholding application of city's licensing scheme to "adult motels," a term of art encompassing motels offering a room for rent for a period of less than 10 hours). See also *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (upholding zoning ordinance restricting residence to "families" of not more than two persons unrelated by blood, adoption, or marriage or of one or more related persons). But see *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (invalidating ordinance preventing relatives outside nuclear family unit from sharing living space).

452. See, e.g., *Runyon*, 427 U.S. at 175 n.13 (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536 (1925)).

rules governing individual units' intimate activities only so long as the national groups do not face internal dissent.⁴⁵³

If only for fear of giving rise to further assaults on its rather restrictive vision of the constitutional protection for intimate association, the Supreme Court would be unlikely to expand the doctrine so as to exempt the Scouts from the operation of antidiscrimination laws.⁴⁵⁴ But the intimate character of much of the Scouts' activities would at minimum inform the Court's understanding of what kind a group it is and how its claims to a distinctive expressive and religious identity relate to the daily activities of individual cell groups throughout the country.

C. *Freedom of Religion: The Autonomy of Churches*

I believe that the most sensible way to approach the question of the constitutionality of regulating the Scouts' membership policies would at least begin by attending to the distinctively religious character of the organization. Such an approach would most probably lead in practice to extending the special protections traditionally accorded religious organizations to at least some private organizations that we do not instinctively regard as religious. The historic First Amendment doctrine of ecclesiastical autonomy would be extended. Whether we think of this approach as giving to non-religious organizations what their religious counterparts already receive or as broadening what we mean by "religious," the result would largely be the same. Moral and educational organizations like the Scouts would receive constitutional protection by virtue of serving purposes analogous to those distinctive to churches and other religious organizations in American history. This sort of approach is desirable, not only because religious and non-religious groups and beliefs are

453. *See supra* note 128. In considering whether to accord standing to the national association to defend the interests of its constituent units, courts might consider the degree to which the national organization actually exerts influence over the intimate affairs of the troops. Many courts "have rejected the imposition of liability against the BSA or the local councils" for the acts of troops or scoutmasters, "noting the lack of control these entities exercise over individual troops and their sponsoring organizations." *Wilson v. United States*, 989 F.2d 953, 958-59 (8th Cir. 1993) (rejecting tort claim against Boy Scouts of America arising from troop event resulting in accidental death of plaintiffs' son).

454. *But see* *New York State Club Assoc., Inc. v. City of New York*, 487 U.S. 1, 19 (1988) (O'Connor, J., concurring, joined by Kennedy, J.) (suggesting that "in such a large city" as New York, even "a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence" over the application of antidiscrimination law).

difficult to distinguish,⁴⁵⁵ but because the Establishment Clause and basic fairness mandate treating religious and nonreligious groups identically in many instances.

In decisions concerning church membership, the church must have plenary authority. The Court's holding in *Employment Division v. Smith*⁴⁵⁶ does not weaken the force of this principle. True, the Supreme Court declared in *Smith* that individuals' rights to free exercise is not violated by neutral ("religion-neutral"—"religion-blind"), generally applicable laws that on their face make no reference to religion, even if those laws have the incidental effect of burdening religiously motivated conduct.⁴⁵⁷ But *Smith* preserved at least two important exceptions to the rule of formal neutrality. First, the rule does not apply to hybrid rights cases—cases where a claim under the Free Exercise Clause is conjoined with a claim that a government action violates some other constitutional provision.⁴⁵⁸ In *Smith*, the court cited *Roberts* as one of a number of hybrid rights cases.⁴⁵⁹ The Scouts might well be able to use not only freedom of association but other constitutional rights to "hybridize" their complaint under *Smith*.⁴⁶⁰ Second, the rule does not apply to government intrusions upon decisions by churches about the structure and membership of their organizations. A line of cases going back to 1872, cases that the Court cited favorably in *Smith* itself, hold that courts are to evaluate these intrusions by resort to a set of principles quite different from the *Smith* rule.⁴⁶¹

455. See, e.g., Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 795 n.48 (1998) ("Commentators agree that no bright line exists between religious and secular belief systems for constitutional purposes.").

456. 494 U.S. 872 (1990).

457. See *id.* at 878-881.

458. See *id.* at 882 ("The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.").

459. In all the cases cited other than *Roberts*, the party claiming constitutional protection had prevailed in the Court. See *id.* at 881-82.

460. See, e.g., *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that Religion Clauses and RFRA independently bar canon law teacher's claims against Catholic university for sex discrimination under Title VII of the Civil Rights Act of 1964).

461. See *Smith*, 494 U.S. at 877 ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma.") (citing *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445-52 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119 (1952); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25 (1976)). If the *Smith* rule were meant to apply without modification or modulation to these cases, then *Smith* would simply have overruled these cases. See, e.g., *Catholic Univ. of Am.*, 83 F.3d at 463.

The Court's teaching on the autonomy of churches began with *Watson v. Jones*,⁴⁶² in which the Court announced a rule whereby federal courts should resolve disputes between disputing claimants to church property. English courts had developed a rule for resolving church property disputes on the principle that church assets were held in an implied trust for specific religious purposes. American courts adopted the rule.⁴⁶³ Applying the English rule, a court would determine which of the disputing parties had most faithfully followed the purposes of the trust.⁴⁶⁴ *Watson* abandoned the English rule.⁴⁶⁵ Churches, said the Court, were either congregational or hierarchical in polity.⁴⁶⁶ In the former circumstance, federal courts would accord to a majority of the members, or to the congregation's duly authorized officers if there were any, the right to decide the disposition of the property.⁴⁶⁷ In the latter—that is, where the church was “a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization”⁴⁶⁸—courts would defer to the determination of the authoritative tribunal of the church.⁴⁶⁹ In explaining why deference to religious authority should be a necessary consequence of the American understanding of religious freedom, the Court disclosed, in marvelous, ringing language, the crucial link between individual freedom to decide about

462. 80 U.S. (13 Wall.) 679, 731 (1871). The case was one of “division or schism in the church,” involving a dispute as to which of two groups—pro-slavery Southerners or abolitionist Northerners—was the true Third or Walnut Street Presbyterian Church in Louisville, Kentucky. *See id.* at 717. The Supreme Court's disposition of the case awarded the church's property to the Northern group. For a thorough discussion of the factual background of the case, see Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1847-48 (1998).

463. *See Watson*, 80 U.S. at 701.

464. *See Attorney General v. Pearson*, 3 Mer. 353, 36 Eng. Rep. 135 (Ch. 1817); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-11, at 1232-33 (2d ed. 1988) (discussing *Pearson* and the problems raised by its application).

465. *See Watson*, 80 U.S. at 725. *Watson* did endorse the power of federal courts—“though the task may be a delicate one and a difficult one”—to adjudicate disputes over the terms of express religious trusts. *Id.* at 724. In abandoning the English rule, *Watson* changed federal common law without deciding any questions of federal constitutional law. *See Kedroff*, 344 U.S. at 116 n.32. The Court held in *Kedroff*, however, that the freedom announced in *Watson* “must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.” *Id.* at 116.

466. *See Watson*, 80 U.S. at 722-23.

467. *See id.* at 725.

468. *Id.* at 722-23.

469. *See id.* at 727.

one's religious identity and organizational autonomy.⁴⁷⁰ A "full, entire, and practical freedom for all forms of religious belief and practice," the Court began, "lies at the foundation of our political principles."⁴⁷¹ The scope of this broad freedom, as the Court went on to explain, includes the freedom to belong to religious organizations that choose their members and leaders without any need to justify their selection decisions to a government actor:

In this country the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.⁴⁷²

Even trying to figure out whether an authoritative church judicatory exceeded its ecclesiastical jurisdiction, as granted by binding religious documents, would embroil a secular court in religious controversy.⁴⁷³

In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,⁴⁷⁴ the Court extended the logic of *Watson*, holding that a judicial attempt to determine whether a religious body had departed substantially from its traditional doctrine would violate constitutional strictures against governmental

470. *See id.* at 728-29.

471. *Id.* at 728.

472. *Id.* at 728-29. In addition, the Court went on to say, secular courts simply were not as competent to adjudicate religious disputes as their ecclesiastical analogues would be. Secular court review of church court decisions would mean only "an appeal from the more learned tribunal in the law which should decide the case, to one which is less so." *Id.* at 729.

473. *See id.* at 733-34.

474. 393 U.S. 440 (1969).

entanglement in religious doctrinal disputes.⁴⁷⁵ “First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.”⁴⁷⁶ Far safer, said the Court, for courts to apply “neutral principles of law, developed for use in all property disputes.”⁴⁷⁷ Thus “states, religious organizations, and individuals must structure relations involving church property so as not to require the civil courts to resolve ecclesiastical questions.”⁴⁷⁸ The Court left for another day the resolution of how neutral principles might work in practice.

In *Jones v. Wolf*,⁴⁷⁹ the Court gave force, puzzlingly, to the “neutral principles” language of *Hull Church* in a way that highlighted the ambiguity of any claim that a secular court might make to neutrality in adjudicating disputes between religious claimants.⁴⁸⁰ In *Wolf*, the Court held that the First Amendment did not

475. Under the approach invalidated in *Hull Church*, the Georgia courts would hold that a religious denomination had violated its implied trust to maintain true to its doctrine if the courts found that the body had departed substantially from that doctrine. If the trust had been violated, then a local congregation claiming that the denomination had violated its trust could take control of the property, heretofore identified with the denomination, where the congregation worshipped. *See id.* at 443-44 & n.2. The Court’s decision made clear that the implied-trust doctrine was not just disfavored in federal courts, as *Watson* had taught, but constitutionally impermissible. *See id.* at 447.

The logic of *Hull Church* would seem necessarily to forbid courts from enforcing express religious trusts, but the holding of *Hull Church* did not explicitly disturb *Watson*’s holding on that point. Justice Harlan joined the opinion of the Court in *Hull Church* precisely on the understanding that he read it not to disallow judicial enforcement of express religious trusts. *See* 393 U.S. at 452 (Harlan, J., concurring).

What did the other Justices think about Justice Harlan’s reservation and examples? One cannot say. They did not dispute his reservation, but neither did they incorporate it. Justices in the majority probably disagreed among themselves, or did not want to think hard about the question, or both. No subsequent Supreme Court decision directly discusses the possible validity of enforcing some express trusts.

Greenawalt, *supra* note 462, at 1857.

476. *Hull Church*, 393 U.S. at 449.

477. *Id.*

478. *Id.*

479. 443 U.S. 595 (1979).

480. *See id.* at 602-04. Another church autonomy case fraught with ambiguity is *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), in which the Court held that New York courts could not apply the state’s Religious Corporations Law to eject a duly appointed archbishop from possession of a Russian Orthodox cathedral. The Russian Orthodox Church in North America claimed that the patriarch in Moscow who had appointed the archbishop was a pawn of the Soviet government. Applying the *Watson* rule, the Court found that the authoritative voice on ecclesiastical law within the church had spoken. *See id.* at 120-21. *See also id.* at 125 (Frankfurter, J., concurring) (“[U]nder our Constitution it is not open to the governments of this Union to reinforce the loyalty of their citizens by deciding who is the true exponent of their religion.”). The lone dissenter, Justice Jackson, would have deferred to the New York courts’ application of state law.

forbid Georgia's courts from deciding a church property dispute without deferring to the determination of an authoritative church body—even where the church in question was a hierarchical one, according to the rule of *Watson*.⁴⁸¹ For instance, the state courts could employ a presumptive rule of majority representation that could be overcome on a showing that the identity of the local church should be determined by some other means. That such a presumptive rule would favor congregationalist denominations as against hierarchical or “mixed” polities did not seem to trouble the Court. In part, no doubt, this was because in practice the *Wolf* holding will mostly harm only churches with ignorant lawyers. *Wolf* requires a secular court to give effect to trust language in church documents. If the documents indicate that the property is being held in trust for the denomination, then the denomination will have power to determine who receives ultimate control of the property. The courts must examine the religious documents “in purely secular terms.”⁴⁸² Any denomination could escape the ill effects of “neutral principles” by stating clearly and in secular language the proper procedures to follow in resolving church property disputes.

Both the majority and the dissent in *Wolf* claimed the mantle of noninterference in ecclesiastical disputes, but with different results. The four dissenters would have treated the case as demanding the direct application of the *Watson* rule: they would first have examined the church's polity and would then have deferred to the determination “of the church government agreed upon by the members before the dispute arose.”⁴⁸³ For them, the majority approach in *Wolf* was a startling retreat from the respect for church autonomy upheld in both *Watson* and *Hull Church*.⁴⁸⁴ For the majority in *Wolf*, by contrast, the approach offered by the dissenters would require, at least in some

I do not see how one can spell out of the principles of separation of church and state a doctrine that a state submit property rights to settlement by canon law. If there is any relevant inference to be drawn, I should think it would be to the contrary, though I see no obstacle to the state allowing ecclesiastical law to govern in such a situation if it sees fit.

Id. at 131 (Jackson, J., dissenting). For a lucid exposition of *Kedroff*, see JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM*, 197-200, 229 (1998). See also ROBERT A. HORN, *GROUPS AND THE CONSTITUTION* 45-49 (AMS Press 1971) (1956).

481. See *Wolf*, 443 U.S. at 602.

482. *Id.* at 604. This aspect of *Wolf* has been sharply criticized. See NOONAN, *supra* note 480, at 201 (asserting that “to read a religious document but not pay any attention to its religious content and context . . . sounds counter-intuitive, if not counter to common sense”).

483. *Wolf*, 443 U.S. at 614 (Powell, J., dissenting).

484. See *id.* at 620-21 (Powell, J., dissenting).

instances, a “searching and therefore impermissible inquiry into church polity.”⁴⁸⁵

Outside the realm of church disputes involving title to property, *Wolf* does not seem to displace the rule articulated in *Serbian Eastern Orthodox Diocese v. Milivojevich*,⁴⁸⁶ where the Court described as a “constitutional mandate” the proposition that “civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastic rule, custom, or law.”⁴⁸⁷ As in *Kedroff*, the dispute was between a mother church and American bishops who said that the former had been corrupted by a Communist government.⁴⁸⁸ *Milivojevich*, a bishop of the Serbian Orthodox Church in the United States, had been removed by the Mother Church in what was then Yugoslavia.⁴⁸⁹ He sued in Illinois court to contest the removal.⁴⁹⁰ The Illinois Supreme Court had held that the removal must be set aside, declaring that the Mother Church had not acted according to the church’s constitution, hence that it had acted arbitrarily.⁴⁹¹ The U.S. Supreme Court reversed.⁴⁹² The Court ruled that in examining the church’s constitution, the Illinois court had improperly assumed the responsibility of assessing the ecclesiastical judgment of the Serbian church.⁴⁹³ “When . . . ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate ecclesiastical bodies, the Constitution requires that civil courts accept their decisions as binding upon them.”⁴⁹⁴ The Court put the basic point pithily: “a civil court must accept the ecclesiastical decisions of Church tribunals as it finds them.”⁴⁹⁵

485. *Id.* at 605 (citation omitted).

486. 426 U.S. 696 (1976).

487. *Wolf*, 443 U.S. at 602 (citing, inter alia, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976)). See also TRIBE, *supra* note 464, § 14-11, at 1239 (discussing *Milivojevich*).

488. See *Milivojevich*, 426 U.S. at 706.

489. See *id.*

490. See *id.* at 706-07.

491. See *id.* at 708.

492. See *id.* at 725.

493. See *id.* at 708.

494. *Id.* at 724-25.

495. *Id.* at 713.

[W]hether or not there is room for ‘marginal civil court review’ under the narrow rubrics of ‘fraud’ or ‘collusion’ when church tribunals act in bad faith for secular purposes, no ‘arbitrariness’ exception—in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical

The import of *Milivojevich* is quite broad. Undoubtedly decisions on “matters of discipline, faith, internal organization, or ecclesiastic rule, custom, or law” would include church decisions about employment of ministers and about membership—about who qualifies for teaching the faith and who qualifies to be accounted as holding the faith of the organization, and thus as belonging to it.⁴⁹⁶ Lower federal courts tend to follow this approach.⁴⁹⁷ The Ninth Circuit, for instance, has held that the Jehovah’s Witnesses’ practice of shunning former members of their fellowships is protected by the Free Exercise Clause against liability for intentional infliction of emotional distress and other torts.⁴⁹⁸

rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense ‘arbitrary’ must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits.

Id. (footnote omitted). For a paradigmatic example, in a congregational setting, of a case applying this principle, see *Crowder v. Southern Baptist Convention*, 828 F.2d 718, 726 (11th Cir. 1987) (affirming district court’s denial of relief on claim that parliamentary ruling at annual Southern Baptist Convention violated Convention bylaws), *cert. denied*, 484 U.S. 1066 (1988).

496. *Wolf* does contain some language that could be read to extend to cases outside church property disputes. See *Wolf*, 443 U.S. at 606 (“The neutral-principles approach cannot be said to ‘inhibit’ the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods.”) (emphasis added). The language does not seem to have been read that way, however. “[T]he ‘neutral principles’ doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be.” *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169, 1182 (N.D. Tex. 1995) (internal quotation marks and citation omitted) (quoting *Hutchinson v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986)).

497. See, e.g., *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 32 (D.D.C. 1990) (stating that free exercise requires that courts abstain from deciding church membership disputes because they are matters of ecclesiastical cognizance); *Grunwald v. Bornfreund*, 696 F. Supp. 838, 840-41 (E.D.N.Y. 1988) (dismissing motion to enjoin rabbinical congress from excommunicating plaintiff). Cases about church membership seem much less common than cases involving churches’ choices about who can serve as a minister. For instances of the latter, see, e.g., *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1354, 1361 (D.C. Cir. 1990) (affirming dismissal of minister’s age discrimination claim against conference, while remanding for further proceedings on claim that conference breached contract by failing to perform promise to find him a new appointment at the earliest time possible); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (holding Title VII’s prohibition on race and sex discrimination inapplicable to a denomination’s choice of ministers, including those who are not ordained), *cert. denied*, 478 U.S. 1020 (1986); *Bollard v. California Province of the Soc’y of Jesus*, 1998 U.S. Dist. LEXIS 7563, *9 (N.D. Cal. 1998) (“Every federal circuit court to have considered the question has held that the Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes . . .”) (internal quotation marks and citation omitted).

498. See *Paul v. Watchtower Bible and Tract Soc’y of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987). The Court of Appeals relied largely upon *Sherbert v. Verner*, 374 U.S. 398 (1963), in reaching this result. See *Paul*, 819 F.2d at 881-84. The court did not rely on the church autonomy line of cases, dismissing the district court’s resort to those. See *id.* at 878 n.1. For a

Neutral laws have their problems—some of which, in the nature of things, seem quite insoluble. The “neutral principles” approach approved in *Wolf*, for instance, can ratify a background understanding of church governance that need not be stated in explicit religious terms in order to establish a powerful religious preference in church property disputes. The Court in *Wolf* seemed blind to this danger.

If in fact Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, we think this would be consistent with both the neutral-principles analysis and the First Amendment. Majority rule is generally employed in the governance of religious societies.⁴⁹⁹

Yet the case cited by *Wolf* for the majority-rule proposition, *Bouldin v. Alexander*,⁵⁰⁰ says nothing of the kind. The case says, rather, that “[i]n a *congregational* church, the majority, *if* they adhere to the organization and to the doctrines, represent the church.”⁵⁰¹ Even assuming that the proposition were true (it would at least need to be qualified to take account of the sociological realities of influence, charismatic and other, and leadership in the life of religious organizations), it nonetheless begs the question, *which* religious societies. In the religious organization with the most adherents in the United States, the Roman Catholic Church,⁵⁰² majority rule is not the rule. It is by no means obvious that the default rule for all religious societies should be what the generality of religious societies do.

different view on shunning, see the somewhat gnostic discussion in *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107 (Pa. 1975).

499. *Wolf*, 443 U.S. at 607.

500. 82 U.S. (15 Wall.) 131 (1872).

501. *Id.* at 140 (emphasis added). Indeed, *Bouldin* stands for traditional ecclesiastical autonomy in determining who is a member of the ecclesiastical unit and how members should be disciplined, subject always to the initial judicial determination of who constitutes the church. *See id.* at 139-40.

[W]e have no power to revise or question ordinary acts of church discipline, or of excision from membership. . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons excinded are not members. But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others.

Id. (emphasis added).

502. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, at 70 (119th ed. 1999).

Presumptive sameness in religious matters is surely not identical to “neutrality.”⁵⁰³

The *Watson* rule is not without its pitfalls, either. For one thing, it ignores the many varieties of church polity that do not fit easily into “hierarchical” or “congregational” categorizations.⁵⁰⁴ “The lines of authority within polities are apt to be blurred, and the relevant church law chaotic, voluminous, and unintelligible to a court Further, questions of authority are likely to depend on matters of dogma”⁵⁰⁵ The questions will be especially difficult where a dissenting group claims not to be within the authority of a hierarchy.⁵⁰⁶ America is a country of dissenters, and its incredible religious diversity is very often a diversity precisely in respect of what one group, as against another, regards as the difference between dissent and orthodoxy. To identify a church is itself to make a decision with theological implications. Rulings that favor individuals or democratic majorities do tend to disfavor hierarchical institutions, just as Sunday laws favor the great majority of Christians over Seventh-Day Adventists and Jews. But deferring to the central authorities in such institutions would not avoid the problems. Sometimes deference will be deference to decisions undertaken for the rankest and least defensible reasons—reasons that adherents of a religious organization may themselves regard as suspect from the vantage point of their specifically religious understanding of the world. To speak only of

503. See NOONAN, *supra* note 480, at 201 (noting that after *Wolf*, “[e]ach state gets almost carte blanche to divert the property of a religious trust depending on whether the state prefers large organizations and distant authorities or prefers small organizations and local people”); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 865-66 (1984) (“so-called ‘neutral principles of law’” allow state to “appropriate . . . trust property to some object that accords with a state policy respecting religion”). For defense of a moderate neutral principles approach, see *generally* Greenawalt, *supra* note 462.

504. See, e.g., EDWARD MCGLYNN GAFFNEY, JR., & PHILIP C. SORENSEN, ASCENDING LIABILITY IN RELIGIOUS AND OTHER NONPROFIT ORGANIZATIONS 17-20 (Howard R. Griffin ed., 1984) (canvassing different types of denominational polity); KENT R. WEEKS, *Three Denominational Perspectives on Ascending Liability: The Methodist Approach*, ASCENDING LIABILITY 134 (Howard R. Griffin ed., 1984) (“Methodists have always held that theirs is a connectional church, its structure neither hierarchical nor congregational.”).

505. Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV., 1142, 1160 (1962).

506. See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 100-08 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 190-91 (1960) (episode in *Kedroff* saga); GAFFNEY & SORENSEN, *supra* note 504, at 83-86; *id.* at 108 (“There are eighteen separate Lutheran denominations, each one with a different name, each one autonomous legally, financially, and even theologically.”).

the crass and the obvious, some frauds and cheats will use religion as a cloak for acting on their worldly ambitions and prejudices.⁵⁰⁷

Nonetheless, the church autonomy cases, with all their paradoxes and ambiguities, get the basic answer right: presumptive deference of some sort is necessary, if only because the alternative to deference would be worse. It is for churches, not outsiders, to decide what form of governance they possess. The church autonomy cases acknowledge that ecclesiastical jurisdiction—a living and useful concept, not an anachronism—must be respected if individual liberty is to be respected. This is true even of *Wolf*, which allows and does not require the “neutral principles” approach to be used, and which requires deference to ecclesiastical authority under that approach where the authority in question has met a few pertinent formal requirements.

The Supreme Court would almost certainly hold, and rightly, that the Establishment Clause or Free Exercise Clause, or both, actually requires an exemption for churches from antidiscrimination provisions.⁵⁰⁸ That is because the principle of religious liberty underlying both the Clauses implies at the very least that a church possesses unfettered liberty to determine who has authority to preach, teach and lead on its behalf—and to determine who shall be its members.⁵⁰⁹ Here the principle of church-state separation, seemingly weakened in recent decisions of the Court,⁵¹⁰ continues to have sharp

507. Judges do occasionally express disquiet about the possibility that broad protections of church freedom will allow some organizations to “avoid scrutiny of a primary discriminatory objective in the selection or creation of religious officials by exploiting a marginal First Amendment religious claim.” *Minker v. Baltimore Annual Conf. of United Methodist Church*, 894 F.2d 1344, 1362 (D.C. Cir. 1990) (Gesell, J., concurring in the result).

508. The Court has already held that the Establishment Clause does not forbid the federal government from exempting religious organizations from statutory protection against discrimination in employment on account of religion. See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 338-39 (1987).

509. For a radically different view of these matters, see Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987), which argues that churches and other religious organizations should be constitutionally entitled to exclude only nonmembers from employment, and that members should not be barred from seeking redress against the organizations by resort to employment discrimination law. “Employment” here would include holy orders. Thus the Roman Catholic Church, for instance, would have no constitutional protection against suits by female members denied admission to the priesthood. This intriguing proposal seems to have met with little acceptance by other scholars. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 n.15, 1248-49 (1994).

510. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 214 (1997) (holding that federally funded program providing supplemental, remedial instruction to disadvantaged children does not violate Establishment Clause when instruction occurs on premises of sectarian schools); *Rosenberger v. Rector*, 515 U.S. 819, 837 (1995) (holding that state university’s denial of student activities

relevance. Government inquiries into whether a church body had “discriminated” would so entangle the government in controversial and delicate theological determinations as to eviscerate our historic separation between government and the church’s appointment decisions.⁵¹¹

This is true as much for independent “ministries” and other nontraditional religious organizations as it is for ordinary churches, synagogues, and mosques. To disfavor new and independent groups would be to mask an implicit preference for the familiar and the already established.⁵¹² Many now venerable groups began as independent movements within or outside more traditional organizations. Benedict’s monastic order was a radical departure from the religious life to which Christians were accustomed in the early sixth century, but today “religious orders” are enshrined in the United States Code;⁵¹³ the Methodists, once a reform movement within the Church of England, are now among the largest Christian bodies in the United States. The Constitution does not say that “house churches,” self-discovery groups, and one-man or one-woman prophetic ministries may not be just as close to God, if not closer, than some or all traditional religious groups. Whether they are is not the state’s business, but treating them equally is.

Principles of church autonomy and nondiscrimination among religious groups are surprisingly pertinent to the Scouts’ own claim to

funding to religious publication violated Free Speech Clause where other publications received funding and where reason for denial of funding to religious publication was that it spoke from a religious viewpoint).

511. Under the rule of *Lemon v. Kurtzman*, 403 U.S. 602, 618-19 (1971), although eradicating discrimination might be a “secular purpose” (but could a provision barring religious discrimination, as applied to churches, be said to have a secular purpose?), the “primary effect” of an antidiscrimination provision would be sharply to undermine religious associations that discriminated in selecting ministers. And any administrative regime set up to determine when a religious association is discriminating would be liable to “entangle” the government in the most intimate workings of the association. Cf. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-07 (1979) (construing National Labor Relations Act, in light of potential entanglement problems, so as not to apply to schools operated by churches).

512. For a blatant recent example of such implicit preferences at work in a court decision, see *Campus Crusade for Christ v. Unemployment Appeals Comm’n*, 702 So. 2d 572, 577-78 (Fla. App. 1997) (holding “religious missionary order” is not a “church” entitled to exemption from provisions of state unemployment insurance code) (“Campus Crusade’s meetings are not conducted by ordained ministers, they do not appear to have an established liturgy, and the sacraments, including communion, are not offered. In other words, conditions typically found in church services are missing from these meetings. . . . [C]hurch services contemplate the presence of an ordained ministry and the existence of an established liturgy, both factors being absent here.”).

513. A Westlaw search of the unannotated U.S. Code (database USC) for “religious order,” undertaken on April 8, 1999, found 25 documents containing the phrase.

freedom from the application of public accommodations statutes. This is true not only because Scoutmasters are the quasi-ecumenical analogue of church youth ministers whose primary function is to communicate moral and religious messages to the young by word and example, but because the Scouts' vision of good character is an explicitly religious one. Boy Scouts promise to "do [their] duty to God," and to "be reverent and faithful in [their] religious duties,"⁵¹⁴ Cub Scouts pledge "to do my best to God and my country . . ."⁵¹⁵ Three specific teachings about God are conveyed by these promises. First, there exists such a Being as God. Second, some duty (and not a trivial one: it encompasses "honor," "reverence," "faithfulness," and "doing my best") is owed to this Being. Third, one's relatives possess important information about those duties: "A member of your family will be able to talk with you about your duty to God."⁵¹⁶ In terms reminiscent of the putatively nonsectarian prayer held to violate the Establishment Clause in *Lee v. Weisman*,⁵¹⁷ this exhortation claims to be many things to many people, but certainly not to be all things for all. No wonder that many churches sponsor individual Scouting troops.⁵¹⁸

That the group is broadly ecumenical does not belie the conclusion that its ecumenism is a religious ecumenism. It might seem tempting to accord more autonomy to a purportedly "sectarian"

514. *Randall v. Orange County Council, Boy Scouts*, 952 P.2d 261, 264 (Cal. 1998). See also *supra* note 223 (Boy Scout Oath and Boy Scout Law).

515. *Randall*, 952 P.2d at 264.

516. *Id.* at 263.

Adult Cub Scout leaders are expected to convey to their scouts the fundamental belief that they cannot develop into the best kind of citizen without recognizing an obligation to God. Leaders specifically are instructed to introduce the idea and meaning of God to scouts, and to teach nonsectarian religious ideals by way of explaining the child's duty to God.

Id. at 265.

517. 505 U.S. 577, 586-87 (1992). The prayer in *Weisman* had been formulated by the National Conference of Christians and Jews. See *id.* at 581. Justice Blackmun, a United Methodist Christian, recognized it without difficulty. "[T]he religious message it promotes is specifically Judeo-Christian. The phrase in the benediction: 'We must each strive to fulfill what you require of us all, to do justly, to love mercy, to walk humbly' obviously was taken from the Book of the Prophet Micah, ch. 6, v. 8." *Id.* at 604 n.5 (Blackmun, J., concurring).

518. To a significant extent, the Scouts are an organization of church youth groups. See Thompson, *supra* note 6, at W11 ("The Church of Jesus Christ of Latter-day Saints—the Mormon Church—charters 23 percent of the 130,000 scout troops in the United States."); William A. Donohue, *Culture Wars Against the Boy Scouts*, SOCIETY, May 1994, at 60 ("About 30 percent of all Boy Scouts troops in the United States are sponsored by churches and synagogues, with the strongest support from the Church of the Latter Day Saints of Jesus Christ, the United Methodist Church, and the Roman Catholic Church."). Fifty percent of the dens within the jurisdiction of the Scouting Council sued in *Randall* were sponsored by churches and other religious organizations. See *Randall*, 952 P.2d at 265.

group than to a group that makes an effort to include a broad range of persons from different traditions while maintaining a threshold standard of qualification that includes an irreducibly particular religious affirmation. But favoring “sectarian” groups would not only involve courts in difficult determinations of what traditions’ religious affirmations are more broad or welcoming than other traditions’ affirmations. It would also be to condition religious liberty on the content of groups’ religious speech—a flatly impermissible undertaking. The government has enough trouble as it is evaluating whether a conviction is religious in nature. Indeed, as the Court has said, “apart from narrow exceptions . . . it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”⁵¹⁹ Obviously this is a statement of aspiration, in some sense, not of a rule that can be followed literally: courts cannot avoid making determinations as to what is and is not religion. But courts can avoid making unnecessary attempts to figure out whether one tradition is more or less religious than some other tradition. That kind of inquiry would only multiply the problems of partiality and misunderstanding attendant on the necessary enterprise of identifying religion in the first place.⁵²⁰

Even if the Scouts had no religious beliefs or requirements at all, I would argue for providing them with the same liberties that any church would possess in selecting leaders and members for a youth group or confirmation class. At least some nonreligious associations are functionally so similar to religious ones that basic principles of fairness, if not the Establishment Clause itself, requires that no distinction be made among them.⁵²¹ Neutrality argues for giving

519. *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (reversing conviction of Jehovah’s Witnesses minister for violating ordinance forbidding “public addresses” in public parks where other religious groups were allowed to hold services, including preaching, in parks) (emphasis added). The “narrow exceptions” cited by the Court were *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding federal statute banning polygamy in United States Territories), and *Davis v. Beason*, 133 U.S. 333 (1890) (upholding territorial statute forbidding advocates of polygamy from voting in elections or holding public office).

520. For a survey of some approaches to the problem of defining religion, see Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 831-39 (1984) (discussing and critiquing approaches advanced by Professors Choper, Greenawalt, and Tribe).

521. The same principles of fairness require that religious organizations that engage in essentially commercial activity may not exempt themselves from generally applicable laws designed to protect employees and others from economic harms without some very good reason. *See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (rejecting free exercise challenge to application of Fair Labor Standards Act to nonprofit religious organization that operated a number of commercial businesses).

religious and nonreligious organizations the same benefit where the latter perform at least some of the tasks traditionally associated with the core functions of religion as it has been understood historically.⁵²² Put otherwise, neutrality argues for extending church-autonomy antidiscrimination exemptions to organizations similarly situated to churches in respects other than religious identity. The Scouts are such an organization because their core function—teaching the young a vision of moral excellence—is a core function of a typical religious body. It should follow that the Scouts have the autonomy that current law affords to religious bodies who discharge the same functions.⁵²³ On this view, a civil court would be forced to take the Scouts' leadership and membership decisions "as it finds them."⁵²⁴

This kind of uniform treatment would minimize problems occasioned by the delineation of boundaries between religious and nonreligious that often are difficult to discern. It could also, in a queer way, foster mutual tolerance, as well as civic peace. Imagine that the Scouts are forbidden, say, from excluding women—as may be the case in New Jersey if the Scouts lose in *Dale*. It seems improbable that courts would enforce such a prohibition against a church youth group segregated by sex. Many young boys (and girls) no doubt would continue to want, and their parents would want for

522. *Good News/Good Sports Club, Inc. v. Ladue Sch. Dist.*, 28 F.3d 1501, 1502 (8th Cir. 1994), applies this principle in a case involving the Scouts on a doctrinal ground that is distinct from the arguments related to religion that the Scouts might proffer in cases such as *Dale*. The *Good News/Good Sports Club*, "a community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values," *id.* at 1502, had met at the Ladue Junior High School from 1988 through 1992, when residents complained to the school board about the religious character of the group's meetings. *See id.* at 1502-03. The board promulgated a policy allowing only athletic groups and the Boy and Girl Scouts to meet on school premises immediately after school on weekdays. *See id.* at 1503. The policy forbade the Scouts from "speech or activity involving religion or religious beliefs." *Id.* The Eighth Circuit Court of Appeals held that "the 'ideals of Scouting,' which Scout meetings seek to support, involve exactly the same category of speech for which the Club seeks access: moral and character development." *Id.* at 1506 (citations omitted). Because both groups' speech concerned the same subject matter, the policy constituted viewpoint discrimination in violation of the First Amendment. *See id.* at 1507.

523. Thus it should make no difference to the Scouts' freedom that the constituent religious groups who take part in Scouting disagree with each other and the Scouts about the particulars of the Scouts' vision. Like dissenting Roman Catholics, or Serbian-American Orthodox, or Louisville Presbyterians, individual Scouts and troop sponsors who disagree with what the organization preaches and does should not have an entitlement to court action to coerce the organization to change. Dissenters should vote with their mouths and, if necessary, with their feet—for the formation of alternative organizations is always a possibility in a free society that allows a pluralism of private groups and private goals. The foundation of this pluralism is the liberty for each group to set and enforce basic requirements for membership and leadership despite internal dissent.

524. *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 713 (1976).

them, the opportunity to engage in Scouting-like activities in the company of peers of their own sex. But only parents who chose to put their children in church youth groups (or their non-Christian religious analogues) would be free to take advantage of that opportunity. That would be likely to cause inter-religious, and antireligious, resentments. It would also close off occasions for young people to interact in settings outside public schools with peers who differ from them in crucial ways.⁵²⁵

In a time when common civic space is hard to come by, quasi-ecumenical voluntary groups such as the Scouts serve an especially valuable function. Even those of us who are deeply troubled by the Scouts' policies on gays might well agree that on balance the Scouts do considerably more good than harm in promoting a vision of unity among all, or most, Americans (to say nothing of teaching survival skills and good manners). If the alternative to a world in which the Scouts discriminate is a world in which the Scouts do not exist or are radically diminished, and in which church youth groups take their place, is anyone's project of civic inclusion much better off? The question seems a doubtful one, to say the least.⁵²⁶

Outlawing the Scouts as we know them would send a message of exclusion, stamped with state approval, to millions of Americans who hold a different vision of what inclusion and civic responsibility mean. It would also make acting on the different vision (unless, on my hypothesis, one does so as part of one's church) a violation of law. Voluntary associations are a social safety valve⁵²⁷ for the expression of deeply held, and deeply conflicting, visions and values.⁵²⁸ To limit the safety valve to the avowedly religious would be profoundly imprudent, as well as unjust.

525. In places where churches are already in the business of sponsoring Scouting groups, a shift from Scouting to religious youth groups would not make much of a practical difference. In other places, such a ban could make a significant difference—or exert marginal influences that in the aggregate would be significant.

526. Those who doubt whether church youth groups might sprout up to take the place of the Scouts should read *Good News/Good Sports Club, Inc.*, 28 F.3d 1501, where the Christian club started competing with an already extant Scout troop.

527. See ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 12, at 22, 162.

528. “[G]enerous freedom of association for groups and shifting involvements by individuals offer the best chance of correcting and containing the vices that subvert the general moral climate of democracy in everyday life.” *Id.* at 18. See also Rosenblum, *Compelled Association*, *supra* note 96, at 76 (stating that “because associations often owe their origin to a dynamic of affiliation and exclusion, resentment and self-affirmation, liberal democracy is consistent with and even requires the incongruence between voluntary groups and public norms that always accompanies freedom of association”).

VI. ENDING STATE SPONSORSHIP OF PRIVATE EXCLUSION

The approach I advocate would leave the Scouts free to discriminate in many cases, as private actors exercising private rights on behalf of their constituent individual members. But the Scouts of 1999 are not unambiguously private actors in many concrete instances. As the New Jersey Supreme Court and Appellate Division mentioned (but did not, perhaps, sufficiently emphasize), both local Scouting organizations and the national organization are entangled in a web of relationships with governments that began no later than 1916, when the Scouts were specially chartered by an Act of Congress.⁵²⁹

Congress's charter to the Scouts does not amount to mere recognition that the group exists. Federal law specifies the goals of the organization as a nonprofit corporation,⁵³⁰ sets out the basic rules by which it is to be governed and the powers that it may exercise,⁵³¹ gives it the exclusive right "to use emblems, badges, descriptive or designating marks, and words or phrases the corporation adopts,"⁵³² and requires that it report annually to Congress on its activities.⁵³³

The charter need not make the Scouts a state actor for constitutional purposes, and under current law the Scouts are probably not one. The Scouts are hardly the only federally chartered organization in the country;⁵³⁴ many other organizations are regulated

529. See *Historical Highlights—1910s* (visited Jan. 18, 2000) <<http://www.bsa.scouting.org/factsheets/02-511/1910.html>>. The charter provisions appear at 36 U.S.C. §§ 30901-08 (1998). An illuminating, if polemical, discussion of the Scouts' various ties with governments is Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, THE HUMANIST, Sept. 19, 1995, at 6-B.

530. The purposes are "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods that were in common use by boy scouts on June 15, 1916." 36 U.S.C. § 30902 (1998). See also 36 U.S.C. § 30906 (providing that the BSA may not operate for pecuniary profit to its members or distribute stock or dividends) (1998).

531. See 36 U.S.C. §§ 30903 (Governing body), 30904 (Powers), 30907 ("Annual and special meetings") (1998).

532. 36 U.S.C. § 30905 ("Exclusive right to emblems, badges, marks, and words") (1998).

533. See 36 U.S.C. § 30908 (Annual report) (1998).

534. Other federally chartered organizations include the Boys and Girls Clubs of America, 36 U.S.C. § 31101; the Girl Scouts of the U.S.A., 36 U.S.C. § 80301; the Catholic War Veterans of the U.S.A., Inc., 36 U.S.C. § 40101; the Jewish War Veterans of the U.S.A., 36 U.S.C. § 110101; the Ladies of the Grand Army of the Republic, 36 U.S.C. § 130101; the Military Chaplains Association of the United States of America, 36 U.S.C. § 140301; the National Education Association, 36 U.S.C. § 151101; the Paralyzed Veterans of America, 36 U.S.C. § 170101; and the Sons of the American Revolution, 36 U.S.C. § 153301. See Act of Aug. 12, 1998, Pub. Law No. 105-225, 112 Stat. 1253 (recodifying laws "related to patriotic and national observances, ceremonies, and organizations"), as amended by Act of Nov. 3, 1998, Pub. Law. No.

by federal charters that specify important aspects of the organizations' purposes, governance, and activities.⁵³⁵ And a federal charter, as the Supreme Court held in *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*,⁵³⁶ is not enough to turn a private organization into an arm of the state. Some federal statutes single out the Scouts for what appear to be unique or exclusive benefits.⁵³⁷ However, if these were amended to allow other organizations to compete on equal terms for the receipt of benefits, as some statutes already provide,⁵³⁸ then they would pose little likelihood of making

105-354, 112 Stat. 3238 (stating regulations for display of POW/MIA flag, adding federal charters for two organizations).

535. Equivalents of all the provisions respecting the chartering of the Scouts can be found in charters for other organizations. *See generally* Pub. Law No. 105-225. Sometimes the provisions are notably specific. For instance, the stated purposes of the Catholic War Veterans are, among other things, to "increase our love, honor, and service to God and to our fellow man without regard to race, creed, color, or national origin." 36 U.S.C. § 40103 (Purposes) (1998).

536. 483 U.S. 522, 543-44 (1987) ("All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.").

537. *See* 10 U.S.C.S. § 2544 ("Equipment and other services: Boy Scout Jamborees") (authorizing Secretary of Defense to lend to BSA "cots, blankets, commissary equipment, flags, refrigerators, and other equipment and without reimbursement, furnish services and expendable medical supplies," on condition that "[n]o expense shall be incurred by the United States Government for the delivery, return, rehabilitation, or replacement of such equipment;") authorizing Secretary "to provide, without expense to the United States Government, transportation from the United States or military commands overseas, and return, on vessels of the Military Sealift Command or aircraft of the Military Airlift Command"; specifying that United States is to be reimbursed for actual costs of transportation; authorizing Secretary to provide personnel services and logistical support for Boy Scout Jamboree held on military installation); 10 USCS § 4682 ("Obsolete or excess material: sale to National Council of Boy Scouts of America") ("Secretary of the Army . . . may sell obsolete or excess material to the National Council of the Boy Scouts of America . . . at fair value to the Department of the Army, including packing, handling, and transportation"); 10 USCS § 7541 ("Obsolete and other material: gift or sale to Boy Scouts of America, Naval Sea Cadet Corps and Young Marines of Marine Corps League") (Secretary of Navy may do same for Scouts and two other beneficiary groups); 10 USCS § 9682 ("Obsolete or excess material: sale to National Council of Boy Scouts of America") (same, but by Secretary of the Air Force, with Scouts as exclusive beneficiaries) (1998).

538. *See* 10 U.S.C.S. § 772 (Boy Scouts may wear military uniform, as may "[m]embers of any other organization designated by the Secretary of a military department"); 14 USCS § 641(a) ("Disposal of certain material") ("The Commandant . . . may dispose of, with or without charge, to the Coast Guard Auxiliary, including any incorporated unit thereof, to the sea-scout service of the Boy Scouts of America, and to any public body or private organization not organized for profit having an interest therein for historical or other special reasons, such obsolete or other material as may not be needed for the Coast Guard."); 16 U.S.C.S. § 539f ("Nonprofit organization user of national forest lands") (Secretary of Agriculture must waive annually some or all of payment for permit to use national forest lands as campgrounds when payor is local unit of BSA "or such other nonprofit organization" and unit is willing to perform services yielding valuable benefit to public and Secretary's program(s)); 32 U.S.C. § 508 ("Assistance for certain youth and charitable organizations") (National Guard may provide, *inter alia*, ground

the Scouts into state actors. Local units of the Scouting organization may be another matter. According to the American Civil Liberties Union, some twenty percent of Scouting troops are chartered by governments or government agencies.⁵³⁹

However the courts may regard the Scouts' ties with government, no constitutional bar prevents legislators and executive officials from clarifying government's historic relationship with organizations such as the Boy Scouts in ways that diminish the special character of the relationship. At least as a matter of policy and common sense, Congressional chartering in our day still connotes at least some implication of sponsorship—after all, only a fraction of the nonprofit organizations in the country are chartered⁵⁴⁰—and this should be discouraged where the chartered organization acts and speaks in ways that would be unconstitutional if the organization was a state actor. Special access to government property and privileges raises even stronger concerns, for there the preferential treatment is undisputed. Local government sponsorship makes the Scouts engines of character education for the state—a noble goal, maybe, but one that no longer represents a common ideal that all Americans can be expected to endorse.

The best course for both the Scouts and the larger society, for the sake of freedom of conscience and of civic peace, would be for the Scouts to disengage from partnerships with governmental authorities that lend the aegis of official sponsorship to Scout convictions and activities. If the Scouts are unwilling to do this, then government

transportation, administrative support services, technical training services, emergency medical assistance and services, and communications services to Boy Scouts, twelve other listed organizations, and any other youth or charitable organization designated by Secretary of Defense); 36 U.S.C. § 40731 (authorizing federally chartered Corporation for the Promotion of Rifle Practice and Firearms Safety to issue or loan firearms and supplies to Boy Scouts, 4-H Clubs, Future Farmers of America, organizations affiliated with the Program that provide firearms training, or other youth organizations) (1998).

539. See Gary Wisby, *ACLU to Sue City Over Scout Sponsorship*, CHICAGO SUN-TIMES, April 10, 1997, at 8. Moreover, the Scouts have accepted sponsorship and funding from nonprofit agencies claiming a public role similar to the government's role in providing important services to all persons. In *Randall v. Orange County Council*, the local Scouting Council had accepted funds from United Way on the condition that funded programs would be open to persons of all religious beliefs without requiring participation in any religious activity. 952 P.2d 261, 264 (Cal. 1998).

540. By my count, the current recodification of federal charters mentions 90 chartered organizations. See Act of Aug. 12, 1998, Pub. Law No. 105-225, 112 Stat. 1253 (recodifying laws "related to patriotic and national observances, ceremonies, and organizations"), as amended by Act of Nov. 3, 1998, Pub. Law. No. 105-354, 112 Stat. 3238 (stating regulations for display of POW/MIA flag, adding federal charters for two organizations).

officials, local and national, should take the lead.⁵⁴¹ Disentangling the Scouts from government would preserve the Scouts' autonomy to pursue their mission as they understand it.⁵⁴² It would also assuage the concerns of those advocates of equality for gays and others who rightly see the prestige of the Scouts as an obstacle to the moral and political transformation that they seek. To the extent that government sponsorship bolsters that prestige, it is problematic. If the Scouts' liberty to discriminate is grounded (at least in part) in a distinctive religious commitment, then government sponsorship of the Scouts is no less than endorsement of that commitment in violation of the Establishment Clause.

State sponsorship, of course, is distinguishable from interactions between government and private activity that do not rise to state action. Providing religious organizations access to government property and services, when access is available to organizations of all kinds, does not violate the Constitution,⁵⁴³ and in many cases may

541. Some have already done so. "In 1993, the San Diego school board voted unanimously to oust the Scouts from running school-day programs in the eighth largest district in the nation." Donohue, *Culture Wars*, *supra* note 518, at 62. See also Jim Allen, *City, Scouts Sever Ties in Suit Settlement*, CHICAGO DAILY HERALD, Feb. 4, 1998, at 8 ("Under a settlement that will be entered in federal court today, the city of Chicago will end 30 years of sponsorship of Boy Scout troops unless the organization changes its bylaws to allow the participation of homosexuals and atheists."); Lisa A. Hammond, *Boy Scouts and Non-Believers: The Constitutionality of Preventing Discrimination*, 53 OHIO ST. L.J. 1385, 1398 (1992) ("Levi Strauss, Wells Fargo Bank, BankAmerica, and a United Way chapter have cut off funding to the Boy Scouts because of their refusal to admit homosexuals.").

542. The Scouts have demonstrated some willingness in the past to reach compromises with gay-rights supporters. See, e.g., *Marcos' Remains to Be Returned*, ST. LOUIS POST-DISPATCH, Aug. 15, 1991, at 14A (summaries of newswire reports) ("Challenged by a homosexual-rights group and the United Way in the Bay Area to end its practice of banning homosexuals, the Boy Scouts of America has instead agreed to develop a youth program that will allow gay members, atheists and girls. The program announced Monday, 'Learning for Life,' will be separate from the traditional Scout program but will be administered by local Scout councils that choose to offer it. It will provide scouting for ages nine through 18 in public schools. 'We recognize that we need to reach a different population with different requirements,' Scouts spokesman Blake Lewis said. 'In no way does the establishment of this program send the message that we are altering our traditional values in scouting.'").

543. See, e.g., *Sherman v. Community Consol. Dist. 21 of Wheeling Township*, 8 F.3d 1160, 1162-65 (7th Cir. 1993) (rejecting claim that Scouts' use of public school's facilities and distribution of flyers on school grounds establishes religion and denies equal protection, where use and distribution occur on basis available to other groups), *cert. denied*, 511 U.S. 1110 (1994). Official incorporation, a government action that today we regard as essential to the survival, let alone the flourishing, of any private organization, was once regarded as a privilege connoting government sponsorship. James Madison disapproved of incorporation for churches on the ground that it constituted an establishment of religion. See NOONAN, *supra* note 480, at 84 ("The sweep of what [Madison] disapproves is striking. Separateness [between religion and government] for him means no public support for a church; no incorporation; no tax exemption."). Madison's view was shared by Baptist Christians, *see id.* at 99, and Virginia inscribed it into law for fifty years. Between 1795 and 1845, the state forbade churches from

indeed be required by the Constitution.⁵⁴⁴ The full resolution of the pertinent principles will require the clarification of such vexing doctrinal problems as the constitutional status of government grants of benefits on condition that the recipient decline to exercise various constitutional rights—a recurring problem in a world in which government, by sheer size alone, possesses immense power to affect ordinary citizens' exercise of fundamental liberties.⁵⁴⁵ In light of the complexity of the problem, it is no surprise that the New Jersey appellate courts did not attempt to argue that the Scouts are state actors or that their connections with governments make a significant difference to how their constitutional claims should be analyzed. But that should not alter the force or the relevance of the overarching theme: the Scouts and other religious (or analogous) organizations must accept as a condition and sign of their freedom that they generally be treated the same as are all other nonpublic groups. If the

incorporating while allowing other charitable organizations to do so. *See id.* at 84. *Cf.* Maguire v. Loyd, 67 S.E.2d 885, 892 (Va. 1951) (“No man at all acquainted with the course of legislation in Virginia, can doubt, for a moment, the decided hostility of the legislative power to religious incorporations.”) (quoting Gallego’s Ex’rs v. Attorney General, 30 Va. 450 (1832)) *aff’d on reh’g*, 72 S.E.2d 631 (Va. 1952). In Massachusetts, by contrast, “a religious society used not to be eligible for tax support unless incorporated.” NOONAN, *supra* note 480, at 99. “Today,” of course, “the implication that a state might be bestowing a privilege on a denomination has been removed; instead, the state accepts properly filed articles of incorporation from any organization wishing to be incorporated.” GAFFNEY & SORESENSEN, *supra* note 504, at 28.

544. *See, e.g.*, *Rosenberger v. Rector*, 515 U.S. 819, 837 (1995) (holding that state university’s denial of student activities funding to religious publication violated Free Speech Clause where reason for denial of funding to religious publication was the publication’s religious viewpoint); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (holding that a school board’s forbidding a church to use school premises to show film violated Free Speech Clause where permission had been denied solely because the film dealt with an otherwise permissible subject from a religious standpoint); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (holding that a state university, having made its facilities generally available for activities of registered student groups, may not close its facilities to a registered religious group without violating Free Speech Clause); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1276 (10th Cir. 1996) (holding that city policy forbidding religious worship and instruction at “City Senior Centers” violates Free Speech Clause), *cert. denied*, 519 U.S. 949 (1996). *But see* *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 215 (2d Cir. 1997) (holding that a public school may refuse to allow church to use school facilities for weekly worship services), *cert. denied*, 524 U.S. 934 (1998). *Cf.* *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 864 (2d Cir. 1996) (finding that under the Equal Access Act, 20 U.S.C. §§ 4071-4074, which bars federally funded public schools from discriminating against students who conduct extracurricular meetings on the basis of the religious, political, or philosophical content of their expression, school district may not forbid student religious club from writing into club constitution and enforcing a provision that discriminates on religious grounds in selecting key officers), *cert. denied*, 519 U.S. 1040 (1996).

545. *See, e.g.*, Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1048 (1991) (“The function of an unconstitutional conditions doctrine is to preserve certain protected constitutional liberties in an environment of pervasive governmental activity.”).

Scouts are to be free to exclude those who are entitled to inclusion in the public sphere, then the Scouts must pay the price for their freedom and sever their special ties with the state.

VII. IMPLICATIONS FOR SOME OTHER ORGANIZATIONS: RELIGIOUS INSTITUTIONS' FUNCTIONAL ANALOGUES

State action problems aside, the analysis I have sketched is a modest extension of various traditional First Amendment doctrines. The analysis would make clear that the Constitution protects many private organizations that today are uncertain whether they possess the right to exclude persons from their ranks on account of sexual orientation or other protected characteristics. If only for predictability's sake, my approach would bring the application of the *Roberts* test—assuming that *Hurley* has not already tacitly abandoned the test—very close to Justice O'Connor's categorical analysis in that case. Yet the approach would not require abandoning the results or even much of the reasoning in *Roberts*, *Duarte*, and *New York State Club Assoc.* My proposal that the Scouts should be treated like a church may seem a striking departure from current constitutional law on church autonomy, but that is because most of us are wedded to conventional understandings of what a religious association should be. Even this proposal requires less an abandonment of existing understandings than a revision of them.

Our improved appreciation of the functional analogies between religious associations and many other forms of voluntary associations, I believe, compels such a revision. This is true, not only for the Girl Scouts and Boy Scouts, who occupy a unique place in America's civic and moral life. As youth organizations dedicated to the development of moral character, they partake far more of the character of a religious enterprise than do most more or less nonsectarian voluntary associations. But many other organizations also perform the functional analogue of activities that churches customarily have performed. Some serve purposes whose roots in American history lie largely in endeavors by religious organizations: charity, education, reflection, the arts.⁵⁴⁶ I am thinking especially here of associations whose primary purpose is the inculcation or transmission of values or knowledge.⁵⁴⁷ These require the most constitutional protection if their

546. Here Professor Marshall's fascinating exploration of the possibility of a right of cultural association should be compared. See Marshall, *supra* note 70, at 84-91.

547. To those who would omit "knowledge" from my formulation, I would answer that all knowledge is laden with what we usually call judgments of value, and that every act of valuing to which we generally accord significance partakes of what we call knowing far more than is

expressive and religious liberties are not to be infringed by well-meaning government action on behalf of individuals. Organizations that conduct their activities with an eye to profit,⁵⁴⁸ however, are another matter. Courts should not find it too difficult to identify putatively private institutions that in reality exist primarily to serve the business purposes of principals, or of their “member”-customers. Such organizations are “simply . . . business[es] operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs.”⁵⁴⁹

Businesses that provide access to knowledge may pose the greatest problem for this distinction. In the age of the Internet, enterprises that organize and interpret knowledge are among the most profitable known to humanity; and many not-for-profit organizations—for instance, not-for-profit health care service providers—conduct highly profitable activities not directly related to teaching and the transmission of values. Even traditional universities and colleges are not simply, or in many cases even primarily, institutions for the cultivation of the mind and the soul, but are also engines for the learning of specific skills and collections of information that lay open the doors of social and economic opportunity for average Americans. A university has (or should have) its own peculiar First Amendment interest in autonomy from the state,⁵⁵⁰ and balancing this interest against the need for equality of economic opportunity will be difficult in many cases. The task may be even more difficult in the case of institutions of higher learning with religious ties. Many churches and other religious bodies regard

commonly admitted. The distinction between knowledge and value is every bit as fraught with ambiguity and difficulty as is the distinction between religion and nonreligion, if not more so. That said, I would readily acknowledge that commercially useful knowledge can be distinguished as a practical matter from knowledge of other kinds. See below.

548. See, e.g., *Hishon v. King & Spaulding*, 467 U.S. 69, 78-79 (1984) (holding that application of Title VII to hiring decisions of private law firms does not violate constitutional guarantees of freedom of expression or association).

549. *Daniel v. Paul*, 395 U.S. 298, 301 (1969) (holding Title II of Civil Rights Act of 1964 applicable to local “club” serving 100,000 persons each season where, among other things, the record showed owners had adopted a “membership” system after the enactment of the Act, resulting in routine granting of membership to whites upon the payment of a 25-cent fee and in uniform denial of membership and admission to African-Americans). See also *In re Primus*, 436 U.S. 412, 439 (1978) (invalidating state supreme court’s disciplinary action for attorney’s solicitation activity where attorney’s actions were undertaken to express political beliefs, not to derive financial gain). The Court noted in *Primus* that the line between commercial and non-commercial modes of association, “based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, but that is no reason for avoiding the undertaking.” *Id.* at 438 n.32 (citation omitted).

550. See *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 312-13 (1978) (Powell, J.).

universities, colleges, and other schools as essential to their mission; many universities and colleges claim to provide an education that is essentially and wholeheartedly religious; and not a few religious groups see their schools not as autonomous entities but as parts of a coherent whole controlled by the group. It would be difficult to argue that the claims of a university with a religious affiliation to First Amendment protection are identical to a church's claims;⁵⁵¹ but that does not resolve the difficulty of determining what weight such claims should be given and how to go about evaluating them. What might make this problem less worrisome as a practical matter is that many institutions of higher education take government funds to which are attached conditions that prevent most forms of invidious discrimination. Those conditions, however, are unconstitutional themselves in some cases; and current unconstitutional conditions doctrine does not offer clear guidance on how to distinguish the permissible from the forbidden.⁵⁵²

551. "It is settled that the 'right to discriminate' argument [i.e., the argument that such a right exists] will fail when the challenged legislation prohibits discrimination in housing, employment, accommodations, or education—essentially those areas which, though privately controlled, involve access to publicly available opportunities." Marshall, *supra* note 70, at 68. Perhaps for this reason, commentators seem to agree that *Bob Jones* would have been decided differently, and should have, if the Internal Revenue Service had tried to remove the tax exemption of a church instead of a university. See, e.g., Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 509, at 1314 n.142 ("[U]nder the theory we propose, it would be clearly unconstitutional for the government to condition the tax-exempt status of churches upon their willingness to select priests without regard to race or gender."). Cf. Gutmann, *An Introductory Essay*, *supra* note 35, at 7 ("Churches serve largely different social purposes [than universities]. The claims of a Bob Jones Church with a religiously based policy of forbidding miscegenation among its congregants would have been significantly stronger relative to the state's claims in combating racial discrimination than were the similarly based claims of Bob Jones University. . . . The claims of a Bob Jones Church to discriminate on grounds of race therefore might be overriding as the claims of Bob Jones University are not.")

552. "As applied . . . the doctrine of unconstitutional conditions is riven with inconsistencies." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1416 (1989). See, e.g., *National Endowment v. Finley*, 524 U.S. 569, 573-80 (1998) (upholding against facial challenge statutory provision requiring Chairperson of National Endowment for the Arts to ensure that "general standards of decency and respect for the diverse beliefs and values of the American public" are taken into account when applications for arts grants are considered); *Rosenberger v. Rector*, 515 U.S. 819, 837 (1995); *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (holding that the federal government may forbid recipients of federal family planning services funds from counseling patients concerning use of abortion as family planning method or referring patients for abortion as family planning method); *Federal Communications Comm'n v. League of Women Voters of Ca.*, 468 U.S. 384, 402 (1984) (holding that the federal government may not prohibit noncommercial educational broadcasting station receiving federal grants from engaging in editorializing); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) (holding that the federal government may condition tax-exempt status on exempted organization's refraining from participation in lobbying or partisan political activities) ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny"); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958)

Before the state can punish an organization for discriminating, it must ask and answer the question, “discriminating in the provision of what?” If the answer is access to expression or to participation in the life of a church or analogous organization—membership in the group, not access to external benefits—then the discrimination in question is itself protected from government intrusion by the Constitution. As applied to religious and analogous associations, laws that forbid discrimination should be held invalid unless the discrimination to which they apply bars more than access to the organization itself and its expressive or religious activities.⁵⁵³ Just as surely, the Constitution should not be held to protect participation in collective activity where the activity is intended to provide access to commercial information, to “leadership training,” and to business opportunities generally.⁵⁵⁴

This approach allows for the possibility that even a paradigmatic “expressive” organization would be subject to government regulation in the provision of benefits external to its core activities. In *Curran v. Mount Diablo Council*, the California Supreme Court noted that the Scouts had conceded that dealings in goods made available for purchase to outsiders would be subject to California’s statute forbidding discrimination in business establishments.⁵⁵⁵ Justice Werdegarr attacked the court’s concentration on business activities, fearing that one organization could be subject to a confusing multiplicity of standards depending on what activity it could later be held to have engaged in.⁵⁵⁶ But the majority’s distinction seems sensible, at least with regard to the question of constitutional protection for a group’s activities. When an organization deals

(holding that a state may not condition property tax exemption on prospective recipient’s signing a declaration disavowing a belief in overthrowing the United States government by force or violence). Among the few cases, other than *Rosenberger*, on (possibly) unconstitutional conditions affecting the autonomy of religious enterprises is *Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984), in which the Court held that it did not violate the First Amendment to limit federal education assistance for students to colleges that comply with Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational programs receiving federal financial aid. See also *Dodge v. Salvation Army*, 1989 U.S. Dist. LEXIS 4797, *13 (S.D. Miss.) (holding unconstitutional a statutory exemption of religious organizations from Title VII’s ban on religious discrimination as applied to employment funded substantially by government funds).

553. For similar proposals, see Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on “Equal Access” for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 681 (1996); Eisgruber & Sager, *The Vulnerability of Conscience*, *supra* note 509, at 1311-14.

554. *Roberts* itself, a case where “membership” was something like a code word for a package of goods and services, denoting little more than access to outside business opportunities, can be regarded as a key application of this principle.

555. 952 P.2d 218, 237-38 (Cal. 1998).

556. See *id.* at 258-59 (Werdegarr, J., concurring).

commercially with outsiders, those dealings should be accorded less protection, generally speaking, than the expressive activities at the core of the organization.⁵⁵⁷ But access to the core itself—to membership—should be governed by the organization. “[N]othing strikes closer to the heart of American pluralism than a law which tells an association who it must accept as a member.”⁵⁵⁸

That an organization aggressively invites individuals to consider participating in it is not a good reason for holding that the organization is a commercial one. Many churches evangelize quite freely, exhorting all persons to take part in their common life, but this does not imply an invitation to come on any terms. The same goes for moral-cultural organizations such as the Scouts, whose open invitation to membership carries with it the condition that the invited party agree to abide by the peculiar rules and practices that make the organization what it is. Invitation to join is a far cry from holding oneself out as a seller of goods and services that can easily be detached from participation in the internal life of a group.

VIII. WHY ASSOCIATIONAL FREEDOM?

The approach I propose would result in the drawing of two very bright boundaries, outside of which the Scouts and analogous organizations would be entitled to almost no constitutional protection. First is the boundary line between the expressive and participative space inhabited by the organization and the outside world with which the organization must necessarily interact. On one side of the line, a group must be free to choose how to constitute itself as an organization and select and discipline its members. On the other side, however, the group deals with outsiders as outsiders—say, in commercial transactions in which the organization holds itself out to the public to sell wares for a profit—and these dealings are not entitled to the same constitutional respect. Second is the boundary between state sponsorship and mere participation in free society. An organization gives up its freedom to be itself when it bargains for a special role in relationship to the state that connotes state endorsement of the organization’s activities and goals. The Constitution offers no protection from state interference in the affairs of an organization that has allied itself with the state. Not only this, but various provisions of the Constitution mandate interference in an organization’s affairs

557. *Compare with Recent Cases*, 113 HARV. L. REV. 621, 625 (1999).

558. Linder, *supra* note 69, at 1902.

where it bargains for state endorsement. The Establishment Clause is one prominent example.

Do the exemptions from state intrusion afforded by these bright-line boundaries depend for their justification on a positive vision of associational liberty and the possibilities that it represents? For Justice Brennan, the primary paradigms of this particular brand of human freedom were family life and speech.⁵⁵⁹ But one can imagine other paradigmatic forms and categories of voluntary association: friendships, schools, churches (communities of worship), social clubs, labor unions (state action problems aside, in this last case). Each paradigm carries its own bundle of associations and meanings, some but not all of them consciously experienced, others subliminal—and many of them viscerally felt. For those of us to whom “private” connotes principally the stuffy odor of the club, or the whitewashed homogeneity of the suburban homeowners’ association,⁵⁶⁰ associational liberty will seem of small moment.⁵⁶¹ But for others, “private” can mean the sphere in which one worships God and agitates for justice and works for dreams that not everyone shares—dreams that on this account may seem more precious to the dreamer. How can one choose among the varied connotations?

Some private groups provide great service to the national community as a byproduct of their having remained successfully private. In this there is a paradox. Such groups provide valuable benefits to the national community precisely insofar as their liberties are respected; paradoxically, they do the most good for all when allowed to be themselves for themselves. When treated as if they were public entities, and subjected to all the constraints that rightfully limit the power of government and commercial enterprises, they wither.⁵⁶² That is one among many reasons why these groups must be given substantial space to elaborate their visions of salvation or human betterment without interference from others.

559. See *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

560. For a lengthy discussion of residential community associations (RCAs), see “Corporate Culture and Community at Home,” in ROSENBLUM, *MEMBERSHIP AND MORALS*, *supra* note 12, at 112-57. “As of 1994, an estimated 32 million people were members of 150,000 homeowners’ associations In Los Angeles and San Diego counties, RCAs account for 70% of the new housing market; they make up more than 50% of new home sales in the 50 largest metropolitan areas” *Id.* at 112.

561. Indeed, the exercise of associational liberty is rightly regarded as at least occasionally deleterious to the health of civil society. The question is whether “occasionally” should be replaced by “usually.” See *id.* at 32. See also *id.* at 243-48 (discussing “[t]he Internal Life of Paramilitary Groups”).

562. See Rosenblum, *Compelled Association*, *supra* note 96, at 76-77; Kathleen Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713, 1719 (1988).

But what of groups whose relationship to the common good is more ambiguous? One might say that associational freedom provides a safety valve for the peaceable expression of disparate visions that otherwise might meet in destructive conflict. A society of persons who disagree deeply about how to live need considerable room in which to peaceably carry out their separate conceptions. Private associations—whether they be gay bars, prayer meetings, or clubs for particular racial and ethnic groups—are a means of providing that needed room, of providing spaces in which people can dream together about what others regard as stupid, trivial, or downright immoral.

These thoroughly instrumental (and speculative) justifications for associational freedom seem to me ultimately insufficient, though not wholly unpersuasive. Many associations serve little or no public benefit; and we have little or no way of knowing whether they serve as effective safety valves for the expression of otherwise destructive social pressures. Nor, indeed, do I take much comfort in any assertion that associational pluralism is in itself a great intrinsic good. It would be another thing, of course, to say that a variety of groups is a good thing; plainly many are. But a good many are not. Private groups are indeed the means and the end of American pluralism, source and emblem of a diversity of insights, desires, and purposes; yet some of them are awful groups, manifesting false insights, foolish or blameworthy desires, and dangerous if not deadly aims.

Perhaps the best thing one can say for associational liberty is that the alternative would be intolerable. But one would like to think that the constitutional doctrines protecting freedom of association reflect the same kind of insight that one finds in modern discourse about religious toleration. The fundamental fact about religious conscience is that it cannot be violated without damage to the spiritual constitution of the individual. Somehow the very dignity of the human person demands that one not coerce one's neighbor into reaching an understanding of the truth about God and God's will. Not that the neighbor may not be wrong, but that the neighbor must be free to find the way of truth for himself or herself. Indeed, there is no other way for our neighbor to find the way of truth. Were we to try to force the truth on him, we would fail in our aim precisely to the extent that our efforts attained the outward appearance of success. Put otherwise, it is in the nature of the knowledge of truth that this knowledge is not forced but is acquired freely.

As collective manifestations of conscience, religious and analogous organizations give to individuals the ability to practice, formulate, and spread deep beliefs that otherwise would go unheard

by others, and maybe would never be conceived. The content of these beliefs and the manner in which they are expressed—two things that in theory are hard to separate and in practice are almost impossible to distinguish—depend crucially on who belongs to the associations, if only because we live in a world in which many of us disagree deeply about the most basic human questions. Freedom to exclude others who seek to take part in one of these enterprises is freedom to determine what the enterprise is and what it says. The categorical rule stated by Justice O'Connor in *Roberts* makes perfect sense, at least for those associations that we can identify as conscience-forming: under the First Amendment, discrimination of any kind in choosing one's fellows in the conscience-forming enterprise must be viewed as protected expression.⁵⁶³ Laws that aim at discrimination as applied to these settings must be considered laws that aim at expression.

Discrimination is, of course, conduct, not just expression. But discriminatory conduct that effectuates a vision of life, for an organization whose business it is to communicate a vision of life, deserves full First Amendment protection, just as does the conduct that is marching, shouting, or printing. Indeed, conduct of the former sort can be more expressive than the latter kind.

A parade all too often is conduct without much of a conscience. It communicates a message that at its best is diffuse and plural. The Boy Scouts' message is much more focused, and the focus is on what it takes to be an excellent male human being. That emphasis on the development of individual male character, a development with a goal and a set of rules for avoiding wrong turnings, provides a clear nexus between the Boy Scouts' view of the good moral life and their exclusion of "avowed" gays, young women, and atheists as individuals from Scouting. The Boy Scouts' conduct in discriminating is conscientious conduct that expresses basic affirmations about how a boy should live and should not live. Like a church that discriminates on the basis of creed and other considerations in choosing its members, the Scouts practice discrimination that bears a direct relationship to the ongoing formulation and maintenance of their distinctive moral and spiritual message.

Conduct of this sort is conduct that demands constitutional protection (and an end to state sponsorship of the conduct!)—but not

563. Discrimination on account of race, perhaps, is to be excepted from this pronouncement. That is not to deny that forbidding discrimination based on race would infringe on expression. It is only to suggest that the Civil War Amendments made possible a regime in which the legacy of slavery would be eradicated even at the expense of some expression.

just because the Scouts serve a valuable civic purpose, or because frustrated Scoutmasters might join some fringe *faux* militia group upon being forced to admit homosexuals to their troop. Protection is warranted because the conduct in question aims centrally at the formation of conscience in a specific, controversial, and deeply value-laden manner. Those of us whose consciences reject the Scouts' vision are entitled to try to persuade them to change it, but not to force them to do so. To force them would do violence to the First Amendment's promise of liberty for all consciences, collective as well as single.