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A COMPREHENSIVE APPROACH TO CONFLICTS BETWEEN ANTIDISCRIMINATION LAWS AND FREEDOM OF EXPRESSIVE ASSOCIATION AFTER *BOY SCOUTS OF AMERICA V. DALE*

ADRIANNE K. ZAHNER*

INTRODUCTION

In July of 1990, during the summer after his first year at college, James Dale was expelled from the Boy Scouts and his position as an assistant troopmaster was revoked.¹ Dale, an exemplary scout who had achieved the prestigious rank of Eagle Scout the year before, was expelled because the Boy Scouts had an unpublicized policy that “specifically [forbade] membership to homosexuals.”²

Dale thus joined the ranks of gay scouts across the country who have been expelled or ostracized from an organization that purports to welcome all boys. Dale filed suit against the Boy Scouts, alleging discrimination in violation of New Jersey’s Law Against Discrimination.³ The Boy Scouts contended that application of New Jersey’s

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1. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000).

2. *Id.* at 645, 665.

3. N.J. STAT. ANN. § 10:5-4 (West 2000). The complaint also alleged common-law causes of action, which were dismissed early in the litigation.

In a series of cases prior to *Dale*, the Boy Scouts’ discriminatory membership policies with respect to homosexuals, females, and atheists were brought to court in various states. In each of these cases, the Boy Scouts’ membership decisions were protected, usually because the court found that the state’s antidiscrimination policy did not apply to the organization. *See, e.g.*, *Curran v. Mt. Diablo Council of the Boy Scouts*, 952 P.2d 218 (Cal. 1998) (holding that the Boy Scouts is not a business establishment within the meaning of the antidiscrimination provisions of the California Civil Rights Act); *Merino v. San Diego County Council of the Boy Scouts*, Nos. D021969, D022829, 1997 WL 1145151, at *9 (Cal. Ct. App. May 21, 1997); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465, 469 (Or. 1976) (holding that “place of public accommodation” language in state statute was not intended to include the Boy Scouts for purposes of applications by girls for membership); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385 (Kan. 1995) (holding that the Boy Scouts is not a public accommodation within the meaning of Kansas Act Against Discrimination, and the organization may exclude from positions of adult leadership persons who are unwilling to profess belief in and duty to a supreme being). *But see* *Richardson v. Chicago Area Council of the Boy Scouts of Am.*, No. 92-E-80, 1996 WL 734724, at *1 (Chicago Comm’n on Human Relations Feb. 21, 1996) (holding that the Boy Scouts’

law would be unconstitutional because its membership decisions were protected by the First Amendment.⁴

The case reached the United States Supreme Court, where Justice Rehnquist's majority opinion held that application of the antidiscrimination law had indeed violated the Boy Scouts' First Amendment freedom of expressive association.⁵ Strong dissenting opinions observed that the decision in *Dale* differed markedly from prior freedom of association cases,⁶ and noted that until *Dale*, the Court had "never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law."⁷

While the *Dale* result reflects "our nation's commitment to protect freedom of speech,"⁸ the Court is indeed stepping onto new ground in *Dale*. The controversial 5-4 opinion raises, but leaves unanswered, important questions about the tension between freedom of expressive association and antidiscrimination laws. This Comment posits that *Dale* is an important development in First Amendment expressive association jurisprudence, and suggests a framework that provides absolute First Amendment protection of membership decisions for purely expressive associations, minimal First Amendment protection for purely commercial organizations' membership decisions, and a balancing of state interests and group interests for hybrid commercial-expressive groups. Absolute First Amendment protection of membership decisions for purely expressive associations is justified in light of First Amendment objectives, and balancing governmental and organizational interests prevents excessive politicization of individuals' personal characteristics.

Part I of this Comment presents an overview of the law pertaining to freedom of expressive association before *Dale*, and Part II contains a summary of the opinions in *Dale*. Part III analyzes *Dale* in the context of prior expressive association decisions and proposes a framework for understanding the developing doctrine. Part IV addresses the politicization of identity characteristics in conflicts between expressive association and antidiscrimination laws.

discriminatory employment policy violates Chicago Human Rights Ordinance).

4. *Dale*, 530 U.S. 640 (2000).

5. *Id.* at 644.

6. *Id.* at 678-79 (Stevens, J., dissenting).

7. *Id.* at 679.

8. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995).

I. CONFLICTS BETWEEN ANTIDISCRIMINATION LAWS AND FREEDOM OF EXPRESSION BEFORE *DALE*

Freedom of expressive association is the right to assemble to engage in activities protected by the First Amendment: the exercise of speech, assembly, religion, and petition for redress of grievances.⁹ The freedom is deemed essential to preserve political and cultural diversity and to shield dissident expression from suppression by the majority.¹⁰ Because freedom of expressive association hinges on expression, an organization cannot prevail on an expressive association claim unless it establishes that it engages in expressive activity protected by the First Amendment.¹¹ A brief examination of the Supreme Court's freedom of expressive association jurisprudence before *Dale* will put the decision into context.

A. *Freedom of Association Balanced against the State Interest in Eradicating Discrimination: The Roberts Trilogy*¹²

The Supreme Court's freedom of expressive association jurisprudence before *Dale* balanced state interests in ending discrimination against organizations' interests in freedom of association. The Court's analysis carefully scrutinized groups' contentions regarding their expressive activities, but readily accepted the states' interests in ending discrimination as compelling. To invoke the balancing test,

9. *Dale*, 530 U.S. at 678; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). Freedom of association falls into two categories: freedom of intimate association and freedom of expressive association. Freedom of intimate association generally refers to human relationships such as marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 620 (1984); *Duarte*, 481 U.S. at 544. Because of its size and nonselectivity, freedom of intimate association is not implicated by the application of the New Jersey Law Against Discrimination to the Boy Scouts. See *Dale*, 530 U.S. at 646-48.

10. *Dale*, 530 U.S. at 647. Freedom of expressive association was first recognized as an implied fundamental right in the 1958 case of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). It is interesting to note that the doctrine of freedom of expressive association originally protected civil rights groups but has more recently been used as a defense to the application of civil rights laws.

11. See *Dale*, 530 U.S. at 648. In *Hishon v. King & Spalding*, a former associate of a law firm sued the firm under Title VII of the Civil Rights Act of 1964 for employment discrimination when the firm refused to consider her for partnership on the basis of her gender and ultimately terminated her position. 467 U.S. 69 (1984). One of the firm's defenses was that its partnership decisions were protected by freedom of expressive association. *Id.* at 78. The Court recognized that a law firm's activities can be expressive, but held that the firm had not shown how its expression would be inhibited by considering the complainant on her merits. *Id.*

12. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), are referred to jointly as the *Roberts* trilogy.

the organization had to show that the antidiscrimination law in question implicated its First Amendment rights.

In *Roberts v. United States Jaycees*¹³ and *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹⁴ the Supreme Court considered two civic organizations' claims that the First Amendment freedom of expressive association protected their men-only membership policies from the application of state antidiscrimination laws. In both cases, the Court held that requiring the clubs to admit women would not significantly affect the organizations' activities and that the states' compelling interest in eradicating discrimination against women justified any impact on members' freedom of expressive association.¹⁵

The Court's strong preference for antidiscrimination laws was evident in *Roberts*. Though primarily a business organization, one of the Jaycees' written objectives was to "promote and foster the growth and development of young men's civic organizations . . . and to develop true friendship and understanding among young men of all nations."¹⁶ Despite the unequivocally gendered language of the organization's bylaws, the *Roberts* opinion held that compelling the Jaycees to accept women as members "require[d] no change in the Jaycees' creed of promoting the interests of young men," and that the Jaycees had not demonstrated that Minnesota's Human Rights Act imposed "serious burdens on the male members' freedom of expressive association."¹⁷ The Court rejected the Jaycees' argument that the organization's public expression would have a different effect if group membership were extended to women, calling it an "unsupported generalization[] about the relative interests and perspectives of men and women."¹⁸ Similarly, the *Duarte* court found that admitting women would have no significant effect on the Rotary Club's expressive activities because the organization had traditionally chosen to remain silent on public issues.¹⁹ In a footnote, the Court dismissed the group's contentions that its men-only membership policy enhanced group dynamics and allowed the organization to

13. 468 U.S. 609 (1984).

14. 481 U.S. 537 (1987).

15. See *Roberts*, 468 U.S. at 623, 627; *Duarte*, 481 U.S. at 548-49.

16. 468 U.S. at 612-13, 616. The Jaycees was originally established as the Junior Chamber of Commerce. *Id.* at 612.

17. *Id.* at 626-27.

18. *Id.* at 627-28.

19. 481 U.S. at 548.

operate effectively in foreign countries with varied cultures and social mores.²⁰

Roberts and *Duarte* concluded that state laws prohibiting discrimination in places of public accommodation on the basis of gender represent compelling state interests unrelated to the suppression of ideas, and that the state interest could not be accomplished through less restrictive means.²¹ The *Roberts* opinion gave a lengthy explanation of the social and personal harms addressed by antidiscrimination laws.²² Both *Roberts* and *Duarte* balanced the minimal impact on the organizations' freedom of expressive association against the state interest in eradicating discrimination and concluded that the organizations' First Amendment rights were not violated by the antidiscrimination laws.²³

Although the Court again struck down a First Amendment challenge to an antidiscrimination law in *New York State Club Ass'n v. City of New York*, the Court explained in dicta that it was possible for a group to prevail on an expressive association claim against an antidiscrimination law.²⁴ Antidiscrimination laws, the Court explained, are meant to prevent organizations from using specified characteristics as "shorthand measures" in place of "legitimate [membership] criteria."²⁵ Thus, an association that could "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," would present a strong freedom of expressive association claim in the face of an antidiscrimination law.²⁶

20. *Id.* at 541, 549 n.8. The footnote observes that women already participated in Rotary Club meetings and activities before the enactment of the antidiscrimination law, and states that the Rotary Club's effectiveness as an international organization will not be undermined since the judgment only applies to California. *Id.* at 549 n.8.

21. See *Roberts*, 468 U.S. at 623; *Duarte*, 481 U.S. at 549.

22. 468 U.S. at 623-26.

23. See *Roberts*, 468 U.S. at 623; *Duarte*, 481 U.S. at 549.

24. 487 U.S. 1 (1988). The case involved a facial challenge to a provision of New York City's Human Rights Law, which prohibited discrimination on the basis of race, creed, color, national origin, or sex by any club with more than four hundred members that "provide[d] regular meal service and regularly receive[d] 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." *Id.* at 6, quoting N.Y.C. ADMIN. CODE § 8-102(9) (1986).

25. *Id.* at 13.

26. *Id.* *Hurley* explained that the application of the antidiscrimination law was upheld because compelled access to the public benefits provided by the organization did not "trespass on the organization's message." 515 U.S. 557, 580 (1995).

The Court did not encounter a group that fits this description until *Dale*.

B. Freedom of Speech Balanced against State Interests: Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,²⁷ state courts had applied Massachusetts' public accommodations law to require the organizers of Boston's Saint Patrick's Day Parade to allow the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to march in the parade behind a banner identifying the group by name, contrary to the parade organizers' wishes.²⁸ The organizers contended that the First Amendment freedom of speech protected their decisions about who should be permitted to participate in the parade. The Supreme Court unanimously held that states may not require the organizers of a parade to include a group communicating a message the organizers do not wish to convey.²⁹ The Court made clear that the First Amendment protects expression beyond written or spoken words and that "a narrow, succinctly articulable message is not a condition of constitutional protection."³⁰ Simply put, freedom of expression entails a right to decide what not to say.³¹ As for the validity of the antidiscrimination statute itself, including the provision relating to sexual orientation, the *Hurley* court stated that such provisions are "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, and they do not, as a general matter, violate the First or Fourteenth Amendments."³²

Expressive association claims are typically treated differently from freedom of speech claims, but the *Hurley* court noted that the outcome would be the same under a freedom of expressive asso-

27. 515 U.S. 557 (1995).

28. *Id.* at 561-66. While participation in the parade was largely open to anyone who applied, the organizers of the parade, the South Boston Allied War Veterans Council, had also excluded the Ku Klux Klan and an antibusing group. *Id.* at 562. The parade organizers did not seek to exclude homosexuals from the parade: the disagreement stemmed from GLIB's intent to march carrying an identifying banner. *Id.* at 572.

29. *Id.* at 559.

30. *Id.* at 569.

31. *Id.* at 573 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)). "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

32. *Id.* at 572.

ciation analysis.³³ The opinion stated that “GLIB could . . . 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 the club’s existing members.”³⁴ The unanimous Court thus analogized the exclusion of GLIB and its banner to the legitimate membership criteria described in *New York State Club Ass’n*.³⁵ Hurley’s flexible doctrinal approach to freedom of expression and expressive association, together with *Roberts*, *Duarte*, and *New York State Club Ass’n*, set the stage for *Boy Scouts of America v. Dale*.

II. *BOY SCOUTS OF AMERICA V. DALE*: CHANGING THE RULES OF THE GAME?

A. *James Dale’s Expulsion from the Boy Scouts*

James Dale became a Boy Scout in 1981, when he was ten, and remained a Scout until the age of eighteen.³⁶ In 1988, he achieved the prestigious rank of Eagle Scout, an honor that only 3 percent of all Boy Scouts attain.³⁷ In 1989, Dale applied for adult membership in the Boy Scouts, and he was appointed assistant scoutmaster of Troop 73.³⁸

He enrolled the same year at Rutgers University. There, he recognized that he was gay, and became involved with the Rutgers University Lesbian/Gay Alliance.³⁹ In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers.⁴⁰ A newspaper covering the event published Dale’s photograph along with an interview and a caption identifying him as co-president of the Rutgers University Lesbian/Gay Alliance.⁴¹

33. *Id.* at 580.

34. *Id.* at 580–81.

35. Compare *id.* at 580–81, with *New York State Club Ass’n*, 487 U.S. at 13.

36. 530 U.S. at 644. Dale was a Boy Scout for the maximum period of time allowed: scouts are between the ages of ten and eighteen. Before he reached age ten, Dale was a member of the Cub Scouts, an organization associated with the Boy Scouts.

37. *Id.* at 644, 665.

38. *Id.*

39. *Id.* at 644–45.

40. *Id.* at 645.

41. Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (NEWARK), July 8, 1990, § 2, at 11.

Shortly thereafter, Dale received a letter from local Boy Scout executive James Kay revoking Dale's adult membership and his position as assistant scoutmaster.⁴² When Dale wrote back to ask why his membership had suddenly been revoked, Kay responded that the Boy Scouts "specifically forbid[s] membership to homosexuals."⁴³ Dale had not revealed his sexual orientation to anyone affiliated with the Boy Scouts, and had not indicated that he planned to discuss his sexuality with the troop members.⁴⁴

Dale sued the Boy Scouts in 1992, alleging that its revocation of his membership on the basis of his sexual orientation constituted a violation of New Jersey's Law Against Discrimination.⁴⁵

B. Dale v. Boy Scouts of America in the New Jersey State Courts

The trial court found that New Jersey's public accommodations law did not apply to the Boy Scouts because the organization was not a "place of public accommodation" within the meaning of the law.⁴⁶ Even if the Boy Scouts were a place of public accommodation, the trial court reasoned, it is a distinctly private group exempted from coverage under New Jersey's law.⁴⁷ The trial court further found that the First Amendment freedom of association prevented New Jersey from forcing the Boy Scouts to accept Dale as a member because the Boy Scouts' prohibition of "active homosexuality" was unequivocal.⁴⁸

The New Jersey Superior Court's Appellate Division reversed, holding that New Jersey's public accommodations law did apply to the Boy Scouts, and that Dale's expulsion constituted a violation of

42. See *Dale*, 530 U.S. at 665 (Stevens, J., dissenting).

43. *Id.* The Boy Scouts is a national, nonprofit membership organization chartered by Congress. As of December 1992, the BSA reported 3,453,315 youth members and 1,172,485 adults registered in 123,045 traditional scout units. *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 274 (N.J. Super. Ct. App. Div. 1998). Each United States president since Taft has acted as honorary president of the club. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1212 (N.J. 1999). The federal government supplies facilities, equipment, and services to the club. See *id.* at 1212-13.

44. In fact, troop leaders are strongly discouraged from discussing sexuality with their charges. See 530 U.S. at 654; *Id.* at 669 (Stevens, J., dissenting) (quoting Scoutmaster Handbook (1972)). The majority opinion notes that the Boy Scouts dispute this statement with contrary evidence. *Id.* at 655.

45. *Id.* at 645. Dale's complaint also alleged common law claims, the dismissal of which was affirmed by the Appellate Division of the New Jersey Superior Court and by the New Jersey Supreme Court. 706 A.2d 270, 283 (N.J. Super. Ct. App. Div. 1998); 734 A.2d at 1219 (N.J. 1999).

46. 530 U.S. at 645.

47. *Id.*

48. *Id.*; *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 284-85 (N.J. Super. Ct. App. Div. 1998).

the law.⁴⁹ The court assumed, *arguendo*, that the application of New Jersey's law to the Boy Scouts implicated the First Amendment.⁵⁰ The Appellate Division found that application of the law would not significantly affect the Boy Scouts' expression.⁵¹ The Boy Scout Oath states that Scouts should be "morally straight" and "clean," but the court found no indication that those statements refer to heterosexuality, apart from position statements the organization issued after Dale's expulsion.⁵² Moreover, the position the Boy Scouts advocated had not been publicized in any form when it expelled Dale, most members were unaware of the existence of such a policy, and the policy contradicts the beliefs of many sponsoring groups. These facts provided further evidence that application of New Jersey's Law Against Discrimination would not affect the Boy Scouts' expression.⁵³

The Appellate Division dismissed the Boy Scouts' claims that *Hurley* was dispositive. Unlike *Hurley*, where both the parade and GLIB's desire to participate were pure speech,⁵⁴ the application of the antidiscrimination law to the Boy Scouts in *Dale* would not "alter the content of the [Boy Scouts'] viewpoint."⁵⁵ Finally, the court held that self-identification as gay could not constitute "expressive activity" on the basis of which the organization could expel Dale.⁵⁶

The New Jersey Supreme Court affirmed the judgment of the Appellate Division.⁵⁷ Because Dale's membership and leadership had

49. *Dale*, 706 A.2d at 280–81, 283. A separate opinion concurred with the majority in the Appellate Division that the Law Against Discrimination required that the Boy Scouts restore Dale's membership, but dissented insofar as a leadership position was concerned. *Id.* at 294–95 (Landau, J., concurring and dissenting). Judge Landau agreed that the Law Against Discrimination prohibits the Boy Scouts from revoking Dale's membership, but did not believe that New Jersey could require the Boy Scouts to reappoint Dale to a leadership position without running afoul of the First Amendment. *Id.*

50. *Id.* at 287–88.

51. *Id.* at 288.

52. *Id.* at 289–90. The Boy Scouts was embroiled in litigation challenging its antigay policy at the time. See *Curran v. Mt. Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998). New Jersey's Appellate Division suggested that the statements were "a litigation stance taken by the [Boy Scouts] rather than an expression of a fundamental belief concerning its purposes." *Dale*, 706 A.2d at 290.

53. *Dale*, 706 A.2d at 290–91.

54. *Id.* at 293.

55. *Id.* The court wrote that Dale's "public acknowledgement that he is a homosexual is hardly comparable to a banner in a parade declaring his pride in his homosexuality." *Id.*

56. *Id.* "We . . . cannot accept the proposition that the [Boy Scouts] has a constitutional privilege of excluding a gay person when the sole basis for the exclusion is [that person's] exercise of his own First Amendment right to speak honestly about himself." *Id.*

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

been revoked as a result of his sexual orientation, the Boy Scouts had violated New Jersey's Law Against Discrimination.⁵⁸ Citing the *Roberts* trilogy, the New Jersey Supreme Court held that application of New Jersey's Law Against Discrimination does not implicate the Boy Scouts' freedom of expressive association. The Court reasoned that since the record did not show that a purpose of the organization is to promote the view that homosexuality is immoral, being forced to include Dale would not significantly affect the group's ability to carry out its purposes.⁵⁹

The New Jersey Supreme Court distinguished the facts of *Hurley* on two grounds. First, Dale did not attend Boy Scout meetings carrying a banner announcing his sexual orientation.⁶⁰ Second, Boy Scout leadership, unlike a parade, is not a form of pure speech in that Dale did not participate in the organization to express a point of view, the way marchers in a parade do.⁶¹ The court rejected the idea that including Dale required the Boy Scouts to endorse any message.⁶²

C. *The United States Supreme Court's Analysis of Dale*

Chief Justice Rehnquist's majority opinion in *Dale* found that the application of New Jersey's Law Against Discrimination to the Boy Scouts violated the First Amendment because forcing the Boy Scouts to include Dale would require the organization to send a message it did not wish to send.⁶³ First, the Court found that the Boy Scouts' mission of inculcating values is clearly expressive.⁶⁴ Second, including Dale would significantly affect the Boy Scouts' ability to advocate public or private viewpoints.⁶⁵ Finally, because including Dale would require the Boy Scouts to send a message about homosexuality, the

58. *Id.* at 1218–19.

59. *Id.* at 1223.

60. *Id.* at 1229.

61. *Id.*

62. *Id.*

63. *Dale v. Boy Scouts of Am.*, 530 U.S. 640, 643–44. The Court basically found that the conditions set forth in *New York State Club Ass'n* had been satisfied. For a discussion of the conditions set forth in that case, see *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

64. *Dale*, 530 U.S. at 648–50. The *Dale* court found it “undisputable that an association that seeks to transmit such a system of values engages in expressive activity,” and stated that protected group expression need not be advocacy, and may be public or private. *Id.* at 650.

65. *Id.* at 649–57.

application of New Jersey's antidiscrimination law to the Boy Scouts was unconstitutional.⁶⁶

The Court accepted the Boy Scouts' arguments regarding the nature of the organization's expression and the significant burden that Dale's inclusion would have on its expression.⁶⁷ The Court gave complete deference to the Boy Scouts' assertion that Dale's inclusion would negatively affect its expression.⁶⁸ Despite its deference to the group's claims about what would impair the group's expression, the Court declared that an expressive association cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."⁶⁹ The Boy Scouts' claim was not fictitious, the Court determined, because Dale admitted that he is a community leader who is open and honest about his sexual orientation.⁷⁰ Because the Boy Scouts refuses to "promote homosexual conduct as a legitimate form of behavior," Dale's presence would interfere with the Boy Scouts' choice "not to propound a point of view contrary to its beliefs."⁷¹

The Court concluded that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."⁷² Although the Court had earlier recited the test set out in *Roberts*,⁷³ it recognized that its deference to the Boy Scouts' claims

66. *Id.* at 659.

67. *Id.* at 651–53. The Court made clear that it would be improper for a court to evaluate conflicting Boy Scout policies. *Id.* at 651.

68. *Id.* at 651. The opinion states:

The Boy Scouts asserts that it "teaches that homosexual conduct is not morally straight" and that it does "not want to promote homosexual conduct as a legitimate form of behavior." We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality.

Id. (citations omitted). However, the Court went on to examine an unpublicized 1978 internal Boy Scout memorandum, position statements issued after Dale's expulsion, and the existence of other litigation on its antigay membership policy "on the question of the sincerity of the professed beliefs." *Id.* This examination obscures the Court's actual approach, and fuels concerns, addressed *infra* Part III.B.3, that organizations will be able to use the First Amendment freedom of expressive association as an easy justification for violation of antidiscrimination laws, as long as the organization can produce a document explaining the organization's discriminatory policy.

69. *Id.* at 653.

70. *Id.*

71. *Id.*

72. *Id.* at 659.

73. *Id.* at 647–48.

more closely approximated the approach taken in *Hurley*.⁷⁴ The *Dale* court distinguished the facts of *Roberts* and *Duarte* because, in those cases, the Court found that enforcement of the statute would not materially interfere with the ideas the organization sought to express.⁷⁵

Finally, Rehnquist's opinion addressed the flaws in the New Jersey Supreme Court's analysis. First, the First Amendment's protections of expressive activity are not limited to association for the purpose of disseminating a certain message.⁷⁶ The Boy Scouts did not need to prove that a primary purpose of the organization was to promote the idea that homosexuality is immoral to be entitled to First Amendment protection. Second, even if Scout leaders are discouraged from talking about sexual matters with Scouts, rolemodeling—the manner of expression used by the Scouts—is protected.⁷⁷ Third, the New Jersey Supreme Court wrongly assigned relevance to the fact that not all members agree with the Boy Scouts' position on homosexuality.⁷⁸ "The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection," wrote Rehnquist.⁷⁹

D. *The Dale Dissents*

The new approaches of the majority in *Dale* provided ample room for strong dissents, representing four of the nine Supreme Court justices. Justices Souter, Ginsburg, and Breyer joined Justice Stevens' dissent. Stevens would have held that New Jersey's Law Against Discrimination does not implicate the Boy Scouts' constitutional rights because it "does not impose any serious burdens on [the Boy Scouts'] collective effort on behalf of its shared goals, nor does it force the organization to communicate any message that it does not wish to endorse."⁸⁰ His dissent focused extensively on the lack of shared goals or a common moral stance on homosexuality within the organization and the fact that the Boy Scouts' message

74. *Id.* at 659.

75. *Id.* at 657–58. Of course, the simplicity of this reasoning does not explain why the Court carefully scrutinized the organizations' claims in *Roberts* and *Duarte*.

76. *Id.* at 655.

77. *Id.*

78. *Id.* at 655–56.

79. *Id.* at 656.

80. *Id.* at 664–65 (citations omitted).

regarding homosexuality was not publicly expressed.⁸¹ Justice Stevens's opinion expressed astonishment at the majority's deference to the Boy Scouts' litigation posture, and said that a court must perform independent analysis of a group's message.⁸² Otherwise, genuine freedom of association claims will be indistinguishable from claims seeking to protect nonexpressive private discrimination, and civil rights legislation will be rendered useless.⁸³

Justice Stevens's dissent found *Dale* indistinguishable from *Roberts* and *Duarte*, and noted that *Dale* represents the first instance in which the Court upheld a freedom of association claim over a state antidiscrimination law. In order to reach a balancing of state and group interests, Stevens wrote, "the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude."⁸⁴ The dissent found *Hurley* inapplicable for the same reasons expressed by the New Jersey Supreme Court: by participating in the Boy Scouts, Dale did not express a message in the same way that GLIB expressed a message by participating in the parade carrying a banner, and it was not likely that Dale's speech would be perceived as the organization's speech.⁸⁵ According to Justice Stevens, because the Boy Scouts did not show how its expression would be affected by New Jersey's antidiscrimination law, it was unnecessary to weigh the state and group interests against each other, and the application of the antidiscrimination law should have been upheld.⁸⁶

Justice Souter's dissent, joined by Justices Ginsburg and Breyer, agreed with Stevens's argument that in order for an association to prevail on a freedom of expressive association claim, it must "identify[] a clear position to be advocated over time in an unequivocal way."⁸⁷ To require less, Souter writes, "would convert the right of expressive association into an easy trump of any antidiscrimination

81. *Id.* at 665–78.

82. *Id.* at 685–86. Stevens believes that *Roberts* and *Duarte* show that it is not enough to simply engage in some kind of expressive activity and adopt an exclusionary membership policy. Furthermore, mere articulation of some connection between the group's expressive activities and its exclusionary policy will not allow a group to prevail on an expressive association claim. *Id.* at 680–84.

83. *Id.* at 686–87.

84. *Id.* at 687.

85. *Id.* at 693–95.

86. *See id.* at 663–65.

87. *Id.* at 701.

law.”⁸⁸ Justice Souter noted that changing public perceptions of homosexuality should not control the Boy Scouts’ ability to establish a freedom of expressive association claim.⁸⁹

III. HOW DOES *DALE* FIT INTO THE PUZZLE OF EXPRESSIVE ASSOCIATION?

The *Dale* court was highly protective of associational freedoms, but did not explain why the Boy Scouts prevailed on their freedom of expressive association claim though groups such as the Jaycees and the Rotary Club had not succeeded in making very similar claims. The *Dale* result is very difficult to square with the language of the *Roberts* trilogy, and important distinctions can be drawn between the circumstances in *Dale* and those in *Hurley*. Evaluating freedom of expressive association claims by looking at a group’s primary purpose will help jurists and scholars understand the contributions *Dale* has made to the development of freedom of expressive association jurisprudence.

A. *Dale and Precedent*

1. The *Roberts* Trilogy and *Dale*

Boy Scouts of America v. Dale marks an important departure from precedent because of its deference to the Boy Scouts’ claims. Once an organization has established that it engages in expressive activity,⁹⁰ the analytical framework developed in *Roberts*, *Duarte*, and *New York State Club Ass’n* consists of two main parts. First, the organization must show that application of the antidiscrimination law would significantly burden the organization’s expressive activities.⁹¹ Upon a showing that application of an antidiscrimination law would significantly burden its expression, the second part of the analysis is to balance the group’s interest in freedom of expression against the government’s interest in eradicating discrimination.⁹²

88. *Id.* at 701–02.

89. *Id.* at 700–02.

90. The various United States Supreme Court decisions readily accepted that the Boy Scouts engaged in expressive activity.

91. See *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

92. See *Roberts*, 468 U.S. at 623, 628; *Duarte*, 481 U.S. at 549.

The *Dale* analysis did not follow the analytical framework laid out in the *Roberts* trilogy. With respect to the first part of the analysis, the opinion concluded that a connection existed between the Boy Scouts' expression and the exclusionary policy without analyzing the Boy Scouts' claims regarding the nature of its expression and the effects that application of the antidiscrimination law would have on that expression. The Court had been very critical of such claims in *Roberts* and *Duarte*, and had required detailed explanations of how allowing membership to women would change the group's expression, ultimately rejecting such arguments.⁹³ If the *Dale* Court had followed *Roberts* and *Duarte* closely, it would likely have concluded that since scout leaders are directed not to speak to their troops about matters of sexuality, the inclusion of gay scout leaders would have no effect on the Boy Scouts' expression.⁹⁴

The *Dale* opinion departed from the second part of the *Roberts* framework altogether. When balancing the group's interest in freedom of expression against the state's interest in eradicating discrimination, the state's interest must be compelling, unrelated to the suppression of ideas, and the law must be no more restrictive than necessary to achieve the state interest.⁹⁵ The opinions in *Roberts* and *Duarte* enunciate, without exception, the principle that a state's interest in eradicating discrimination is compelling.⁹⁶ Moreover, *Hurley* specifically addressed a law that prohibited discrimination on the basis of sexual orientation, and found that, on its face, the law was

93. Compare *Dale*, 530 U.S. at 649–53, with *Roberts*, 468 U.S. 609, 626–28, and *Duarte*, 481 U.S. at 548–49.

94. In *Roberts*, the Court condemned reliance on unsupported generalizations about differences between men and women. 468 U.S. at 627–28. The *Duarte* court stated that compelling the Rotary Club to admit women would not affect expression because the group had traditionally remained silent on political issues. 481 U.S. at 548.

95. *Roberts*, 468 U.S. at 623; *Duarte*, 481 U.S. at 549.

96. See *Roberts*, 468 U.S. at 624–26; *Duarte*, 481 U.S. at 549. Certainly, it would be inappropriate for a court to determine that eradicating certain kinds of discrimination (e.g., discrimination against women) constitutes a compelling governmental interest, but eradicating other types of discrimination (e.g., discrimination on the basis of sexual orientation) does not constitute a compelling governmental interest. Justice Stevens's and Justice Rehnquist's opinions in *Dale* addressed this point in their exchange about the public perception of homosexuality. Stevens argued that the public perception of homosexuality has changed (presumably to show that eliminating discrimination against gays and lesbians is a compelling governmental interest), but Rehnquist responds that public perception is not relevant to a compelling governmental interest. Justice Souter's dissenting opinion agrees that public opinion of homosexuality has nothing to do with the outcome of the case. This aspect of the *Roberts* analysis may explain why the majority opinion reverted to a *Hurley* analysis rather than continuing the *Roberts* analysis. If Rehnquist's opinion had used a *Roberts* analysis, he would have had little choice but to concede that eliminating discrimination on the basis of sexual orientation is a compelling state interest.

not directed at expression and did not impermissibly discriminate on the basis of viewpoint.⁹⁷ Using a *Hurley*-type analysis, the *Dale* Court found that application of the antidiscrimination law would force the Boy Scouts to send a message it did not wish to, and, consequently, the majority opinion did not reach the *Roberts* balancing test. The Court concluded that the state's interest could not outweigh the Boy Scouts' interest in not being forced to express points of view it did not wish to express.⁹⁸ Accordingly, the Court did not explain whether the application of the antidiscrimination law to the Boy Scouts was struck down because the state interest was related to the suppression of ideas, because the Court had found that this state interest was not compelling, or because although it was compelling and unrelated to the suppression of ideas, it did not outweigh the Boy Scouts' interest in freedom of expressive association.

Thus, the *Dale* court varied greatly from precedent in both major portions of the *Roberts* trilogy analysis. First, the *Dale* court accorded deference to the Boy Scouts' assertions about the nature of its expression and the effects that the antidiscrimination law would have on the expression. Second, the *Dale* court did not directly address the conflict of interests between the Boy Scouts and New Jersey as a result of that deference. To reconcile *Dale* and the *Roberts* trilogy, there must be some distinction beyond the fact that the Jaycees and Rotary Club did not argue that their expression included the message that women do not belong in business.⁹⁹ If the Jaycees and Rotary Club had made such arguments under the analysis used in *Dale*, the organizations would have been afforded deference regarding the types of expression the organization engaged in and the effect that admitting women would have on the group's expression. Meeting these requirements would be easy for any group, and would constitute an "easy trump" of antidiscrimination laws, in the words of Justice Souter.¹⁰⁰ A more viable distinction between *Dale* and the *Roberts* and *Duarte* opinions is the nature of the

97. 515 U.S. 557, 572 (1995). The Court noted that rather than focusing on expression, the antidiscrimination law in question focused on the act of discrimination in the provision of publicly available goods, privileges, and services. The constitutional violation in *Hurley* was not created by the antidiscrimination law itself, but by its application to a group's expression (a parade). *Id.* at 573.

98. *Dale*, 530 U.S. at 654–55.

99. Presumably, most organizations with discriminatory membership policies could find a document that referred to or justified (however obliquely) the exclusionary policy, similar to the Boy Scouts' 1978 internal memo.

100. *Dale*, 530 U.S. at 702 (Souter, J., dissenting).

organizations involved—the Boy Scouts is a primarily expressive organization, the Jaycees and Rotary Club are not. The *Dale* Court does not focus on this variance, but the distinction is highly relevant.

2. *Hurley* and *Dale*

The *Hurley* decision made clear that although the case was decided on free speech rather than expressive association grounds, freedom of speech and freedom of expressive association are so closely related that either analysis could be applied to a given case, and the outcome under each test would often be the same.¹⁰¹ The intersection of the two concepts is logical in *Dale*, but the Supreme Court majority opinion did not effectively address the arguments in the dissenting and lower court opinions that *Hurley* is distinguishable because it is a pure speech rather than a freedom of expressive association case.

Applying the maxim that freedom of expression entails the freedom not to speak invites inquiry as to whether *Dale*'s inclusion would require the Boy Scouts to make any expression about homosexuality. Clearly, the decision not to speak about homosexuality is as expressive as the decision to speak against it.¹⁰² Yet strong arguments have been made that permitting James Dale, an Eagle Scout, to continue as an assistant troopmaster would not require the Boy Scouts to express anything.¹⁰³ Certainly, the organization is not expected to embrace all of the opinions and activities of all of its troopmasters.¹⁰⁴ However, the principal reason that *Hurley* is applicable is that, unlike the Jaycees and the Rotary Club, the Boy Scouts' sole purpose is to inculcate its set of values into young people. Whether fire building or knot tying, the Boy Scouts'

101. *Hurley*, 515 U.S. at 580–81; see *supra* notes 33–35 and accompanying text. Darren Hutchinson decried the approach in *Hurley*, partly because of its potential to “disturb” the *Roberts* framework. Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 91, 102 (1998). While *Dale* may have proven that *Hurley* would have an important effect on the development of freedom of expressive association case law, this Comment suggests that the *Roberts* framework has not been “disturbed,” but that it has been expanded upon to more adequately protect the association of all groups, regardless of the group’s message.

102. This concept is discussed *infra* Part III.B.4.a. Cf. STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH* 31–50 (1994) (explaining that a non-Western university curriculum is no more political than an all-Western curriculum).

103. See *Dale*, 530 U.S. at 684–85 (Stevens, J., dissenting); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1229 (N.J. 1999); *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 293 (N.J. Super. Ct. App. Div. 1998).

104. See *Dale*, 530 U.S. at 690–91 (Stevens, J., dissenting).

activities are as expressive as a parade because they are inextricably tied to the inculcation of values. Any nonexpressive activity the organization engages in is merely incidental to the expressive activity. As an expressive association, the Boy Scouts should have the absolute decision-making authority as to who will be permitted to participate.¹⁰⁵

The dissenting justices emphasized the fact that Dale did not seek to participate in the Boy Scouts to “make a point” about sexuality the way the marchers in *Hurley* did.¹⁰⁶ This is irrelevant: where an organization’s freedom of expression is abridged, the would-be member’s intentions are not part of the inquiry. According to the Boy Scouts, troopmasters lead by example, so leaders’ lifestyles constitute an integral part of the organization’s expression.¹⁰⁷ When the *Dale* majority opinion accepted the Boy Scouts’ assertions at face value without distinguishing between the Boy Scouts and other associations, such as the Jaycees and the Rotary Club, the *Dale* dissenters were horrified at this unquestioning acceptance of a party’s litigation stance.¹⁰⁸ As will be shown, however, this acquiescence is justified in the case of purely expressive associations.

B. A Comprehensive Approach to Reconciling Dale with Freedom of Expressive Association Precedent

The disparity between the results and analysis in *Dale* and the freedom of expressive association precedent can be resolved by examining the cases through a framework that takes into account the purpose of the organization. An organization that is purely expressive will receive a great deal of deference when it claims that application of a state law is violative of its First Amendment freedom of expressive association. An organization that is primarily economic should receive very little deference in First Amendment protection claims. Where an organization’s activities are mixed, *Roberts*-type scrutiny and balancing should take place.

105. The case is complicated by the great degree of governmental support that the Boy Scouts of America receives at the federal, state, and local levels. This problem is addressed in the Conclusion, *infra*.

106. See *Dale*, 530 U.S. at 694–95 (Stevens, J., dissenting); 734 A.2d 1229 (N.J. 1999).

107. *Dale*, 530 U.S. at 649–50. This is further evidenced by the Boy Scouts’ tolerance of straight scout leaders who openly disagree with the organization’s stance on homosexuality. See *id.* at 655–56.

108. *Id.* at 685–86 (Stevens, J., dissenting).

1. Justice O'Connor's *Roberts* Concurrence

Justice O'Connor's concurrence in *Roberts v. United States Jaycees* is a useful starting point for the framework proposed in this Comment. Justice O'Connor wrote that the test employed by the *Roberts* majority was simultaneously "overprotective of activities undeserving of constitutional shelter and underprotective of important First Amendment concerns."¹⁰⁹ The opinion expressed concern that commercial associations, which should receive only minimal constitutional protection, might satisfy the requirement that antidiscrimination laws "substantially affect" their expression, thereby gaining protection for discrimination by occasional expressive activity.¹¹⁰ At the other extreme, the analysis set forth in *Roberts* did not afford purely expressive associations enough protection, according to O'Connor.¹¹¹ "An association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members" because the definition of membership is coterminous with the creation of a collective voice.¹¹² Government interference with the development of that voice is an unconstitutional manipulation of the content of public discussion.¹¹³

When presented with associations that are neither primarily expressive nor primarily commercial, Justice O'Connor's approach would assess whether expressive or commercial activities predominate the association's operations, and evaluate predominantly expressive associations' claims the same way that purely expressive associations' claims would be evaluated.¹¹⁴ A predominantly commercial association that engaged in expressive activity would be treated in the same manner as a commercial association that engaged in no expressive activity at all. Recognizing that no simple test would determine whether a group was predominantly expressive or

109. 468 U.S. 609, 632 (O'Connor, J., concurring).

110. *See id.* at 632, 634.

111. *Id.* at 633.

112. *Id.*

113. *Id.* at 634.

114. *See id.* at 635–36. Justice O'Connor writes:

[A]n association should be characterized as commercial . . . 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.

Id.

predominantly commercial, Justice O'Connor argued that making such determinations was feasible if courts examine the purposes of the association and the purposes of members joining the association.¹¹⁵ For example, in *Hishon v. King & Spalding*,¹¹⁶ it was clear that the defendant, a large law firm, was primarily engaged in commercial activity. There was, therefore, no need to evaluate a connection between the firm's discriminatory employment practices and the firm's speech or to weigh compelling state interests against the firm's interest in expression.¹¹⁷ In *Roberts*, Justice O'Connor easily concluded that the Jaycees should be treated as a commercial association because, despite a "not insubstantial" amount of protected speech, the group's activities were primarily commercial.¹¹⁸

The approach advocated in this Comment uses Justice O'Connor's framework to explain how *Dale* fits into a cohesive freedom of expressive association jurisprudence.

2. The Spectrum Approach: Maximal Protection for Freedom of Expression and for Antidiscrimination Laws

Organizations that fall between the extremes of primarily expressive and primarily commercial are those hybrid associations whose commercial and expressive activities are not engaged in solely to facilitate the other type of activity. Although an association that is primarily expressive is incidentally commercial because it enters into the economic marketplace when it purchases uniforms and hires people to clean and perform secretarial duties, these incidental economic activities are pursued only to promote the organization's expressive activity. Similarly, corporate expression pursued to promote the business's economic activity is only incidentally expressive and will not change the company's characterization as primarily economic for the purposes of freedom of expressive association analysis. Hybrid commercial-expressive associations are engaged in independent economic and expressive activities.

A comprehensive approach to freedom of expressive association recognizes the different degrees of government interest in eradicating discrimination and group interest in freedom of expressive asso-

115. *Id.*

116. 467 U.S. 69 (1984).

117. *Roberts*, 468 U.S. at 637 (O'Connor, J., concurring).

118. *Id.* at 639-40. Justice O'Connor quotes the "not insubstantial" language of the Eighth Circuit Court of Appeals. *Id.* at 640.

ciation. Purely expressive groups should receive absolute First Amendment protection,¹¹⁹ and purely commercial associations' expression should receive minimal protection. Between these two extremes, a court's analysis should take into account the relative degrees of interest on the part of the state and the association asserting freedom of expressive association, as described in *Roberts*.

Using this approach, once a hybrid commercial-expressive association (such as the Jaycees or the Rotary Club or a large private club which provides a forum for business transactions) establishes that it engages in expressive activity, a court would evaluate the connection between expression and exclusionary policy, the effects the antidiscrimination law would have on the group's ability to advocate public or private viewpoints, and the degree of government interest in eradicating discrimination. The degree of state interest in eradicating discrimination will vary with the type of benefit denied to excluded individuals. This analysis would be informed by facts relating to the amounts of expressive and commercial activities engaged in by the organization, and the extent to which expressive activities are incidental to commercial activities and vice versa. Thoughtful, consistent application of the *Roberts* balancing test would result in a spectrum of levels of protection because the degree of deference to an organization's expressive activity will vary depending on the amount of the group's expressive activities, and the degree of state interest will vary depending on the group's commercial activities. An association which is primarily expressive but engages in a small amount of non-incidental commercial activity has a strong interest in freedom of expressive association, whereas the state's interest in

119. Professor Richard Epstein argues that all private associations should have the same protection of membership decisions as the Boy Scouts of America does, and antidiscrimination laws should only prevail over freedom of association where the discriminatory organization enjoys a monopoly. Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000). Epstein recognizes that his libertarian approach "call[s] for the constitutional invalidation of much of the Civil Rights Act, including Title VII insofar as it relates to employment." *Id.* at 139. The radical departure from existing First Amendment law that Epstein advocates is beyond the scope of this Comment, but portions of his analysis are very useful for the present endeavor. For example, Epstein points out that but for the provision in New Jersey's law exempting organizations that are "reasonably restricted exclusively to one sex," the analysis Justice Stevens advocated would require the Boy Scouts to admit girls as troop members, since the Boy Scouts does not believe that "girls are immoral per se." *Id.* at 130 (quoting N.J. STAT. ANN. § 10:5-12(f) (West 1993)). Allowing primarily expressive groups to limit their activities to members of one gender allows for a comprehensive approach to the conflicts between antidiscrimination laws and freedom of expressive association rather than requiring exceptions for generally accepted membership policies.

eradicating discrimination in expressive associations is fairly low because of the minimal impact on individuals' social liberty. An association such as the Jaycees, which is primarily economic though it engages in some expressive activity, has a lesser interest in freedom of expressive association, whereas the state's interest in eradicating discrimination is heightened because of the economic nature of the group.

Thus, an organization's interest in freedom of expressive association is proportionate to the amount of its activity that is purely expressive (as distinguished from incidentally expressive), whereas the state's interest in eradicating discrimination is strongest in relation to that part of the organization's activities that affect individuals' social liberty, particularly economic activities. The more integral the expression is to the group's overall activities, the greater the organization's interest in relation to the state's interest. Similarly, the more elemental the right involved is to social liberty, the stronger the state's compelling interest in eradicating discrimination will become in relation to the group's interest in freedom of expression.¹²⁰ Put another way, although the *Roberts* analysis indicates a state's interest in ending discrimination is compelling, the state's interest in eradicating discrimination is not always equally compelling. A governmental interest in providing equal access to economic opportunity, transportation, or literacy is more compelling than a governmental interest in ensuring equal access to social opportunities because the governmental interest is higher with respect to activities that facilitate the participation of independent, self-supporting citizens in the activities of the state.

Recognition of varying degrees of governmental and organizational interest in membership decisions will enliven the *Roberts* test, increasing its utility and providing structure for analysis of conflicts between freedom of expressive association and antidiscrimination laws. This "spectrum framework" shows that *Dale's* recognition of the absolute rights of purely expressive associations can be understood to reflect the development of a more comprehensive approach to freedom of expressive association than the language of the opinion reflects.

120. O'Connor's *Roberts* concurrence addresses only economic and expressive groups, but states have important interests in ensuring equal access to other types of opportunities that are essential to liberty, such as education and housing.

3. Absolute First Amendment Protection of Expressive Associations' Membership Policies Will Not Create an "Easy Trump" of Antidiscrimination Laws

The *Dale* dissents expressed concern that *Dale* makes freedom of expressive association an easy way for organizations to avoid the requirements of antidiscrimination laws.¹²¹ The *Dale* majority believed that it would not be easy to fake freedom of expressive association claims to avoid the application of antidiscrimination laws,¹²² but did not adequately explain how courts would recognize such claims. Understanding the outcome in *Dale* as part of a larger framework that only gives great deference to purely expressive organizations shows that such protection will not undermine the effectiveness of antidiscrimination laws.

Associations that are not primarily expressive will not be able to package themselves as such to avoid application of state antidiscrimination laws because courts will look not only to the written materials of the organization but also to the primary activities of the association and the members' reasons for participation.¹²³ Including a written objective relating to the discrimination cannot, of itself, protect a group from antidiscrimination laws, nor is it prerequisite to such protection.¹²⁴ The Jaycees and Rotary Club would not have been able to package themselves as primarily expressive because most of their economic activities were independent from their expressive activities. Furthermore, members typically joined for economic reasons and for professional development, and treated membership fees as a business expense. Based on the public accommodation status and economic

121. See, e.g., 530 U.S. 640, 688 (Stevens, J., dissenting) (arguing that "[s]hielding a litigant's claim from judicial scrutiny would . . . render civil rights legislation a nullity"); *Id.* at 701–02 (Souter, J., dissenting) (reasoning that allowing associations to claim a right of expressive association "without identifying a clear position . . . would convert the right of expressive association into an easy trump of any antidiscrimination law").

122. 530 U.S. at 653–54.

123. See *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

124. See, e.g., *Roberts*, 468 U.S. at 626–27. The confusion caused by the *Dale* court's look at the Boy Scouts' position statements is unnecessary since the position statements were superfluous for the purposes of the Court's analysis. The Court said that the Boy Scouts did not have to present evidence of its expression. 530 U.S. at 652–53. Thus, even if the *Dale* analysis were applied to the facts of *Roberts*, it seems that the Jaycees would not necessarily have prevailed if they had presented the Court with an internal document that says women are inferior or that women should not work out of the home because they are not entitled to the same degree of deference as the Boy Scouts. The problem of freedom of association potentially being an easy trump of civil rights laws is also addressed if the *Dale* case is understood as the Boy Scouts arguing that its primary mission is to promote "family values."

nature of the enterprise, the group's exclusionary membership policy should not be entitled to absolute deference. Where the group is not purely expressive, "[t]he right to associate for expressive purposes is not . . . absolute."¹²⁵ Simply engaging in some "not insubstantial" amount of expressive activity will not save an organization that is not primarily expressive from the reach of antidiscrimination laws.¹²⁶ The law firm in *Hishon v. King & Spalding*, moreover, would not have been able to avoid antidiscrimination laws by engaging in expressive activity because, given the overarching purpose of the organization (commercial law) and the members' reason for joining (earning a living), the law firm's freedom of association claim would have been slight compared to a government interest in eradicating discrimination against women.¹²⁷

Some commentators, as well as the dissenting opinions in *Dale*, argued that the Court should limit itself to objective evidence of a discriminatory message.¹²⁸ This approach does not sufficiently protect First Amendment rights because a particular belief may be so obvious to an organization's members and audience that the organization has not written it down or made formal expression on the topic.¹²⁹ Conversely, an expressive association might not anticipate or recognize certain of its characteristics or membership qualifications until a certain person sought inclusion, but once such a person appeared, it would become clear to the members that the inclusion of that individual would interfere with the group's legitimate expressive activities.¹³⁰ Using the spectrum framework to determine what degree of deference a group's membership decisions should be afforded prevents organizations that are not purely expressive from improperly

125. Cf. *Roberts*, 468 U.S. at 623.

126. See, e.g., *Roberts*, 468 U.S. at 617 (noting that the Jaycees engaged in some "not insubstantial" amount of protected expression).

127. No evidence was presented in *Hishon* that the firm engaged in protected expression. 467 U.S. 69 (1984).

128. See, e.g., 530 U.S. at 687 (Stevens, J., dissenting); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1230 (N.J. 1999) (Handler, J., concurring); Cara J. Frey, Note, *Hate Exposed to the Light of Day: Determining the Boy Scouts of America's Expressive Purpose Solely from Objective Evidence*, 75 WASH. L. REV. 577, 579 (2000).

129. For example, Paul Varnell points out that "the only reason the Boy Scouts never made opposition to homosexuality an explicit part of its 'core' message was that there was never any doubt about the moral status of homosexuality, so it did not need to." Paul Varnell, *Heterosexual Scouts of America*, CHI. FREE PRESS, July 5, 2000, at 13.

130. One can imagine a neighborhood association whose members all belong to one cultural group, whose expressive activities would be impeded by the presence of an unwanted member from a different cultural group, despite the association's lack of written statements or clear membership policies.

using freedom of association to legitimize discriminatory membership and hiring practices.

4. Allowing Primarily Expressive Associations Absolute First Amendment Protection of Membership Decisions is Justified in Light of the Rationales for Freedom of Expression

Because associational freedoms are derived from the First Amendment freedoms of speech and assembly,¹³¹ the justifications for freedom of expressive association are bound up with the justifications for freedom of expression. Common explanations for the freedom of expression are: (1) freedom of expression promotes democracy and self-governance; (2) freedom of expression promotes the search for truth; (3) freedom of expression is an important end in itself because it promotes self-realization; and (4) freedom of expression, by requiring tolerance, promotes more tolerance.¹³² The outcome in *Dale* and the approach advocated in this Comment are justified in light of these considerations.¹³³

a. *Democratic Self-Government*

The outcome in *Dale* and the spectrum approach advocated by this Comment protect the free flow of information central to the democratic process. If individuals are to effectively contribute to the political process, joining with others to contribute to the debate helps to ensure that viewpoints will be heard and taken into consideration by the voting public.¹³⁴ Protecting a purely expressive group's right to

131. *Dale*, 530 U.S. at 647–48; *Roberts*, 469 U.S. at 622. The Supreme Court has declared that the “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

132. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 751–56 (1997).

133. To make sense of freedom of expression, it is helpful to use more than one of these justifications. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 5 (1992); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 579 (1st ed. 1978). One could also embrace Rodney Smolla's argument when he writes:

At its most general level, freedom of speech in the United States needs no functional theories like “the marketplace of ideas” or “the self-fulfillment of the speaker” to support it, but rather is justified by the elegantly simple rationale that what speakers say or journalists print should be decided by speakers and journalists, and not by governments.

SMOLLA, *supra*, at 5.

134. Major proponents of this view include ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960); Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299 (1978); Vincent Blasi, *The Checking*

organize and to include only those individuals it thinks will effectively promote its message ensures that each voice in the debate is robust, undiluted by individuals that a group would rather not include.

A group that communicates disagreement with government action contributes to democratic self-government. Government action that inhibits the formation of a group that disagrees publicly or privately with the government action or social condition negatively affects the functioning of our democratic system. Thus, allowing purely expressive groups absolute First Amendment protection in membership preserves self-government regardless of the degree or nature of disagreement with government action or social condition. Although application of antidiscrimination laws restricting membership decisions of organizations that are not purely expressive implicates the principle of self-government, it does not directly violate the principle.

An expressive group's private expression (or nonexpression, in the case of the Boy Scouts' desire not to speak on matters of sexuality) contributes to the political process as much as public expression does. For example, the Boy Scouts' policy of remaining silent on matters of sexuality serves to silence and close off debate about proper sexuality—thus sending the message that things should continue as they have been, that no change is necessary. The Boy Scouts' decision not to publicize its discriminatory membership policy does not preclude individuals who are excluded on the basis of personal characteristics from publicizing their experience. Thus, the robust discourse envisioned by political theories of the First Amendment is achieved and not undermined.

b. Attainment of Truth

Ensuring that groups primarily engaged in expressive activity can determine their membership without government interference also promotes the attainment of truth. Justice Oliver Wendell Holmes argued in his famous dissent in *Abrams v. United States* that truth should be protected because truth is most likely to emerge from the clash of opinions in the "marketplace of ideas."¹³⁵

Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 523; Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; Cass Sunstein, *Hard Defamation Cases*, 25 WM. & MARY L. REV. 891 (1984).

135. 250 U.S. 616, 630 (1919). This idea had earlier been expressed by John Stuart Mill, who wrote that the "peculiar evil of silencing the expression of an opinion is, that it is robbing the

Although some scholars reject the truth-seeking rationale for First Amendment protections because it does not recognize the inequality of access to the marketplace of ideas, and because it is not obvious that truth will prevail in the marketplace,¹³⁶ the notion remains a strong tradition in American jurisprudence. As exemplified by the nationwide debate over the Boy Scouts' exclusionary policies,¹³⁷ the metaphoric marketplace of ideas can work very effectively. Individuals and organizations are free to choose whether or not to support the Boy Scouts in light of their discriminatory policies, thus enhancing the intellectual development of the nation. Increased participation in the marketplace of ideas makes the attainment of truth more likely. Furthermore, nonapplication of an antidiscrimination law to a purely expressive organization does not heavily disadvantage excluded individuals because other social and expressive organizations exist or can be formed.¹³⁸ Public debate about discriminatory membership policy is preferable to silent but begrudging acquiescence to New Jersey's antidiscrimination law, or worse, covert discrimination.

c. *Advancing Autonomy*

The spectrum approach protects autonomy to a greater degree than the *Roberts* trilogy or *Dale* taken alone. C. Edwin Baker is the chief proponent of the theory that speech is intrinsically important because it is the means by which individuals define themselves in the world.¹³⁹ Just as association among gays and lesbians plays an

human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it." JOHN STUART MILL, *ON LIBERTY* 18 (David Spitz ed., W. W. Norton & Co. 1975) (1859).

136. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); CATHARINE A. MACKINNON, *The Sexual Politics of the First Amendment*, in *FEMINISM UNMODIFIED* 206, 209–10 (1987); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

137. See, e.g., David France et al., *Scouts Divided*, NEWSWEEK, Aug. 6, 2001, at 44.

138. For example, youth organizations that do not discriminate on the basis of sexual orientation include the Boys and Girls Clubs of America, the National 4-H Council, Camp Fire Boys and Girls, the Girl Scouts, Jewish Community Centers, and the YMCA. In the context of services more vital to individual, social, and economic welfare, such as hotel accommodations, the fact that another hotel may not discriminate or that those discriminated against could start their own hotel is not persuasive. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

139. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978); see also Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

important role in the exploration and development of identity,¹⁴⁰ association limited to heterosexuals can be instrumental in the development of individual identity as well. People who believe that homosexuality is immoral can develop their autonomy by expressing their views and sharing time with others who have similar opinions in the context of an expressive association.¹⁴¹ Responding to discriminatory expression can also be empowering to individuals who disagree with the discriminatory speech. Permitting discrimination of this sort in employment, organized labor, or education contexts will harm the autonomy of excluded individuals to a greater degree than others' autonomy will be promoted because of the fundamental nature of the rights involved. Thus, the spectrum approach provides maximal protection for autonomy interests within purely expressive groups and hybrid groups.

d. Promoting Tolerance

The protection of discriminatory membership policies in *Boy Scouts of America v. Dale* effectively demonstrates Lee Bollinger's theory that promoting tolerance is an important force behind the First Amendment.¹⁴² Bollinger suggests that protecting expression of intolerance values expression not for the positive contributions it makes to social progress, but precisely for its lack of value,¹⁴³ that the protection of speech "serves to . . . hold up before us[] that which we aspire to avoid."¹⁴⁴ Witnesses to intolerant speech are afforded the opportunity to evaluate their own perceptions about the subject of the intolerant speech and to embrace tolerance in light of abhorrent intolerant speech.¹⁴⁵

140. WILLIAM N. ESKRIDGE, JR., GAYLAW 181 (1999).

141. It is also useful to note that the Boy Scouts is not engaging in hate speech, but is simply expressing its moral disagreement by restricting membership.

142. LEE BOLLINGER, THE TOLERANT SOCIETY 140 (1986). *Contra*, e.g., David Strauss, *Why Be Tolerant?* 53 U. CHI. L. REV. 1485 (1986). Bollinger himself recognizes that tolerance is not always a virtue, nor intolerance always a vice. BOLLINGER, *supra*, at 11.

143. See BOLLINGER, *supra* note 142, at 140.

144. *Id.* at 126.

145. Bollinger writes:

It can be extremely unsettling to see our own bad qualities reflected in the behavior of others; it draws our attention to what we regularly close off, or censor, from our minds. But such unsettling feelings can turn into abhorrence when we see those bad qualities under intense magnification, when we thus have put before us the potential course of those bad tendencies we sense within ourselves. . . . And it is the intolerance we feel toward our own intolerance that contributes to our wanting to censor the external, exaggerated reflection of that part of ourselves.

Id. at 127. See also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's*

Thus, knowledge of the Boy Scouts' exclusionary policies gives individuals an opportunity to reflect on their own perceptions of homosexuality and appropriate roles for gays and lesbians in society, to reject their prejudices, or simply to recognize that they exist.¹⁴⁶ Protecting intolerant expression also allows others to take part in social means of deterrence of inappropriate or unwanted speech.¹⁴⁷ In this sense, law functions as a "major project concerned with nothing less than helping to shape the intellectual character of the society."¹⁴⁸

Protecting intolerant membership policies in hybrid commercial-expressive organizations does not further this goal of promoting tolerance because the exclusionary policy goes far beyond the expression of intolerance that gives rise to desired mental processes. Discriminatory policies in hybrid organizations can deprive people of meaningful participation in society. Thus, the spectrum approach ensures the most efficient promotion of tolerance by regulating membership decisions of some hybrid groups and allowing individuals opportunity to evaluate their own perceptions by protecting membership decisions of purely expressive groups.

IV. THE PERSONAL IS POLITICAL—BEYOND THEORY INTO LAW?

Providing absolute First Amendment protection for expressive associations to determine their membership but limiting protection for hybrid groups to discriminate in their membership policies allows individuals to function in society without their personal lives becoming excessively politicized. Only where necessary to protect first amendment freedoms will an individual's personal characteristics keep him or her from participating in activities, thus limiting the legalization of the notion that "the personal is political."

Story, 87 MICH. L. REV. 2320, 2369 (1989) (recognizing concerns that some individuals miss entirely sarcastic messages and simply enjoy racist dialogue on its face).

146. Even a dialogue ending with, "Well, I don't know why I don't want my child in a Boy Scout troop with a gay scout leader, I just don't," has brought the speaker closer to tolerance by recognizing intolerance and the lack of reason behind it. Bollinger writes that his tolerance approach is in a broad way consistent with a commitment to pluralism. *Id.* at 242-43.

147. *Id.* at 12-13, 29. Social intolerance may well be more powerful than legal intolerance. *Id.* at 109-10.

148. BOLLINGER, *supra* note 142, at 107. Of course, in cases where racist or homophobic language is commonplace and accepted, the result may be the opposite—people may adopt such views without conscious thought. Nevertheless, our system of government presumes that individuals are autonomous, active individuals who are conscious of their decisions, not sheep who follow the herd. See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 178-79 (1982).

The slogan "the personal is political" took root in the second-wave feminism of the 1970s.¹⁴⁹ Originally, the catchphrase recognized that personal circumstances are molded and defined by the broader social and political setting in which they arise. In order to improve one's individual situation, it is necessary to address the context in which the oppression arose. Later, the saying came to mean that individual choices have political implications. For example, the choice to bear children, to shop at The Gap, or to follow a vegetarian diet is both a personal and a political decision. This latter meaning is frequently used in contemporary thought, and is the one William Eskridge uses when he writes: "[f]or gays, as much as for feminists, the personal is the political."¹⁵⁰

Eskridge continues: "Following the feminist lesson that the private is public, post-Stonewall gay activism teaches that revelation of personal sexual identity not only has political effects, but that tolerance of gay people does not happen without people coming out of their closets."¹⁵¹ For Eskridge, if gays and lesbians are to achieve meaningful social change, they must contribute to the "diverse and robust polity that the First Amendment envisions."¹⁵² This idea finds support in case law, as well. For example, in *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*,¹⁵³ the California Supreme Court recognized self-identification as gay to be political speech because "an important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' acknowledge their sexual preferences, and to associate with others in working for equal rights."¹⁵⁴

Other theorists argue that when the personal becomes political, important autonomy interests may be undermined. For example, Vincent Samar explains how information that is private with respect to some individuals or segments of society may not be private with respect to others, and vice versa.¹⁵⁵ The possibility of selective

149. THE NEW BEACON BOOK OF QUOTATIONS BY WOMEN 534 (Rosalie Maggio ed., 1996); MAGGIE HUMM, THE DICTIONARY OF FEMINIST THEORY 204 (2d ed. 1995).

150. ESKRIDGE, *supra* note 140, at 181.

151. *Id.* at 202.

152. *Id.* at 180. For Eskridge, this goal is achieved by self-identification as well as by expressions of affection, from public hand-holding to private sexual conduct. *Id.*

153. 595 P.2d 592 (Cal. 1979).

154. *Id.* at 610.

155. VINCENT J. SAMAR, THE RIGHT TO PRIVACY 64-65 (1991). Samar writes:

[W]hile the amount of one's income may be private with respect to certain members of one's family, the law provides that it is not private with respect to the IRS. On the other hand, whether or not one wears a toupee may not be private with respect to

disclosure avoids possible chilling effects on private acts from sexual activities to business transactions.¹⁵⁶

To promote the development of a tolerant society, antidiscrimination laws such as New Jersey's Law Against Discrimination recognize that the personal cannot always be political if we are to have a just or efficient society. By protecting individuals' privacy in the sphere of employment or public accommodations, such laws allow people freedom to come out of the closet, organize, and form a collective voice. In instances where members of a particular group may not recognize each other unless they self-identify, it is particularly important not to stifle First Amendment expression and the development of a diverse and robust polity by penalizing individuals who do self-identify.¹⁵⁷ Thus, where integral elements of social liberty

these same family members, but it is not the business of the IRS. Similarly, certain acts (such as having an abortion) are private with respect to the state (so long as the fetus is not considered to be a person and there is no jeopardy to the mother's health).

Id. Samar states that "[a]n action is . . . private with respect to a group of other actors if and only if the consequences of the act impinge on the first instance of the actor and not on the interests of the specified class of actors." *Id.* at 68. From this definition, Samar derives a definition of a private state of affairs: "[a] state of affairs is private with respect to a group of other actors if and only if there is a convention, recognized by the members of the group, that defines, protects, preserves, or guards that state of affairs for the performance of private acts." *Id.* at 73.

156. *Id.* at 74. Despite the benefits of such an approach, a right to selectively disclose personal information is not generally understood as legally cognizable. For example, in *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984), a California court dismissed Oliver Sipple's claims that national newspapers' publication of his homosexuality constituted an invasion of privacy. In September 1975, Oliver Sipple diverted the gunshot that Sara Jane Moore intended for President Ford outside a San Francisco hotel, and newspaper accounts of the occurrence included the fact that Sipple was a prominent member of San Francisco's gay community. As a result, Sipple's family, located in the Midwest, which had not previously known of his sexual orientation, abandoned him, and Sipple was further "exposed to contempt and ridicule causing him great mental anguish, embarrassment and humiliation." *Id.* at 667. The California Court of Appeals found that Sipple's sexual orientation was not private because it was publicly known in San Francisco, where he frequented gay bars, gay parades, and other "homosexual gatherings," and because hundreds of people in other communities across the country knew of Sipple's sexual orientation. *Id.* at 668-69. Thus, although Sipple would have liked to confine the knowledge of his sexual orientation to the gay community, or to any community other than ones that included his family, selective disclosure of private information is not a legally cognizable right.

157. Justice Handler's concurrence to the New Jersey Supreme Court's opinion in *Dale* illustrates this point. 734 A.2d 1196, 1237-45 (Handler, J. concurring). Justice Handler writes: "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." *Id.* at 1238. "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." *Id.* at 1245.

It is also useful to note that a person who self-identifies as gay or lesbian does not propound a set of beliefs. A woman who identifies as a feminist is subscribing to a set of beliefs (however amorphous). Her identity remains "woman"; "feminist" is ideology. Self-identifying as gay or lesbian is an expression of (otherwise unknown) identity, not an expression of ideology.

are concerned, state proscription of discrimination benefits society as a whole by expanding the depth of public discourse. State interference with discrimination by purely expressive associations, on the other hand, would negatively affect individuals' ability to organize and to engage in protected expression.¹⁵⁸

*Richardson v. Chicago Area Council of the Boy Scouts of America*¹⁵⁹ recognized the necessity of separating an individual's sexual orientation from that person's ability to participate meaningfully in the economy. *Richardson* held that the Boy Scouts' opposition to homosexuality constitutes a discriminatory hiring practice prohibited by the Chicago Human Rights Ordinance,¹⁶⁰ and enjoined the Boy Scouts from using sexual orientation as a factor in making hiring decisions within Chicago.¹⁶¹ In light of *Dale*, what the *Richardson* court failed to recognize is that not all employers are created alike. While it is permissible for the state to remove the personal from the political in public employment and in ordinary private employment, governments may not interfere with the hiring practices of organizations which primarily engage in expression protected by the First Amendment. Government manipulation of hiring decisions will hinder the creation of a collective voice in much the same way that manipulation of membership policies does.

Thus, the concept that "the personal is political" is legally mandated insofar as participation in purely expressive associations is concerned. Outside of that arena, an individual has a right to choose whether to politicize identity.

158. Richard E. Sincere, Jr., *Pro-Gay Ruling in New Jersey Hurts Gay Rights*, WALL ST. J., Aug. 11, 1999, at A18. Responding to the New Jersey Supreme Court's decision prohibiting the Boy Scouts from discriminating against Dale on the basis of his sexual orientation, Sincere writes:

Thus, although far from its intent, the court's decision undermines the right of gay men and lesbians to seek and maintain "queer-safe space" such as social clubs, fraternities and sororities, and social-service organizations like Washington, D.C.'s Sexual Minority Youth Assistance League. Very few gay teenagers are likely to attend Saturday afternoon rap sessions to discuss personal problems with their peers if they know that they might be forced to share this private space with heterosexual teens.

The court's decision also makes it harder for homosexuals to combat government-based discrimination. For example, freedom of association is the key to overturning the U.S. Supreme Court decision in *Bowers v. Hardwick*, which gave state governments the authority to regulate our most intimate associations—sexual relationships. Similarly, the right of homosexuals to associate with whom we wish, when we wish, where we wish, will be an important factor in overturning . . . various state laws prohibiting same-sex marriage.

Id.

159. No. 92-E-80, 1996 WL 734724 (Chi. Comm'n on Human Relations Feb. 21, 1996).

160. Chi. Mun. Ordinance § 2-160-010 to § 2-160-120.

161. 1996 WL 734724, at *42.

CONCLUSION

Viewed in the context of the framework laid out in this Comment, the *Dale* decision protects the rights of all people, including minority groups, to maintain private expressive associations without the interference of unwanted outsiders.¹⁶² It ensures that debate on matters of public importance will be “uninhibited, robust, and wide-open.”¹⁶³ The spectrum approach advocated here also serves to protect the personal from becoming political in arenas where it should be private, and ensures that organizations will not be able to use freedom of expressive association as an easy trump of antidiscrimination laws.

Of course, people who disagree with the Boy Scouts’ discriminatory policies should continue to work to see that the extensive federal, state, and local government ties to the Boy Scouts are severed.¹⁶⁴ Nonetheless, the shortcomings in the Court’s analysis should not obscure the doctrinal value of *Boy Scouts of America v. Dale*.

162. Paul Varnell writes:

[F]reedom of association is an important principle for gays, as for any minority, and one we should not want to see compromised, even for a short term gain. We relied heavily on arguments for freedom of association during the early years of the gay movement when we had to defend our right to form gay clubs, gay political groups and gay student groups. It is no less important a principle now that our right to form gay groups is no longer generally contested. It might be contested again sometime.

Paul Varnell, *Scouting the Gay Ban*, CHI. FREE PRESS, Oct. 20, 1999, at 13.

163. See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

164. As Paul Varnell succinctly puts it: “No gay tax money for anti-gay discriminators.” Varnell, *supra* note 162. See also Andrew R. Varcoe, *The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law*, 9 LAW & SEXUALITY 163, 167 (2000). Elsewhere, Varnell suggests that individuals “sue to prevent governmental entities from sponsoring or subsidizing Boy Scout troops or permitting the use of governmental facilities not open to other religious groups.” Varnell, *supra* note 129, at 13. The Boy Scouts’ governmental ties include a federal charter, the United States President acting as honorary president of the Boy Scouts, and local fire and police department sponsorship of Boy Scout troops.

