MAKING SENSE OF *DALE*

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Things are often more complex than they seem, even when they seem complex. In *Boy Scouts of America v. Dale*,[1] the Supreme Court held that the Boy Scouts have a right under the speech clause to exclude an openly gay man from being a Scoutmaster. The man in question was also, in the Court's view, a gay rights activist. The Court held that this right trumped New Jersey's law against discrimination in employment and public accommodations. In greatly simplified terms, there are two ways of looking at this ruling.

Easy case; rightly decided.

Dale was an easy case. James Dale was openly gay. If he was a Scoutmaster, then people would think that the Scouts think that being gay is acceptable. The Scouts don't think that. In fact, the Scouts think just the opposite, though they would prefer to be polite about their opposition rather than making an explicit point of it. It makes no difference whether the Scouts actually teach boys that homosexuality is wrong. Dale would send a message just by being openly gay, and the Scouts have a constitutional right not to be forced to express any messages they do not want to express. There would be no point in analyzing the Scouts' message anyway, for the Court could not constitutionally pass judgment on that message in any respect. The Scouts therefore may exclude Dale regardless whether they teach anything about sex or homosexuality. Their statement in court that they do not wish to express the message Dale personifies is enough to defeat New Jersey's anti-discrimination law.

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

There is considerable power in this view. If it is correct, *Dale* is a significant departure from previous cases and sets a new direction in First Amendment law. One of the main questions about *Dale* is whether we should interpret the Court's opinion as adopting this view. The result in the case and some of the Court's language suggest that we should.

But the Court has never held that personal characteristics such as race, gender, or sexual orientation are inherently expressive within the meaning of the speech clause. (I will refer to such a theory as one of "expressive identity.")[2] The Court did not expressly adopt such a theory in *Dale*; it instead repeatedly referred to Dale as a gay rights activist. To say that personal characteristics are speech would require a second look at many anti-discrimination statutes. The expressive identity notion also calls into question precedents holding that women had to be admitted to the Rotary and the Jaycees, but the Court did not say it was overruling those cases.

Hard case; at least partly wrong.

Dale was a hard case. In the Scouts' favor, constitutionally protected expression is sometimes the product of the association of persons who wish to make a common point. An early statement of the modern expressive association right is found in *NAACP v. Alabama*,[3] an important case in the civil rights battles that produced so much of our modern constitutional law. The scope of a right cannot depend on one's view of the persons against whom it is used. The same right used by the NAACP to fight majority imposition of racial apartheid is fully available to the Scouts to fight majority imposition of homosexual tolerance.

Moreover, some advocates of gay and lesbian rights argue that sexual identity, if openly proclaimed, is a form of expression that deserves constitutional protection.[4] In *Dale,* this argument

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2. The phrase is Professor Hunter's. See Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 Harv. C.R.-C.L. L. Rev. 1 (2000); Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695 (1993).

3. 357 U.S. 449, 460 (1958).

4. Professors Cole, Eskridge and Hunter have each developed arguments along these lines. E.g., David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 S. Ct. Rev. 203; William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 176 (Harvard U. Press, 1999) ("An admission of sexual identity is expressive in the strictest sense of the word"); Hunter, 35 Harv. C.R.-C.L. L. Rev. (cited in note 2). My own view is that many acts and statements can be expressive, and that questions of constitutional protection depend heavily upon the context and manner in which expression is communicated and perceived, as well as upon the purposes of particular free speech doctrines. See, for example, Robert C. Post, *Recuperating*

favored the Scouts. If a declaration of sexual orientation gives one a free speech right not to be kicked out of the military, such a declaration also counts as expression for purposes of the Boy Scouts' right not to be forced to express messages with which they disagree. On the other hand, as just noted, the Court has not endorsed a theory of expressive identity and lower courts have not been notably receptive to the theory.[5] Because the Court did not hold that personal characteristics are free speech, one could argue, admitting Dale could not amount to compelled expression.

And the most analogous precedents favored Dale in important ways. If the Court had scrutinized the evidence of the Scouts' expressive activity as it did with the Jaycees and the Rotary, the record suggested that the Scouts (as a national organization apart from the local sponsors who actually instruct the boys), do not have common beliefs or teachings about homosexuality. Under previous interpretations of the right of expressive association, the lack of such common beliefs and the lack of any express teachings about homosexuality would undercut the Scouts' claim. On this view, the opinion reflects mostly the skillful manipulation and dodging of precedents to reach a desired result.

First Amendment Doctrine, 47 Stan. L. Rev. 1249 (1995); Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 Hastings L.J. 921 (1993).

Treating a declaration of sexual identity as expressive is not likely to help us resolve actual cases. Theories of pure associational rights or expressive identity tend to rest at least in part on free speech theories of autonomy, self-realization, or closely related ideas. E.g., Cole, 1999 S. Ct. Rev. at 230; Eskridge, *Gaylaw* at 178-79; Hunter, 35 Harv. C.R.-C.L. L. Rev. at 4-5 (cited in note 2). Such theories have a troubled history because either side in virtually any case can claim that the activity at issue advances or limits their autonomy and ability fully to realize their personalities. Dale's complete realization of his sexual identity by coming out as a gay man can be countered by the claim of some within the Scouts that their autonomy is impinged by Dale's assertion of his own; the desire of Nazis to express anti-Semitism harms Jews and therefore impinges on their self-realization. See David F. McGowan and Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 Cal. L. Rev. 825, 844-45 (1991). Such broad theories are also indifferent to context, which plays a critical role in reconciling competing demands in free speech cases. E.g., Robert C. Post, *Constitutional Domains: Democracy, Community, Management* 16 (Harvard U. Press, 1995). Because self-realization and autonomy may be achieved in an essentially unlimited number of ways, these principles cannot explain why speech should receive more protection than freely regulated activities. E.g., Frederick Schauer, *Free Speech: A Philosophical Enquiry* 48 (Cambridge U. Press, 1982). For a concise summary of arguments on this point, see Daniel A. Farber, *The First Amendment* 3-4 (Foundation Press, 1998).

5. Cases rejecting such claims are collected in Eskridge, *Gaylaw* at 429 n.2 (cited in note 4).

This essay examines these competing views and attempts to sort out what is right and wrong in each of them. My aim is to determine where the doctrine of expressive association stands after *Dale*. In particular, *Dale* poses the question of just what the expressive association doctrine protects. Is it the ability of groups to express their ideas, the ability of certain types of groups to manage their affairs without government interference, or a hybrid right the core of which is expression but which also protects from state interference some degree of managerial discretion necessary to make sure the group's message is expressed?[6] In my view the third of these options best captures the opinion, but the Court's opinion obscures this fact and leaves the doctrine in an uncertain state.

In the course of the essay I offer two conjectures about the facts of the case. The first is that the Scouts wish to exclude openly gay men to reassure parents that their boys will be safe from homosexual advances. The second is that the message the Scouts defended was a political compromise among sponsors of Boy Scout troops, who appear to disagree about homosexuality. I believe there is a reasonable basis for each conjecture, but I do not claim that either or both of them represent the "true" story of the case. Their role here is heuristic. My arguments, in brief, are these:

- The Court's analysis was cursory and conflicting. In a case where the Court said the facts and law were virtually inseparable, it resolved two of the three factual questions at issue by deferring to assertions in the Scouts' briefs. In a case where the Court began by demonstrating that the Scouts are a group with an expressive purpose, it then limited its inquiry to avoid asking whether the Scouts' expression had anything to do with homosexuality, while simultaneously saying that a group could not defeat an anti-discrimination law just by claiming that "mere acceptance" of a person protected by the law would impair the group's expression. (Parts II and V)

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6. Some might be tempted to say that managerial discretion and expression cannot be separated. That position is undercut to some degree by the Court's statement that a group could not establish a constitutional defense to an anti-discrimination law "simply by asserting that mere acceptance of a member from a particular group would impair its message." *Dale*, 530 U.S. at 653. And the countless regulations that constrain the ability of groups to manage their affairs—from marginal tax rates to fire codes to wage and hour rules—also effect their expression. It does not follow that such regulations should be analyzed as restrictions on speech. Cf. Alexander, 44 Hastings L.J. at 930-31 (cited in note 4).

- The Court's stated deference was inconsistent with its analysis in prior cases, raised questions about the degree to which the speech clause protects expression rather than the managerial discretion of expressive groups, and left the doctrine in an unsettled state. (Parts II and V)
- The Scouts' decentralized organizational structure complicated the case significantly. The national Scouting body sets and interprets policy, but local troops actually express the Scouts' messages. Groups of sponsors filed briefs on both sides of the case suggesting that local troops deviate significantly from the message the Scouts defended in litigation, and which the Court accepted as a matter of deference. (Parts III and IV)
- Group expression is different from either individual expression or the free exercise of religious beliefs. A group's expression is the product of the common beliefs and interests around which its members form. Determining whether compelled association impairs a group's expression, or forces the group to express views it has a right not to express, requires analysis of the relationship between the group members' common beliefs and interests and the characteristics of the person the group wishes to exclude. (Part I)
- The Court was right to insist that it would not try to resolve differences of interpretation about a group's tenets. The only relevant question was whether the Scouts expressed a message sufficiently related to homosexuality that Dale's presence would alter it. That question cannot be answered solely by deference to litigation positions, however. In order to keep the right of expressive association tied to expression, a court must analyze the relationship between the group's common beliefs and interests and the person it wishes to exclude. (Part V)
- The Court has left us with a right that protects group expression and includes some protection for managerial decisions related to that expression. The Court's deference and its terse opinion leave us with little guidance on how far managerial discretion will be protected in order to protect a group's expression. The Court's reasoning would have been better had it focused more closely on the messages the Scouts actually expressed. The Court could have done this by acknowledging that the actual speech at issue occurred at the local level and holding that New Jersey's anti-

discrimination law be applied on a troop-by-troop basis. (Part VI)

I. THE NATURE OF EXPRESSIVE ASSOCIATION

Because one cannot assess claims of expressive association without some theory of how associations form and communicate messages, I begin with that subject.

A. A BRIEF HISTORY OF THE EXPRESSIVE ASSOCIATION DOCTRINE

Current expressive association doctrine can be traced to the Court's opinion in *United States v. Cruikshank.*[7] *Cruikshank* involved the Enforcement Act,[8] one of the Reconstruction statutes designed to guarantee blacks the enjoyment of their new civil rights, in particular the right to vote.[9] The statute made it a crime to "band or conspire together" to oppress any citizen or "hinder his free exercise . . . of any right . . . secured to him by the Constitution" or federal law.[10] The indictment alleged in part that the defendants had banded together and conspired to deprive black citizens of their right to assemble for peaceful and lawful purposes.[11]

The question was whether the indictment alleged a deprivation of a federal right. The *Slaughter-House Cases* defined the privileges and immunities of citizens of the United States to include a right "to peaceably assemble and petition for redress of grievances . . . ."[12] The *Cruikshank* Court drew on this concept, saying that "[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for

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7. 92 U.S. 542 (1875).

8. Act of May 31, 1870, ch. 114, 16 Stat. 140 (repealed 1894).

9. *Cruikshank*, 92 U.S. at 548. For a history of the statute and *Cruikshank*, see Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-1888* at 145 (Macmillan Publishing Co., 1987).

10. *Cruikshank*, 92 U.S. at 548.

11. Id. at 551. Professor Fairman reports that the case arose from the "Colfax Massacre" of 1873. Beginning in a dispute over which officers retained power after an election, fighting ended with black citizens retreating to a church which, after women and children were allowed to leave, was set on fire by the whites on the scene. Some of the men inside the church were shot while fleeing, some died inside, and others were executed later. Fairman, *Reconstruction and Reunion* at 262 (cited in note 9). Eric Foner states that this massacre was the most violent riot of the Reconstruction era. Eric Foner, *Reconstruction: American's Unfinished Revolution 1863-1877* at 437 (Harper & Row, 1988).

12. 83 U.S. 36, 79 (1872).

consultation in respect to public affairs and to petition for a redress of grievances."[13]

The problem in *Cruikshank* was that the indictment did not allege that the blacks whose assembly had been broken up were meeting to petition the federal government.[14] The indictment was therefore too broad. The right of assembly was bounded by the purpose of the assembled, and the indictment did not allege that the assembly was for the purpose of petitioning the national government. The Court therefore held that breaking up the assembly did not violate a national right.

Using the approach taken in the *Slaughter-House Cases*, the *Cruikshank* Court linked association to the petition clause, and thus to core political speech. The Court then began to expand protection of association in cases where an assembly related to public speech on matters of general public concern. In *DeJonge v. Oregon*, for example, Chief Justice Hughes quoted *Cruikshank's* language linking the right of assembly and petition to republican government.[15] That *DeJonge* reversed a conviction for a speech concerning a strike, made at a meeting of the Communist party, is a good measure of the changes in the doctrine to that point. But the Court still cast the doctrine in fairly conventional terms of public speech on matters of general interest having an obvious relationship to self-governance.[16]

This concept of expressive association fit well with the subversive advocacy cases that came to the Court early in the first half of the 20th Century. During the same period, however, the Court was also dealing with cases involving freedom of con-

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13. *Cruikshank*, 92 U.S. at 552.

14. "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is . . . . under the protection of, and guaranteed by, the United States. . . . If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever." Id. at 552-53.

15. 299 U.S. 353, 364 (1937).

16. An interesting aspect of the early cases was the Court's willingness to affirm convictions based on membership in an organization even if the member in question had opposed the policies for which the group as a whole was condemned. Anita Whitney, for example, was arrested after a meeting at which she had argued that violence should be rejected and that protests should be made using the ballot. *Whitney v. California*, 274 U.S. 357 (1927). Whitney was charged with being a leader of the group, however, not just a member. See Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 244 (Harper & Row, 1988).

science. These cases mainly involved the raising of children or the claims of minority religious groups to practice their faith notwithstanding general state laws.[17] Though the two lines of cases differed, the Court saw a connection between freedom of conscience generally and freedom to express one's views. The Court linked both freedoms to the freedom to assemble. Justice Rutledge's opinion in *Thomas v. Collins* exemplifies the point:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance. This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience.[18]

This language from *Thomas* is interesting in part because it seems at best marginally relevant to the case. A Texas statute required that paid labor organizers register with the state and obtain an organizer's card. On his way to speak at a rally, Thomas was served with an order enjoining him from speaking because he had not registered. He violated the order and was fined and jailed for contempt. The Court held that the Texas statute infringed Thomas's freedom of speech, concluding that a state could not impose a licensing requirement on speech that enjoyed the full protection of the First Amendment.

The Court began the quotation above by citing *DeJonge,* the facts of which were reasonably close to Thomas's labor organizing. But the Court ended the quotation by citing *Pierce v. Society of Sisters*, *Meyer v. Nebraska*, and *Prince v. Massachusetts*.[19] The first two cases are well known for advancing parental rights in the instruction of children; the latter is one of the Court's many cases involving the free exercise rights of Jehovah's Witnesses.

These freedom of conscience cases seem out of place in *Thomas*, unless one reads Justice Rutledge as objecting to the Texas statute both because it unlawfully burdened Thomas's speech and because it forced him to declare his personal convic-

17. E.g. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

18. 323 U.S. 516, 530-31 (1945) (citations omitted).

19. See note 17.

tions to the state. Thomas made a living by declaring these convictions in public, so the point might not have been a large one in his case. For other persons who wished to form and develop their beliefs privately, however, the burden might be significant.[20]

The Court cited *Thomas* in *NAACP v. Alabama,* the case that established the basis for the current form of the doctrine.[21] That case established that a group has standing to assert the speech and association rights of its members, extended the right to private activity within a group in addition to the more traditional public rallies and speeches at issue in previous cases, and adopted an explicitly instrumental rationale for the doctrine. The Court said that

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[22]

All law is purposive, and the Court's statement of the doctrine of expressive association was no exception. Under *NAACP v. Alabama*, group association is protected because it enhances effective advocacy.[23] *Runyon v. McCrary* confirmed

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20. In this sense, one might read *Collins* as a precursor to *Shelton v. Tucker*, 364 U.S. 479 (1960), in which the Court struck down an Arkansas statute requiring public school teachers to disclose the organizations to which they belonged or had belonged in the preceding five years. In context, the case appeared to be an effort by Arkansas to identify and root out teachers who supported the NAACP. *Shelton* did not cite *Thomas v. Collins*, but it did cite *DeJonge*.

21. On the importance of the case, and of roughly contemporaneous cases involving membership in subversive organizations, see Cole, 1999 S. Ct. Rev. at 207 (cited in note 4).

22. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (citations omitted).

23. As Judge Easterbrook described it, *NAACP v. Alabama* held that "association is protected as an implicit constitutional right to the extent it makes the explicit constitutional right more valuable, and that the Constitution forbids steps . . . that reduce the effectiveness of the association." Frank H. Easterbrook, *Implicit and Explicit Rights of Expression*, 10 Harv. J.L. & Pub. Pol. 91, 94 (1987).

the point. The Court there said it has "recognized a First Amendment right 'to engage in association for the advancement of beliefs and ideas . . . .' That right is protected because it promotes and may well be essential to the '[e]ffective advocacy of both public and private points of view, particularly controversial ones' that the First Amendment is designed to foster."[24]

This language casts the expressive association doctrine as an instrumental adjunct to the speech clause. In this respect, the expressive association doctrine is similar to the actual malice rule[25] and the overbreadth doctrine.[26] Those doctrines suspend the operation of state laws that might penalize protected speech in order to decrease the risk of liability and thereby encourage the production of speech.[27] Those doctrines thus represent a bargain: Some cost is incurred—such as damage to the reputation of a public figure who is the subject of a false but not malicious report—and in return society gets the "uninhibited, robust, and wide-open" debate the speech clause is designed to protect.[28] On this view, the expressive association doctrine would provide little if any protection against anti-discrimination laws to groups that wish to remain silent on a topic rather than speaking, unless the silence was necessary to facilitate the communication of a message actually expressed.

Constitutional protection of association is not limited to the speech clause. In language reminiscent of *Thomas v. Collins*, the Court in *Roberts v. United States Jaycees* referred to "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion" that was protected "as an indispensable means of preserving other individual liberties."[29] In *New York State Club Association v. New York*, the Court spoke in similar terms, saying that "[t]he ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation

24. 427 U.S. 160, 175 (1976), quoting *NAACP v. Alabama*, 357 U.S. at 460.

25. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

26. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

27. E.g., Frederick Schauer, *Uncoupling Free Speech*, 92 Colum. L. Rev. 1321 (1992).

28. See David McGowan and Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 Harv. J.L. & Pub. Pol. 293, 383 (1994) (footnote omitted).

29. 468 U.S. 609, 618 (1984).

of the freedoms the First Amendment has guaranteed to individuals as against the government."[30]

On these descriptions, the doctrine is still instrumental—it is designed to facilitate the exercise of the specified rights—but its scope is the same as the First Amendment as a whole. As Professor Cole described the existing doctrine, in an article arguing for the development of a freestanding right of association, "association is not mentioned in the First Amendment, the Court reasons, but deserves protection . . . because it is a necessary means to the ends that are expressly mentioned—speech, assembly, petition, and religion."[31] The doctrine is penumbral; it assists in the enjoyment of other rights but does not stand on its own.

Dale is a hard case in part because the Scouts' litigation position defended silence on the topic of homosexuality, and indeed on matters of sexuality in general, while claiming a penumbral right of disassociation based on the speech clause. The Court's opinion is difficult to analyze in part because it based its crucial deference to the Scouts' assertions in large part on a free exercise case. The balance of this essay explores the complexities this approach creates and, in particular, what interest this doctrine protects.

B. THE STRUCTURE OF GROUP EXPRESSION

In addition to describing expressive association as an instrumental doctrine, the Court in *Roberts* referred to a right of association designed to protect "the ability of the original members to express only those views that brought them together."[32] It was this right that the Court held "plainly presupposes a freedom not to associate."[33]

Without explaining why, the *Dale* Court subtly shifted away from the language of *Roberts* and the theory of group expression that language implied. The opinion in *Dale* quotes the "plainly presupposes" language from *Roberts*, and it quotes other language from earlier in the same paragraph of the *Roberts* opinion. But the *Dale* Court then skips over *Roberts'* reference to the

30. 487 U.S. 1, 13 (1988). Indeed, in *New York State Club Association*, Justice Scalia concurred in part to note that the Court "assumes for purposes of its analysis, but does not hold, the existence of a constitutional right of private association for other than expressive or religious purposes." Id. at 20.

31. Cole, 1999 S. Ct. Rev. at 208 (cited in note 4).

32. See *Roberts*, 468 U.S. at 623.

33. Id.

ability of groups "to express only the views that brought them together." For this language *Dale* substitutes a reference to "the ability of the group to express those views, and only those views, that it intends to express."[34] With this shift in language, the Court foreshadowed its treatment of the Scouts as equivalent to an individual speaker and its refusal to consider facts relevant to aspects of group expression that differ from individual expression.

Neither *Roberts* nor *Dale* actually develops a theory of group expression. This lack of development is a problem. One cannot analyze expressive association cases without some underlying theory of how associations express themselves. As a matter of both logic and common sense, the *Roberts* Court's focus on the common beliefs and interests of group members provides the best basis for analyzing the expression of the group itself. The following description of how groups form and express messages draws on this portion of *Roberts* to suggest a workable structure for deciding expressive association cases.[35]

Expressive associations are not formed by random selection. Members of such associations are brought together by the beliefs and interests they have in common. Common beliefs and interests are what constitute a group, defining its social practices and purposes. Common beliefs and interests also constitute a group in the mind of the general public, expressing what the group is and is not about and distinguishing it from other groups. Membership in the Catholic Church implies certain views on religion, but nothing about the proper interpretation of the Second Amendment. Membership in the National Rifle Association implies the reverse.

Association, standing alone, does not imply group expression. Persons attending an opera, a sporting event, or going to a dance hall are associating in some sense, but their act of association does not produce expression within the meaning of the speech clause.[36] Nor is a group's expression simply the sum or

34. *Dale*, 530 U.S. at 648.

35. *Dale* itself is not consistent with the approach outlined in this Part. I discuss the *Dale* Court's treatment of group expression in Part V. The theory described here is also partly at odds with Justice O'Connor's concurrence in *Roberts*, in which she treats group expression as cumulative of the individual characteristics of the members. See 468 U.S. at 632.

36. *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989). The court there upheld a city ordinance limiting adult access to "teenage" dance halls. The Court accepted that the opportunity to dance with adults "might be described as 'associational' in common parlance," but said this opportunity did "not involve the sort of expressive association

the average of the various individual beliefs of its members. Composition and division are as much fallacies with respect to the expression of groups as they are elsewhere. That some NRA members are Christians does not make the NRA a religious group with a religious message; that the NRA expresses no religious message does not imply that its members are irreligious. To refer to the message of a group, as a group, is to refer only to the beliefs and interests that its members hold in common.

Group membership does not imply complete agreement among group members with respect to the common beliefs and interests that define the group. Some NRA members may favor regulation of armor-piercing bullets, while others may oppose it. Such disagreements do not necessarily imply that the group itself lacks meaningful common beliefs or interests, however, nor that the group itself expresses no message the public can understand. The public as a whole still understands that the NRA and its members generally embrace the right to bear arms and oppose restrictions on guns.

The beliefs and practices of expressive groups are not fixed, and the messages a group expresses to its members and to society may change over time. Changes within a group may also dissipate its expression. Disagreements within a group may become so pronounced that they undermine the commonality of beliefs and interests on which the group's expression rests. In that case, such disagreements would effectively disable the membership of a group from expressing any coherent message as a group. Some group members might then re-form around a different set of common beliefs and interests, which would then constitute the basis for the message the re-formed group expressed. Such changes are to be expected, but in each case the group's message is expressed by its common beliefs, the absence of which implies that the group, as a group, expresses no message at all.

Because members of an association are brought together by common interests or beliefs, which in turn are the source of our understanding of the group and its message, membership in a group can be relevant to the group's expression. Forced associa-

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that the First Amendment has been held to protect. The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee. There is no suggestion that these patrons 'take positions on public questions' or perform any of the other similar activities" that the Court had discussed in *Roberts*. Id.

tion with persons an organization condemns, for example, would undercut the organization's message, which would include the implication that members of the denigrated group are unacceptable associates. The Ku Klux Klan hates blacks; to force the Klan to admit blacks would impair the Klan's message. Forced association with persons an organization does not condemn—the elderly, perhaps—would leave its expression unimpaired.

As a group's common beliefs or interests become more general, its membership becomes broader. More people will agree with the group's tenets, and fewer people will be excluded. Any message implied by the group's composition will become correspondingly fainter and more diffuse. To be a member of the Klan is to be racist. To be a member of the Catholic Church is to believe in God. To be a member of the Rotary is . . . not so clear.[37]

As these examples suggest, when a group's members hold in common only very general beliefs—such as a belief in "good" government or "responsible" citizenship—the group and its composition express little if anything relevant to the personal characteristics of its members, such as religiosity, race, gender, or sexual orientation. Compelled association with the irreligious, or with blacks, women, or gays, therefore would not impair the group's expression, and thus would not deprive the group itself of the freedom of speech.

Courts therefore must carefully examine the facts of cases in which groups claim a right of expression against legal rules forbidding discrimination in membership. Such claims rest on the premise that the composition of a group supports expression protected by the speech clause. Because a group's expression is based on the beliefs and interests its members hold in common, courts cannot seriously analyze claims of expressive association without examining the relationship between the person the group wishes to exclude and the beliefs and interests around which the members have formed.

Courts should not scrutinize the plausibility of a group's tenets. Such scrutiny would pose a risk of deterring believers from expressing their true beliefs, and courts are not well-equipped to evaluate such matters. The speech clause protects

37. If the answer is "to favor values of good citizenship and commercial practice," it is at least a partial answer to say "who doesn't"? One would get at the particular message of the Rotary, to the extent it had one, only by focusing on the common interests and beliefs that distinguish its members from others who hold such general views.

implausible as well as plausible expression. But it does protect expression, and not unexpressed feelings of discomfort, disgust, or aversion to associating with a particular class of persons. So while the plausibility or acceptability of a group's message should be immune from judicial scrutiny, the relationship between the excluded person and the common beliefs and interests around which a group has formed that must be examined.[38] But that relationship must be examined if the expressive association doctrine is to remain tied to actual group expression.

This analysis suggests that a group's expression may differ from positions its leaders take in litigation. Suppose, for example, that organizations that sponsor Scout troops, the boys themselves, and the members of Scouting's governing bodies have various views on immigration policy. Suppose further that no one has ever considered these views relevant to Scouting, and that Scoutmasters say nothing whatever to the boys about immigration.

Finally, suppose Scouting's highest governing body is split 4-3 between persons favoring tight restrictions on immigration and those favoring an open-door policy. The advocates of restrictions vote to exclude boys whose parents emigrated from "non-Caucasian" countries.[39] Scout troops obey the vote. A Chinese son of immigrant parents sues a local troop under an anti-discrimination law. The Scouts' board votes 4-3 to defend on free speech grounds, and the briefs offer that defense. What result?

If and to the extent the expressive association doctrine is an instrumental doctrine designed to facilitate actual group expression, and under the theory of group expression defended above, the Scouts would lose. In this example, the members of the Scouts—including boys, Scoutmasters, administrators, and sponsors—have no common beliefs or interests regarding immigration. A ruling compelling the admission of the boy in question would impair neither the ability of the members to pursue their collective purposes nor the expression of the group as a whole.

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38. A similar approach was advocated in an amicus brief filed by Professors David Cole and Nan Hunter on behalf of the Society of American Law Teachers. 2000 WL 339882.

39. Cf. *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923) (holding that a native Hindu of India was not eligible for naturalization under a statute applying to "free white persons").

Suppose the expressive association doctrine is not instrumental, however. Suppose instead that the doctrine protects only the managerial discretion of groups. In that case, all these facts would be irrelevant and the Scouts would win. The question is which outcome the ruling in *Dale* implies.

II. THE COURT'S RULING

New Jersey's law against discrimination prohibits places of public accommodation from discriminating against persons on the basis of their sexual orientation.[40] After the Boy Scouts expelled James Dale from the organization because he is openly gay, he sued the group under this statute. New Jersey found that the Scouts are a place of public accommodation within the meaning of its statute. The Court accepted the New Jersey Supreme Court's interpretation of this law, as it had to, but seemed concerned by this interpretation. The Court said that as the public accommodations concept has broadened beyond "places where the public is invited" such as "taverns, restaurants, retail shops, and public libraries,"[41] the "potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."[42]

The Court's point is a fair one, and may explain the often terse writing in the opinion. But the point cuts both ways. The free speech concept has broadened over time as well. In the days of the traditional public accommodations cases, the *Cruikshank* Court could hold that assemblies were not protected in general but only when they were for the purpose of petitioning the national government.[43] This is not to question the expansion of free speech protection. The point is only that this expansion has been the result of judgments about how speech should be protected and why. The expansion of the public accommodations concept rests on judgments as well. Reconciling the two requires a further judgment; it is not a case of one doctrine expanding to distort another that we may take for granted as a baseline right. How to resolve this conflict is the question at the heart of the expressive association doctrine and of the case.

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40. *Dale*, 530 U.S. at 645.
41. Id. at 657.
42. Id.
43. See text accompanying note 14.

A. THE MAJORITY OPINION

The cases before *Dale* implied that the evidence in the record was the most important part of the case. The *Dale* Court appeared to agree, saying that "the ultimate conclusions of law" in *Dale* were "virtually inseparable from findings of fact."[44] The Court also said that compelled association violates the speech clause only "if the presence of" the person whose admission is compelled "affects in a significant way the group's ability to advocate public or private viewpoints."[45] To qualify for constitutional protection, "a group must engage in some form of expression, whether it be public or private."[46]

The Court did not mean this statement to be taken literally. All organizations engage in some form of "private expression," including business firms whose purpose is to produce widgets rather than speech. Much of the "private expression" in such firms is intended and understood as performative: The expression is a way of getting things done rather than the basis for deliberation and discussion. The Court has not and will not extend the protection of the speech clause to such "private expression." Prior to *Dale,* the speech clause would not provide a defense to a claim under New Jersey's law against discrimination based on a memorandum from the head of a business firm ordering a subordinate not to hire an applicant because the applicant was gay.[47] Nothing in *Dale* changes that result.

Both precedent and the structure of the opinion in *Dale* show that the Court's language distinguishes between groups formed for the purpose of expressing and considering ideas and groups formed for non-expressive purposes, such as the manufacture of bicycles or cars, or the sale of securities. The *Dale* Court began by establishing that the Scouts are an expressive group. It did this by looking in a general way at the Scouts' purpose and practices. The Boy Scouts are "a private, nonprofit organization" whose mission it is "'to instill values in young people.'"[48] Their method is to have adult leaders "spend time with the youth members, instructing and engaging them in activities

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44. 530 U.S. at 648.
45. Id.
46. Id.
47. This would be true even for a government employer, a case in which the requirement of state action would be satisfied. E.g., *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (discussing differences in protection for performative workplace speech and protected expression); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (same).
48. Id. at 649.

like camping, archery, and fishing."[49] In the course of these activities, adult members "inculcate [boys] with the Boy Scouts' values—both expressly and by example."[50] The Court had no trouble finding that "an association that seeks to transmit such a system of values engages in expressive activity."[51]

What values do the Scouts transmit? The Court accepted the Scouts' claim that they try to instill a message of "moral straightness" in boys.[52] The Scouts did not describe their "morally straight" message in detail, but they did say it is inconsistent with homosexuality. The Court accepted as well the Scouts' further claim that allowing openly gay men to become Scoutmasters would impair their message.

"Accepted" in this case is to be taken literally. Chief Justice Rehnquist was admirably direct in stating that "[t]he Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight'" and that "[w]e accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."[53] The Court also said that, "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."[54]

There were four questions in *Dale*: whether the Scouts were an expressive organization; whether they expressed any message relating to homosexuality; whether admitting Dale would impair their expression; and, if so, whether New Jersey's interests justified the impairment. The first three questions were factual; the fourth was legal. The standard of review was *de novo*.[55] The Court decided the first question by looking at the record. It decided the next two by deferring to the assertions in the Scouts'

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49. Id.

50. Id. at 649-50.

51. Id. at 650.

52. Id.

53. 530 U.S. at 651. The Court actually did inquire somewhat further into the record, saying that "because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs." Id. The Court's language suggests that it saw this inquiry as optional and not required by the doctrine itself.

54. Id. at 653. Earlier in the opinion the Court rightly said that to determine whether Dale's presence as a Scoutmaster would impair the Scouts' expression the Court had to "explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality." Id. at 650. The balance of the opinion did little to satisfy this inquiry, however.

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

briefs, with a quick and apparently optional review of the record to gauge the sincerity of the Scouts' professed beliefs.

The only question remaining was whether New Jersey's interests in eliminating discrimination against homosexuals justified the impairment the Court had found. On this point the Court was brief: "The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[56]

Though the Court said it accepted the Scouts' claim to teach boys a message of moral straightness at odds with homosexuality, at times it came close to treating Dale's open homosexuality as inherently expressive. Two statements stand out in this regard. The first is the Court's assurance that, while expressive associations may not "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message," this case was different because Dale was openly gay and a "gay rights activist." Thus, his "presence in the Boy Scouts would . . . force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[57]

The second statement came in response to the New Jersey Supreme Court's conclusion that admitting Dale would not impair the Scouts' expression because the Scouts allow heterosexual scoutmasters to disagree with their policies but do not kick them out. In the Court's view, this fact was irrelevant because "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other."[58]

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56. *Dale*, 530 U.S. at 659.

57. Id. at 653.

58. Id. at 655-56. As Andrew Koppelman has noted, the record did not contain very much evidence to support the Court's characterization of Dale as an "activist." Andrew Koppelman, *Signs of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination* 12 n.8 (unpublished manuscript on file with the author). And, as Koppelman also points out, the Scouts excluded Dale for being openly gay not for being an activist. Id. To me, this fact makes the Court's language more suggestive. The Court knew that the Scouts' policy was to exclude openly gay men. The Court could have referred only to that policy, but it didn't. Instead, in the portion of the opinion that distinguishes *Dale* from pretextual claims of impairment, which the Court says it would not uphold, the Court focuses on Dale's alleged activism as the source of actual impair-

Should these statements be read as holding that Dale's homosexuality was so inherently expressive that admitting him to the Scouts would violate the organization's right against compelled expression? No. Most importantly, in both passages the Court referred to Dale not only as a gay man, nor as an openly gay man, but as a "gay rights activist." This language suggests the Court thought the Scouts had a right to protect their message from being drowned out or blurred by Dale's "activist" expression. On this view, the question whether the Scouts would have a speech-based right to exclude a gay man who was not an activist is left unresolved.

Moreover, reading the Court as holding that Dale's homosexuality was inherently expressive would make large portions of the opinion irrelevant. If the Court had adopted such a theory, it would not have needed to refer to any teaching by the Scouts, nor would it have needed to defer to the Scouts' assertions about their teaching or what would impair it. The opinion could simply have stated that Dale's sexuality was expressive within the meaning of the speech clause and accepted the Scouts' claim that they did not wish to express his message. Nothing more would have been needed.

And reading *Dale* to hold that personal characteristics are expressive within the meaning of the speech clause would imply significant consequences the Court did not consider. Such a reading would imply that any expressive group has a right to exclude persons whose personal characteristics even a portion of the group dislikes, regardless whether the group expresses any message relevant to those characteristics, as a defense against being compelled to express approval of those characteristics. And to the extent personal characteristics are inherently expressive, such a reading could complicate anti-discrimination policy even with respect to groups whose expression was highly instrumental, such as business firms or professional networking organizations. Could any organization meeting the standards of a public accommodation exclude Dale on this reading of the case? The Rotary? The Jaycees? The ABA? The American Chemical Association? The Society of Professional Journalists?

The questions raised by such a reading of the case extend to personal characteristics generally, not just homosexuality. Because the Court made no effort to articulate a theory of expres-

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ment in this case. It may be that the Court will always consider even very scanty evidence sufficient to meet the "activism" requirement, but that remains to be seen.

sive identity, it did not offer any basis for limiting such a theory to sexual orientation. Are we to conclude that race and gender, which are at least as observable as sexual orientation, are inherently expressive?[59] Would it follow that private organizations may exclude women and blacks on the ground that they have a right not to be compelled to express approval of them? Is the doctrine limited to traits we consider immutable or changeable only at great cost? Must elementary schools fire teachers who also teach Sunday school—a choice easier to make and thus presumably more expressive in the conventional sense than race, gender, or sexual orientation—on the ground that employing an "open" Sunday school teacher would express approval of religion?

The question of how far the expressive identity concept goes is particularly important because the Court made a point of deferring to the Scouts' message and their view of what would impair it. If we read *Dale* as establishing a theory of expressive identity then what are we to do with the Court's previous decisions compelling the admission of women to the Rotary[60] and the Jaycees?[61] Both organizations claimed that the admission of women would impair their expression; if gender is expressive within the meaning of the speech clause, then this point must be taken seriously.[62]

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59. Race and gender might be considered less expressive precisely because they are more readily observable. One could argue that gay men might pass for straight, and a declaration of sexual identity would therefore be more expressive than race or gender because it is the product of a choice to communicate. The argument is true, but it does not follow that declarations of sexual identity amount to protected speech. From the speaker's perspective, all forms of communication are produced by choices. Tripping in the street is not speaking, but dancing or marching is. That choice is involved may link a declaration of sexual identity more directly to autonomy or self-realization interests, but these are not useful tools for deciding free speech cases. See note 4. Persons who object to open homosexuality probably object to the status or practices of homosexuals rather than the statement itself. (Would the Scouts exclude a person who said he was gay but whom everyone knew was joking or engaging in satire?) If the status or practices the statement implies are considered part of the protected expression, it would be hard to extend the expressive identity concept to gays and lesbians but not members of other minority groups or to women. Groups such as the Scouts would logically be able to exclude such persons on the ground that exclusion was necessary to avoid communicating a message of approval. That gay men might pass for straight and therefore join groups who would exclude them if they were open might lessen the degree to which a theory of expressive identity works against them. A theory of expressive identity therefore might foreclose more opportunities to women and minorities other than homosexuals than it would to gays and lesbians.

60. *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

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

62. Professor Hunter argues that in *Roberts* Justice Brennan "simply steam-rolled the defendant's claims that admission of women would affect the expressive culture of a

The Court did not say it was overruling *Roberts* and *Duarte*, however. Though its deference to the Scouts' assertions was a significant departure from its approach in those cases, the Court sidestepped this fact and said only that *Roberts* and *Duarte* were different because "in each of these cases we went on to conclude that the enforcement of [state anti-discrimination laws] would not materially interfere with the ideas that the organization sought to express."[63] Because the Court did not argue that homosexuality was more expressive than gender, it is hard to say that the difference in the cases had to do with the expressiveness of personal characteristics.

The stakes on this point are very high. Social interaction in public accommodations rests in large part on statutes that were based on the notion that it is exclusion that is expressive, creating inferior castes and causing psychological harm to members of excluded groups. Congress, the Court, and state legislatures, for example, have found that segregated businesses or schools express a variety of messages disparaging blacks and members of other minority groups.[64] Statutes and decisions forbidding segregation in public accommodations have been designed at least

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previously male-only organization." Hunter, 35 Harv. C.R.-C.L. L. Rev. at 21 (cited in note 2).

63. *Dale*, 530 U.S. at 657.

64. One could say that commercial enterprises are different from the Boy Scouts, and this is true. They are more places for doing business than for debating or inculcating ideas. The point is that if personal characteristics are expressive, and disassociation gets constitutional protection as a defense against compelled expression, then either Congress no longer has plenary power to regulate disassociation by commercial enterprises or we must explain why personal characteristics are expressive in noncommercial contexts but not in commercial ones.

Such distinctions can be made: Customers probably understand that employers hire employees to do a job not tout a view, and further understand that hiring is done subject to a variety of laws. Customers come to businesses to engage in transactions, not debate and deliberate on matters relating to democratic self-governance. Employees are agents acting for firms, not on their own behalf. All these factors and more suggest that the workplace is, and is understood by all concerned to be, an instrumental setting in which considerations of personal expression are subordinate to legal regulation of the transactions in which the firm engages. In such domains, concerns of efficiency and instrumental reasoning predominate over constitutional expression; in the realm of public discourse the reverse is true. Thus we do not see free speech defenses prevailing in garden-variety contract cases or warranty disputes. E.g., *Cohen v. Cowles Media, Co.*, 501 U.S. 663 (1991). (I here follow the analysis most fully developed in Post, *Constitutional Domains* (cited in note 4), in particular the Introduction and Chapter Four.) The problem is that all these points have always been true, even during the period in which the Court and various legislative bodies came to accept the notion of disassociation as the source of expressive harms. Did the Court, Congress, and various state legislatures have this backwards the whole time? I am reluctant to read *Dale* as implying that they did, particularly when the opinion offers no defense of such a reading.

in part to counter such messages.[65] To turn such reasoning on its head and say that it is inclusion that is expressive, with exclusion being a penumbral right powerful enough to trump anti-discrimination laws, is a major step. Though serious scholars have argued that *Dale* should be read as undermining such statutes,[66] the Court provided no analytical basis for taking such a step. For these reasons, and because the facts do not require such a reading, *Dale* should not be read as adopting a theory of expressive identity as a form of constitutionally protected speech.

B. THE DISSENT

Justice Stevens dissented.[67] He pointed out that the Scouts do not actually teach boys that homosexuality is wrong. He cited evidence that the Scouts do not wish to send boys any message at all about sex, preferring that they learn about such matters from their parents or religious advisers.[68] Other evidence showed that the Scouts teach boys tolerance and obedience to laws with which they disagree, messages consistent with New Jersey's statutory requirement that the Scouts admit openly gay men.[69] The Scouts maintain a "don't ask, don't tell" policy re-

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65. On the Civil Rights Act of 1964, see, for example, *United States v. Baird*, 85 F.3d 450, 454 (9th Cir. 1996) ("Prior to the statute, many establishments generally open to the public discriminated against blacks, or Jews, or Indians, or any number of other groups, based on their race, color, religion, and national origin. This established public badges of inferiority for the excluded groups, marking them as of lower social status"). On state laws see *Dale v. Boy Scouts of America*, 160 N. J. 562, 620 (1999) (noting finding of New Jersey legislature that discrimination based on sexual orientation inflicts "stigmatizing" injury). On the expressive aspects of disassociation generally, see, for example, *Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) ("'the policy of separating the races is usually interpreted as denoting the inferiority of the negro group'") (quoting finding of fact from three-judge district court in Kansas); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960).

66. See Richard A. Epstein, *Free Association: The incoherence of antidiscrimination laws*, National Review (Oct. 19, 2000). Professor Epstein argues:

> [r]ightly understood, *Dale* forces us to confront the multiple forms of forced private association that have been staples of the New Deal and the Great Society. For starters, ask whether Title VII of the 1964 Civil Rights Act-which prohibits private employers from discriminating against employees because of race, creed, and sex-can survive constitutional challenge under the First Amendment. If these firms all have their expressive components, then why can the state force them to hire people whom they wish to exclude? Follow *Dale*, and it is flatly unconstitutional for the U.S. to force any private organization to adopt a color-blind or sex-blind policy in hiring or admission to membership.

67. *Dale*, 530 U.S. at 663.

68. Id. at 669-71 (Stevens, J., dissenting).

69. Id. at 672-73 (Stevens, J., dissenting). The reference to obedience for the law

garding gays, which is to a degree inconsistent with the claim that homosexuality violates the requirement that Scouts be "morally straight."[70] Forced admission of openly gay men, Justice Stevens concluded, would not interfere with any message the Scouts actually express to the boys.

At times, Justice Stevens bordered on lecturing the Scouts about their message rather than making it a subject of inquiry. Nevertheless, Justice Stevens had support in the record for the claim that, even after litigation gave them an incentive to build a record, the Scouts made only weak and inconsistent efforts to link the exclusion of openly gay men to their message. Indeed, the Scouts' most recent statement on the matter linked exclusion of gays to parental expectations as much as free expression: "The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations."[71]

Nor did the Scouts claim that they have decided to start taking positions on homosexuality. Thus, the Scouts' teaching presumably will continue to steer clear of sexual issues. They will continue to teach tolerance and obedience to the law, presumably including laws such as New Jersey's anti-discrimination statute. They will continue not to ask whether prospective Scoutmasters are gay, and they will continue to tolerate gay men who are not open about their sexual orientation.

III. THE SCOUTS' VIEWPOINT(S)

Having examined a theory of group expression and the Court's treatment of the Scouts' claims, we turn to comparing the two. Based on the Scouts' briefs, and briefs filed as amici curiae by some of the groups that sponsor Scout troops, the Scouts' members express at least three distinct messages regarding homosexuality, two of which contradict each other. This part ana-

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was in the record. The Scouts' Reply Brief suggested that the Scouts teach tolerance for others.

70. At oral argument, the Scouts' counsel stated that the Scouts' "policy is not to inquire. The policy is to exclude those who are open." 2000 WL 489419 at *5. See also Petitioner's Brief at *6 ("Boy Scouting makes no effort to discover the sexual orientation of any person. Its expressive purpose is not implicated unless a prospective leader presents himself as a role model inconsistent with Boy Scouting's understanding of the Scout Oath and Law"). 2000 WL 228616.

71. *Dale*, 530 U.S. at 674 (Stevens, J., dissenting).

lyzes those messages and their implications for the Scouts' collective expression.

First we must briefly examine the structure of the Scouts as a group. The Scouts exist as a national entity with a national reputation, but their organization is decentralized. The highest governing body is the National Council, which is responsible for developing programs and establishing general policies. Scouting programs are also governed by regional committees, beneath which sit area committees. Within each area, the Scouts accept applications for the creation of local councils, of which there are over 400 nationwide. Each local council is in turn made up of districts, for which district committees are responsible. Troops are formed within districts.[72]

The messages of Scouting are expressed locally. As the Scouts' brief put it,

> Boy Scouting takes place primarily in Troops, small units typically consisting of 15 to 30 boys led by a uniformed Scoutmaster and Assistant Scoutmasters. Almost 65 percent of Boy Scout Troops are sponsored by churches or synagogues, more than 25 percent are chartered to private community organizations, and fewer than 10 percent are chartered to public institutions. Boy Scouting is an integral part of many church youth programs. Responsibility for inculcating Boy Scouting's values is entrusted to the volunteer Scoutmaster and Assistant Scoutmasters.[73]

Appointment of a Scoutmaster is subject to the approval of the sponsor of the particular troop, the local council that oversees scouting in a particular region, and the Boy Scouts of America itself.[74]

The Scouts' opening brief acknowledges that they do not instruct boys on matters of sex or homosexuality. The brief instead argues that their silence on homosexuality and sex in general does not imply approval of or even tolerance for homosexuality. If anything, quiet condemnation is implied:

> Official Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct;

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72. *Dale v. Boy Scouts of America*, 160 N.J. 562, 572 (1999). Every organization that sponsers a troop has a delegate to its local council. Every local council has three or more delegates to the National Executive Board. Petitioner's Reply Brief, 2000 WL 432367 at *7 p. 8.

73. 2000 WL 228616 at *3.

74. Id. at *4.

> rather, they teach family-oriented values and tolerance of all persons. In keeping with the view that boys learn best by positive example, rather than by "thou shalt nots," the handbooks for boys do not catalog immoral behavior for Boy Scouts. It cannot be inferred that unmentioned misconduct is consistent with Scouting's moral code.[75]

As the opinion suggests,[76] and as stated in the sponsors' briefs we will examine in a moment, some heterosexual Scoutmasters apparently depart from this policy and teach either that homosexuality is consistent with moral straightness or that it is not, apparently without sanction by the Scouts.[77] Why would the Scouts claim as an official matter that they do not address homosexuality but allow straight Scoutmasters to deviate from this policy?

One possible answer is that the Scouts exclude gays to send a message to parents about the safety of Scouting rather than to teach boys as part of the message conveyed through Scouting. The opinions presumed that the audience for the Scouts' message is the boys. This presumption is understandable, for that is how the parties presented the case. But parents decide whether

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75. Id. at *5.

76. *Dale*, 530 U.S. at 655.

77. In their Reply brief, the Scouts argued that Scoutmasters who taught that homosexuality was consistent with moral straightness would be "subject to revocation of their registration" and referred to testimony from a Scout executive in Dale's region that persons teaching that homosexuality is morally straight would have their membership revoked. The brief also pointed to a person whose registration was apparently revoked because he taught that homosexuality was morally straight. 2000 WL 432367 at *8. This person had submitted an affidavit in support of Dale, however. The parties may have been using his case to make a point about their litigation positions. His dismissal therefore may or may not reflect general practice. The Scouts' counsel was asked at oral argument whether the Scouts would exclude a heterosexual Scoutmaster who, like Dale, advocated a position of gay equality outside the context of Scouting. He responded that he had "no information as to how that situation would be resolved." 2000 WL 489419 at *12. Neither in their Reply papers nor at oral argument did the Scouts address the claim made in the amicus brief for Dale, which is quoted in the text accompanying note 88. The Court's opinion noted that there was conflicting evidence on this point, 530 U.S. at 655-56 n.1. This point actually does not matter much to the overall analysis, however. The Scouts did not dispute the claim that some troops are actually taught that homosexuality is not morally straight, leaving that teaching as a costless option for persons who actually hold such beliefs. If the Scouts do expel persons who teach that homosexuality is morally straight, the risk of expulsion would make persons more likely to follow the Scouts' stated policy, and therefore produce greater silence on the particular issue of homosexuality, regardless of the personal views of Scoutmasters and sponsors. To the extent such a policy would do anything, it would understate the degree to which sponsors accept homosexuality.

boys become and remain Scouts. The Boy Scouts will have no boys if parents reject scouting.[78]

A conjecture: The Scouts believe that parents fear gay Scoutmasters will make sexual advances towards their sons.[79] To reassure parents, the Scouts exclude openly gay Scoutmasters. Exclusion sends a message to the parents—no gay scoutmaster will make sexual advances toward your son—even if the Scouts do not teach the boys anything on sexual matters. Perhaps this is what the Scouts meant by saying that their policy reflects parental expectations.[80] Once parental fears of sexual activity are calmed, actual indoctrination of the boys is unnecessary.[81]

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78. Various forms of parental permission are necessary for a boy to join the Scouts. Petitioner's Brief at *10.

79. At argument, the Scouts' counsel denied that fear of homosexual predation plays any role in their exclusion of gay Scoutmasters:

> QUESTION: . . . I understand that the Scouts' position on this does not in any way depend on a judgment that Mr. Dale is—presents or would present an undue risk of homosexual conduct with the Scouts in his troop, is that correct? It's not a fear of conduct?
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> MR. DAVIDSON: Absolutely not, Your Honor. In fact, the issue of possible sexual abuse is one that's very important to Scouts. Every Scout handbook and Scout master [sic] handbook comes with an insert, which is in the record at 2248 which talks about sexual abuse at some length. It never mentions the word homosexual. In fact, the only thing it says about gender is that there's a rising incidence of abuse by female adults.

2000 WL 489419 at *9-*10. The Scouts' counsel referred to documents distributed to Scoutmasters and boys, though not to the assurances given to parents on the general issue of abuse. To say that the Scouts are worried about molestation in general (by whom?), or molestation by adult women, but not advances by male Scoutmasters in particular, is not a very credible position. There is nothing wrong with the Scouts' concern over sexual advances towards boys. To the contrary, one would expect any organization in charge of young boys to be concerned with all aspects of their welfare. My only point is that the Scouts' policy may have been designed to send a message of reassurance to parents.

80. Justice Breyer tried but failed to get an answer on this point at oral argument:

> QUESTION: My basic question is, how do I know, how are we supposed to find out whether the policy reflects very great concern about the conduct, or reflects very great concern about public reaction? That was my question, and how do we decide the mix of that?
>
> MR. DAVIDSON: Well, I'm not sure as a matter of First Amendment law that one might decide for public reaction reasons to have a certain policy. I'm not sure of the legal relevance of that distinction. . . .
>
> MR. DAVIDSON: There's been no evidence that would raise any question of fact on that issue. There's been no question that the statements, the position statements aren't authentic and weren't issued by who they said they were issued by. There's simply no basis for any such conclusion.

2000 WL 489419 at *17-*18.

81. There may be a temporal explanation as well. Perhaps the Scouts have not been concerned about openly gay men in the past because gay men historically have not been open about their sexual orientation. (My thanks to Bill Eskridge for this suggestion.) Limiting their prohibition to only openly gay men might be a response to that development, though one still wonders why openly gay men offend the Scouts' teaching of moral straightness, or the Scouts' efforts to personify their teachings, while gay men per

This conjecture rests in part on an assumption: There is a group of parents and sponsors associated with Scouting who maintain various views about homosexuality but who believe common sense dictates that gay men should not be placed in charge of boys. I will refer to members of this group collectively as Group One. What evidence is there that such a group exists? One clue is that, without using the word "homosexual," Scouting literature tries to reassure parents that the risk of sexual abuse is low. For example, Scouting literature assures parents that "one-on-one activities between youth members and adults are not permitted; personal conferences must be conducted in plain view of others."[82]

And consider an analogy drawn by one Scoutmaster after the decision: "how many parents would allow their high school daughters to go backpacking in the mountains, swimming in wilderness rivers, chaperoned by several college men?"[83] As he saw it, "[c]hances are, nothing will go wrong on any given trip, but as parents, you do not want to run that risk. The institutional leaders are even more hesitant, needing to keep the program above all suspicion." Thus, "if the choice is between accommodating

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se do not. An alternative conjecture, which also views the parents as at least part of the relevant audience, is that the Scouts exclude openly gay men because they do not want to be perceived as "promoting" homosexuality. For more on the promotion notion, see William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. Rev. 1327, 1356 (2001).

82. A document filed with the Scouts' brief, entitled "Boy Scouts of America Information for Parents," states that:

- Except for daytime patrol activities where adults are not required, two registered adult leaders or one registered adult leader and a parent of a participant, one of whom must be 21 years of age or older, are required on all trips and outings. If activities are coeducational, leaders of both sexes must be present. . . .
- One-on-one activities between youth members and adults are not permitted; personal conferences must be conducted in plain view of others.
- If you suspect that anyone in the unit is a victim of child abuse, immediately contact the Scout executive, who is responsible for reporting this to the appropriate authorities.

2000 WL 228616 at *3a-*4a.

A document posted on the Scouts' website entitled *Guide to Safe Scouting* further states that "adult leaders must respect the privacy of youth members in situations such as changing clothes and taking showers at camp, and intrude only to the extent that health and safety require. Adults must protect their own privacy in similar situations." The guide also states that "[w]hen camping, no youth is permitted to sleep in the tent of an adult other than his parent or guardian" and that "[p]roper clothing for all activities is required. For example, skinny-dipping is not appropriate as part of Scouting." Guide to Safe Scouting: Youth Protection and Adult Leadership (available at <www.scouting.org/pubs/gss/gss01.html>) (last visited June 29, 2001) (copy on file with author).

83. Frank Laney, *The Troubling Issue is Sexual Attraction*, Raleigh News Observer (Sept. 8, 2000).

gay men and keeping Scout trips comfortable for parents so that boys can participate, the choice will be for boy participation."[84]

Having conjectured that such a group exists, consider the question posed by the Scouts' opening brief: What may we infer about the attitudes of this group from a policy of teaching boys to be "morally straight," saying nothing about homosexuality, and excluding openly gay men as Scoutmasters? Nothing. Parents or troop sponsors who believe that gay men should be excluded from Scouting as a precaution against sexual activity would favor expelling Dale regardless of what they believed about the morality of homosexuality in general.

As noted above, scoutmasters or troop sponsors who wish to teach explicitly that homosexuality is wrong apparently may do so without restriction by the national organization.[85] In light of this fact, one might draw a weak inference that Scoutmasters and troops who do not teach that homosexuality is wrong have no objection to it as a general matter, objecting only that gay men should not be Scoutmasters. But there are too many other explanations to warrant such an inference. Local troops might not oppose homosexuality strongly enough to want to make a point of their opposition, or they might believe the Scouts are the wrong place to make such a point. Either way, we cannot reason backwards from the stated policy to deduce general attitudes on homosexuality within Group One.

In addition to the message the Scouts defended before the Court, troop sponsors and Scoutmasters apparently may offer either of two unofficial messages, which contradict each other. As noted above, a majority of troops are sponsored by one of a large number of religious organizations.[86] Some religions condemn homosexuality and would not tolerate gay Scoutmasters.

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84. Id.

85. See text accompanying note 89.

86. A majority of troops are sponsored by religious organizations, but not a majority of boys. There are four million boys in Scouting; the briefs of amici religious sponsors claim to account for only about 1.3 million. Presumably troops sponsored by non-religious organizations are larger than those sponsored by religious organizations, which would be consistent with the claim of at least some religious organizations to use Scouting as an extension of their youth ministries. Dale's brief provides examples of non-religious sponsors in New Jersey, which include "over 600 government agencies or organizations operating under state aegis, including 15 city governments, 92 law enforcement agencies, 191 public schools, 281 school parent-teacher associations and groups, 21 boards of education, 6 Army National Guard units, 4 Navy units, 1 Coast Guard unit, 2 Disabled Veterans units, 3 Air Force units, 10 Army units, and 132 fire departments." 2000 WL 340276 at *2.

Others disagree.[87] Actually teaching the boys anything about homosexuality, one way or the other, could create or worsen conflict among religious sponsors. A second conjecture: The Scouts avoid such conflict by remaining silent on sexual matters and excluding the most easily identifiable gay men—those who are openly gay.

What support is there for this conjecture? Consider the briefs of two sets of amici who sponsor Scout troops. The first, filed by a group of sponsors including the United Methodist Church, said that

> . . . we have no First Amendment problem in this case. . . . our boys and young men do not participate in the Boy Scouts for the purpose of expressing the view that gay boys and men are immoral. We believe that it is discrimination against gay people that is immoral, a belief that we teach our boys in Scouting and that BSA has never told us not to teach.[88]

I will call this group of sponsors, who wish to teach boys that discrimination against gays is immoral, Group Two. Members of this group would probably disagree with Group One members on excluding gays; the two groups might or might not agree on teaching the boys to tolerate gays and homosexuality in general.

The second brief, filed by a group of sponsors including the Catholic Church, the Church of Jesus Christ of Latter-Day Saints, and a Scouting organization within the United Methodist Church, stated that

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87. *Dale*, 160 N.J. at 615 ("the record in this case reveals that Boy Scouts' religious sponsors differ in their views about homosexuality"). The Court received an amicus brief supporting the Scouts filed by the National Catholic Committee on Scouting, the General Commission on United Methodist Men of the United Methodist Church, the Church of Jesus Christ of Latter-Day Saints, The Lutheran Church–Missouri Synod, and the National Council of Young Israel. 2000 WL 235234. Supporting Dale was an amicus brief filed by The General Board of Church and Society of the United Methodist Church, the United Church Board for Homeland Ministries, the Religious Action Center of Reform Judaism, the Diocesan Council of the Episcopal Diocese of Newark, and the Unitarian Universalist Association. 2000 WL 339878.

88. 2000 WL 339878 at *6. This brief argued that the Scouts' expulsion of Dale contradicted their claim to be defending religious expression because Dale's troop was sponsored by the United Methodist Church:

> . . . James Dale's Boy Scout troop—Troop 73—was sponsored by The United Methodist Church and met in a hall provided by the Matawan First United Methodist Church. The Boy Scouts' rhetoric about protecting religious liberty is just that. It was the Boy Scouts' national leadership—in opposition to the religious doctrines of James Dale's Methodist troop sponsor—that expelled James Dale from membership in his United Methodist Church troop.

Id. at *12.

> Scouting views homosexual conduct as inconsistent with its fundamental moral code. This position is consistent with the broader religious teachings about sexuality espoused by Scouting's major religious sponsors. Amici . . . believe and teach that extra-marital sex is sinful, and that one who engages therein is not qualified to lead impressionable youth. Amici's view of extra-marital sexual relations remains the same whether the specific sexual acts are homosexual or heterosexual.[89]

These sponsors disagree with the Scouts' stated policy of tolerating closeted gays, and would exclude even heterosexual Scoutmasters who had extramarital sexual relations.[90] Not surprisingly, these sponsors appear to view the Scouts as a fairly direct extension of their ministries and the tenets of their particular denominations.[91] I will call this group of sponsors Group

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89. 2000 WL 235234 at *15-*16.

90. Id. at *24 n.12 ("It is no response that someone (unlike Dale) might be able to conceal his homosexual conduct, or that some other person might be able to hide his extra-marital affairs. The Scouting Movement cannot survive, much less accomplish, its mission, if its leaders live a double standard. Hypocrisy is lethal to character education"). In their Reply brief the Scouts cited this amicus brief to support their contention that Dale would in fact contradict the Scouts' teaching. 2000 WL 432367 at *6. The Scouts did not mention that these amici also apparently do not teach the message the Scouts defended before the Court.

91. There is a possible ambiguity in the statement in this brief, which says that the amici teach that homosexuality is morally wrong but does not specifically state that they teach their Scout troops that homosexuality is morally wrong. The brief may fairly be read as saying that the Scout troops get this message, however. It later says that the family values message the amici teach is "at times . . . taught expressly in the Scouting context, as when boys directly pose questions about sex to their scoutmasters," though the message is most often taught by example. 2000 WL 235234 at *24.

The brief elsewhere says that "amici have employed Scouting as a tool of religious ministry, making Scouting an integral part of their youth programs." Id. at *1. "In many of amici's troops, opening and closing prayers are offered to remind the boys of God's watchful presence and the seriousness of their religious obligations." Id. at *18. The brief also makes clear that these sponsors select Scoutmasters

> [a]ccording to BSA standards and their own religiously informed criteria. For many religious organizations, and especially these amici, the Scouting program is a means of youth ministry. By selecting adult leaders who uphold and exemplify Scouting's ideals, BSA and its sponsors ensure that the message of Scouting is properly taught and modeled to impressionable boys.

Id. at *3. As the portion of the brief quoted in the text makes clear, these sponsors impose requirements on their troops that are stricter than those the national organization defended before the Court. For an example of how these sponsors incorporate Scouting into their ministries, see id. at *22:

> Amicus The Church of Jesus Christ of Latter-day Saints uses Scouting as part of the activity program of its "Aaronic Priesthood," the lay priesthood held by all young men in the Church. Thus, although the Church welcomes nonmembers as full participants in its Scouting units, Scouting serves an important religious purpose. Scouting, including Cub Scouting, is an integral part of the priesthood training of LDS boys. The bishop of a Church congregation directly overseas Scouting, personally selecting (and releasing) the congregation's scout leaders

Three. They disagree with Group Two members across the board, but can agree with Group One members on the exclusion of gays.

Graphically, my conjectures suggest a continuum of views on homosexuality within the Scouts as follows. Favored policies on admission of gay Scoutmasters are in the first row, above the bold line, and general attitudes on homosexuality are in the second row. The policies favored by Groups Two and Three imply a specific attitude about homosexuality in general; the policies favored by Group One do not.

Admit Gays/ Teach Homosexuality Acceptable	Exclude Gays/ Say Nothing About Homosexuality			Exclude Gays/ Teach Homosexuality Wrong
Homosexuality Acceptable	Acceptable, but not in Scouting	Unsure, but not in Scout-ing	Unacceptable, but need not be part of message	Homosexuality wrong
Group Two	Group One			Group Three

Table One

To capture the managerial problems this distribution of views presents, we must consider the strength with which members of each group hold these views. Assume that Group Two members feel strongly about teaching tolerance rather than condemnation. There is no question that Group Three members feel the opposite. The submission of some Group Three members stated that:

> If the appointment of scout leaders cannot be limited to those who live and affirm the sexual standards of BSA and its religious sponsors, the Scouting Movement as now constituted will cease to exist. Amicus The Church of Jesus Christ of Latter-day Saints—the largest single sponsor of Scouting units in the United States—would withdraw from Scouting if it were compelled to accept openly homosexual scout leaders.[92]

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in conformity with Church canons and his understanding of God's will. Only those who live in harmony with the teachings of the Church and Scouting are asked to serve as scout leaders. To provide divine approval to their Scouting ministries, senior priesthood officers typically "set apart" new scout leaders by the laying on of hands. Cf. Psalms 4:3 (King James); Acts 6:6 (King James).

92. Id. at *25.

Taking the strength of preferences into account, the distribution of views implies the following policy choices.

	Teach Acceptance/ Retain Dale	Teach Acceptance/ Exclude Dale	Teach Nothing/ Retain Dale	Teach Nothing/ Exclude Dale	Teach Against Homosexuality/ Exclude Dale
Group One	Oppose	Might Favor	Oppose	Might Favor	Might Favor
Group Two	Favor	Might Favor	Might Favor	Oppose	Strongly Oppose
Group Three	Strongly Oppose	Strongly Oppose	Strongly Oppose	Might Favor	Favor

Table Two

Given that we have at least three groups and five policy choices, one might at first suspect that the Scouts would engage in endless cycling.[93] That would not occur with this hypothetical distribution, however, because column four—exclude and teach nothing—is the dominant choice.[94] At least one group strongly

93. E.g., Daniel A. Farber and Philip P. Frickey, *Law and Public Choice* 38-39 (U. of Chicago Press, 1991); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802 (1985). There is of course a sixth option—teach against homosexuality and retain Dale—but it makes no sense in the context of the Boy Scouts and I do not consider it here.

94. It is a Condorcet winner, in other words. For a description of the concept, see, for example, Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 S. Ct. Econ. Rev. 87 (1999). Some Group Three members might accept a teaching that homosexuality was immoral but that one should embrace homosexuals and try to "save" them. The amici briefs from which I draw these distributions do not discuss that approach, however. Group Two members would probably strongly oppose such a policy. I list Group Two members as possibly favoring column two because they would at least be able to teach their message, but it is equally likely that Group Two members would oppose the policy as hypocritical. Because the briefs imply that Group Three members actually express condemnation of homosexuality, I list that group as taking a "might favor" position on column four, which is the Scouts' litigation position, even though Group Three supported the Scouts in the litigation. Because we do not know the attitudes of Group One members about homosexuality in general, I list that group as taking a "might favor" position on each option in which Dale is excluded.

I also assume that Group Two members would only oppose a policy of teaching nothing while excluding Dale, rather than strongly opposing it. I assume this because such a policy at least does not contradict the message Group Two favors, though it does contradict the membership policy Group Two favors. Unlike some Group Three members, Group Two members did not threaten to leave Scouting if the Court ruled against their position. If Group Two members strongly oppose this option, then every policy faces strong opposition from at least one group, and there is no longer a logically domi-

opposes every other option, which makes the members of those groups more likely to break with the Scouts over those choices. Groups One and Three both wish to exclude Dale, which effectively eliminates the first and third columns.

Group Three, which felt Dale's presence would express a message it opposed, could not accept teaching acceptance of homosexuality regardless whether Dale was excluded. The strategic choice is therefore between saying nothing and excluding Dale or teaching that homosexuality is wrong and excluding Dale. Group Two cannot get what it wants. The fifth column requires teachings that contradict Group Two's beliefs, however, while the fourth column does not.[95]

If the submissions of these amici may be taken at face value, homosexuality threatened to fragment the Scouts as an organization precisely because Scouting's sponsors do not agree on what message to send on the subject. Against this background, one can perhaps understand an aspect of the Scouts' argument that might otherwise seem very odd.

The Scouts' briefs portrayed themselves as practicing benign neutrality in the culture wars: "Boy Scouting attempts to walk the line between tolerance toward all people and disapproval of some types of conduct."[96] Bearing witness to the rhetorical force of appeals based on claims of victimization, the Scouts claimed to be victims of efforts to depict them as extremists: "The claim that Boy Scouting can have no protected position other than one of explicit hostility is an effort to disqualify the middle position of the political spectrum so that all remaining opponents can be dismissed as extremists."[97] From reading the briefs, however, one might infer that the Scouts had as many worries from internal disagreements on the issue as from social condemnation.

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nant option. The choice of policy in that case probably would turn on the relative size of the different groups measured by whatever benchmark was most important to the Scouts' administrators—i.e., number of troops sponsored, number of boys in troops sponsored, etc.

95. Column four is the best choice for the Scouts regardless of what Group One members think about homosexuality outside the context of Scouting. Even if all Group One members believe that homosexuality is moral and acceptable in general, but that the risk of sexual activity counsels against making gay men Scoutmasters, the Scouts as a whole will still choose column four, which avoids antagonizing Group Three. We saw earlier that the Scouts' policy of silence on homosexuality tells us nothing about what Group One members think about homosexuality in general. That this policy is the dominant choice on this assumed distribution of groups reinforces that conclusion.

96. Petitioner's Reply Brief, 2000 WL 432367 at *5.

97. Id.

IV. ASSESSING THE SCOUTS' EXPRESSION

Having established in Part I that the expression of groups rests on the beliefs and interests their members hold in common, and having conjectured in Part III that the Scouts include within their ranks three groups with differing beliefs and preferences, I turn to the question of ascertaining what the Scouts' collective message is.

The first problem is how to measure the message of the Scouts as a whole. Groups Two and Three claim to express messages about homosexuality to the boys in the Scout troops they sponsor. I will assume that they do. I also assume that troops sponsored by Group One members receive the message the Scouts defended before the Court: instruction to be morally straight without specific mention of homosexuality. For the moment, I assume that each group is evenly represented in the Scouts. If we consider the message taught to the boys as the relevant message, then the Scouts' teachings look like this:

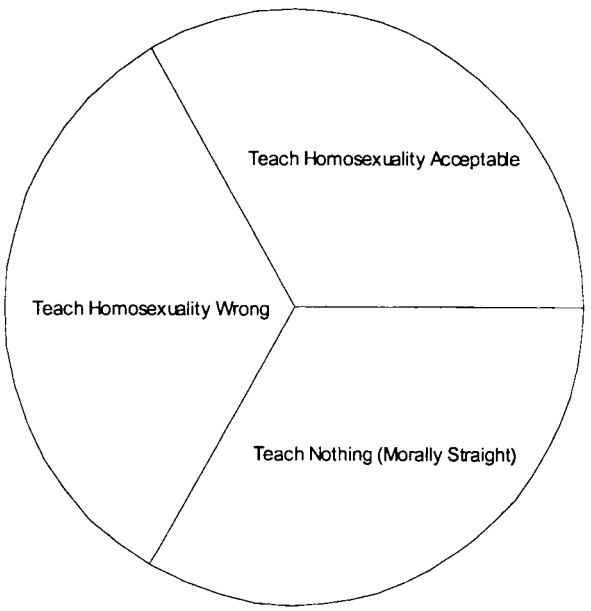

Figure One

On these assumptions, what message do the Scouts express about homosexuality? The answer will of course depend on how the message is measured. Four possibilities come readily to mind. The first is to try to measure the proportion of the group that expresses a message, the second is to measure the proportion of the group that agrees with the message, the third is to accept the message defended by the group's lawyers, and the fourth is to try to measure audience perception.

Predominant Message.

On the first approach, if we measure the message of the group as a whole by the probability that a boy will receive it, and if we assume that boys are randomly distributed among the three groups, the answer of course is that a boy has a 1/3 chance of receiving each message. The Scouts express each message equally. Two of them contradict each other, however, and the third represents silence on the question of homosexuality. Under those conditions, what is the group's message? Are all these messages the group's "expression" on homosexuality? Or do they cancel each other out, so that the group—as a group apart from its members—has no message on homosexuality? The theory of group expression in Part I implies the latter conclusion.

This illustration poses a problem for the message the Court took at face value in *Dale*. The Scouts told the Court that they say nothing about homosexuality in particular, but teach only that boys should be "morally straight." On these assumptions, however, divisions among the local groups that actually do the teaching suggest that 2/3 of boy scouts do not receive the pure "morally straight" message. How could the Scouts' litigation position be considered to be the group's expression if 2/3 of the boys are taught something else?

Acceptance by Members.

This is where the second approach becomes relevant. Even if 2/3 of the boys are actually taught something other than the message the Scouts defended in court, assume that either or both of Group Two and Group Three members (who teach their troops something about homosexuality) are willing to agree that Group One members can remain silent on homosexuality in their troops. If that is the case, then sponsors representing 2/3 of the boys can agree that silence is an acceptable message, even though only 1/3 of the boys actually experience silence while 2/3 of the boys experience some form of affirmative instruction, split evenly between opposing messages. While relevant, the second

approach does not help much to identify a message expressed by the Scouts as a group.

Litigation Position.

The third approach is simple. The Scouts' lawyers say that the group's message is "moral straightness" which, though not mentioning homosexuality, is opposed to it. Accepting this approach solves our measurement problems, and it allows the Scouts to play the dominant strategy in the array of options we saw in Table Two.

The main drawback to this approach is that it is a fiction. Two-thirds of the boys are taught a message other than the one the Court accepts. Of these, 1/3 are taught a message fully consistent with Dale's presence in the Scouts; the other 1/3 are taught a message flatly inconsistent with Dale's presence in the Scouts. Perhaps there is a reason to accept this fiction, but acceptance requires some justification other than the protection of a message actually expressed.

Adopting this fiction implies freestanding constitutional protection of the discretion of at least expressive groups to manage their affairs. As we saw with the example of the Scouts and immigration restrictions, using the doctrine to protect managerial discretion would be inconsistent with the theory of group expression set out in Part I and with the notion of expressive association as an instrumental doctrine designed to protect messages actually expressed. Such an approach would also be inconsistent with the Court's statement that anti-discrimination laws cannot be defeated by assertions that mere association would impair a group's expression. I return to these points in Part V.

Audience Perception.

Finally, the Court could try to measure audience perception directly, through such things as survey evidence. That would be a bad idea. It would be very costly and run the risk of denying protection to messages that are expressed but which are misunderstood. Anyone who has seen survey data on how audiences perceive messages[98] will be reluctant to base such a decision on survey research.

What happens if we relax the assumption that the messages are taught in equal proportion? Conflicts among the sponsors,

98. As in survey evidence that tries to measure confusion in trademark disputes.

and within a single large sponsor, make it hard to measure what boys are actually taught. We can use some rough numbers for illustrative purposes, however. Dale's brief said that, at the beginning of the case, the Scouts had around four million boy members and one million adult members.[99] Churches claiming to sponsor troops with around 500,000 boys and men joined the brief from which I have drawn Group Two's position. The churches who joined the brief from which I have drawn Group Three's position claimed to sponsor troops with around 1.2 million boys, but they claimed 424,000 of the boys in Group Two.[100] If we accept that claim, and assume that all other boys are taught nothing about homosexuality, then the Scouts' message looks approximately like this.

99. 2000 WL 340276 at *1.

100. The brief from which I have drawn the position I ascribe to Group Two based its numbers largely on the participation of the General Board and Society of the United Methodist Church, which said that that Church sponsors over 12,000 troops with over 424,000 boys and men. 2000 WL 339878 at *2. Churches claiming to sponsor troops including 1.2 million boys joined the brief from which I have drawn the position I ascribe to Group Three. 2000 WL 235234 at *1. The General Commission on United Methodist Men of the United Methodist Church, a group that said it was responsible for overseeing the Church's Scouting activities, joined this brief. It was on that basis that the brief included the approximately 424,000 boys in troops sponsored by the United Methodist Church. (This brief referred to 424,000 boys, rather than 424,000 boys and men; I assume that the 424,000 figure refers to boys and not both boys and men.) The numbers in the briefs do not claim to be precise, and the language of each brief aims to give the impression that the group in question sponsors many boys ("over 424,000," for example). For simplicity in the following discussion, I round Group Two's claimed numbers up to 500,000, Group Three's claimed numbers up to 1.2 million, and the United Methodist Church numbers down to 400,000. Because both groups claim the boys in troops sponsored by the United Methodist Church, the total number of boys in both groups is only about 1.3 million. That leaves about 2.7 million boys who I assume receive the message defended before the Court. I do not claim that these numbers are definitive. My analysis is meant only to illustrate the difficulty in analyzing the expression boys actually receive.

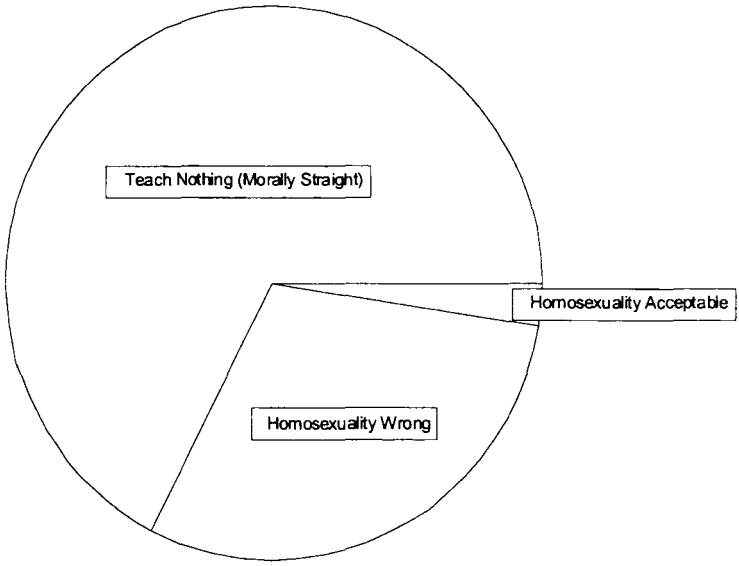

Figure Two

This array of teaching at first seems more congenial to the Scouts' claims. Slightly over 2/3 of the boys actually receive the message the Scouts defended in Court, which means they are taught nothing in particular on homosexuality. About 30% of the boys are actually taught that homosexuality is wrong. Only about 2.5% of the boys are taught that homosexuality is acceptable and discrimination against homosexuals is immoral. Even if we shift the boys in troops sponsored by the United Methodist Church into Group Two, we still have slightly over 2/3 of the boys being taught nothing about homosexuality, with about 20% being taught that homosexuality is wrong and only about 12.5% being taught that homosexuality is acceptable.

If 2/3 of the boys actually are not taught anything about homosexuality, then the free speech argument rests on the notion that admitting Dale amounts to compelling the Scouts to express a message with which they disagree, or that admitting Dale distorts an understanding of "morally straight" that members of the Scouts share to a significant degree. The premise of this argument is, of course, that a significant proportion of the Scouts' members actually believe that homosexuality is unacceptable.

But we do not know what the Scouts' members actually think on this question. Given the policy options available to the three groups within the Scouts, a policy of silence plus exclusion is the dominant choice regardless what Group One members think about the morality of homosexuality in general. It is at least possible for Group One members to believe that (i) gay men should not be Scoutmasters because of the risk of sexual conduct with the boys; (ii) there is nothing wrong with homosexuality in general; and (iii) that discrimination against homosexuals is, in general though not in Scouting, wrong. To say that college men should not chaperone teenage girls is not to condemn college men as such, but only to suggest that it is common sense to keep them out of a particular situation. Similarly, Group One members might, or might not, be happy to associate with homosexuals in churches or other associations.

The Scouts as a whole therefore might want to exclude Dale even if a large majority of their members do not think that homosexuality is morally wrong. On the distribution in Figure One, sponsors of troops accounting for 2/3 of the boys might believe that homosexuality is acceptable in general but is too risky in Scouting. On the distribution in Figure Two, which at first seems a stronger case for the Scouts, the percentage is even higher because the proportion of boys in troops sponsored by groups who believe and teach that homosexuality is wrong is slightly lower. Probably fewer than seventy percent of the persons involved in Scouting hold neutral or favorable views about homosexuality in general. But we cannot draw conclusions on this point from the policy the Scouts adopted. We simply do not know.

V. IDENTIFYING THE PROTECTED INTEREST

Disagreements among Scouting's sponsors might explain why the opinion in *Dale* quietly reworks the characterization of group expression in *Roberts*.[101] Such disagreements also might explain the Court's deference to the Scouts' assertions that the group expresses a message relevant to homosexuality and that Dale would impair that message. Perhaps the Chief Justice saw that any inquiry into the Scouts' common beliefs regarding homosexuality would reveal sharply conflicting claims and contradictory evidence. To reach a conclusion on such a record might

101. See text accompanying note 34.

appear to be taking sides in an internal debate. One can easily understand why the Court would not want to appear to be proclaiming a victor as among sponsors who endorse competing visions of the Scouts' message. The job of a judge is to apply the Constitution as law, not to pick winners and losers in power struggles within a group.

And the Scouts seemed to have resolved these conflicts themselves, at least for purposes of the litigation. The message they defended in litigation might be read as a careful compromise. Sponsors who believe homosexuality is wrong got at least Dale's expulsion and the Scouts' defense of that expulsion before the Court. Sponsors who opposed expulsion and would teach that discrimination is wrong got at least the acceptance of closeted gays and a statement of the Scouts' message that did not explicitly condemn gays. The Scouts managed to craft a message to defend in litigation; why question it when doing so would involve the Court so deeply in the Scouts' affairs? Why not say instead that "the Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes."[102]

Whether the Court's deference was appropriate depends on what purpose the expressive association doctrine serves. Does it facilitate expression, or does it provide stand-alone protection for groups to manage their internal affairs? The two purposes are related, but they are not the same. A fear that homosexual men will make advances towards boys is not speech in any sense traditionally protected under the speech clause; it is a central fact in the exercise of managerial discretion. The same is true of feelings of aversion toward blacks or feelings of paternalism and condescension toward women.

There is no general right of disassociation in the Constitution. If *Dale* expands the expressive association doctrine to allow members of groups that satisfy the standards for public accommodations to exclude persons whom they fear or dislike, but who are not the subject of expression based on the common beliefs or practices of the group, then the doctrine has taken a large step toward becoming a stand-alone right of disassociation rather than the instrumental, penumbral doctrine it has been in the past. Is that what *Dale* does?

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102. *Dale*, 350 U.S. at 655.

A. THE RELEVANCE OF EXPRESSIVE PURPOSE

The majority opinion takes two positions on the question whether the Court should analyze the purpose of an organization when assessing an expressive association claim. The Court's first position is reflected in its finding that the Scouts are an expressive organization that seeks to teach values.[103] The Court reached this conclusion without commenting on why it was relevant, but perhaps this was because the inquiry is so obviously necessary to sensible analysis. If the Scouts sold used cars or ran pyramid schemes, the case would have been decided differently and the Court might have seen no free speech problem at all.

The Court's second position limited the purpose inquiry. The New Jersey Supreme Court had argued that the Scouts must admit Dale because they do not associate for the purpose of expressing views about homosexuality—a point implicit in the Scouts' description of their message. In response, the Court said "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."[104]

The Court went on to say, by way of example, that "the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless."[105] The Court concluded that whether the Scouts associated for the purpose of expressing any message about homosexuality was irrelevant to the protection of the speech clause.

The Court's approach to expressive purpose is flawed in two ways. The first has to do with the Court's use of *Hurley* as precedent. Chief Justice Rehnquist was right to say that in *Hurley* "the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner."[106] No GLIB member claimed to have been excluded because of their sexual orientation from marching as a member of a group otherwise admitted

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103. See text accompanying note 47.

104. *Dale, 530 U.S. at 655.*

105. Id., referring to *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

106. *Dale*, 530 U.S. at 653.

to the parade.[107] *Hurley* did not deal with a claim of expression resting solely on open homosexuality, which is a harder question than whether a group member's more traditional expression as part of the group may be controlled. (Nobody disputed that Dale could have been expelled from the Scouts for actually teaching boys things that were at odds with the Scouts' doctrine.) Given this background, that the majority found *Hurley* such a compelling precedent is some evidence that Dale's "activist" activity was important to their view of the case.

Nor did the Court in *Hurley* ignore the purpose of the association of persons that made up the St. Patrick's Day parade at issue in that case. Parades are as purposive as other associations. As the Court pointed out in *Hurley*, a group of people crossing the street is not a parade,[108] nor is a group of marathon runners. Indeed, it is the expressive purpose of an association that makes its actions recognizable as a parade: "we use the word "parade" to indicate marchers who are making some sort of collective point . . . ."[109] That is why the *Hurley* Court referred to parades as "inherently" expressive. To say that *Hurley* analyzed a parade as a parade is to say that the Court there took into account the purposes around which the association of persons making up the parade had formed.[110]

All parades are associations, but not all associations are parades. Parades are in fact an extreme case of the expressive aspect of association. The message of a parade cannot be readily separated from the banners of its marchers because the whole purpose of the parade is to communicate messages by gathering persons together around a common interest or theme, which becomes the message of the parade. A St. Patrick's Day parade expresses Irish heritage or affinity with it; a Veteran's Day parade expresses pride in military service and patriotism; an Earth Day parade expresses concern for the environment. Earth Day marchers may be veterans with Irish roots, but that does not mean the Earth Day parade expresses the messages of the other two parades. The composition of parade members therefore *is* the message of a parade in a much more direct and transparent manner than is the case with other groups. To use a parade as a

107. *Hurley*, 515 U.S. at 572.
108. Id. at 568.
109. Id.
110. That Justice Souter wrote *Hurley* but dissented in *Dale* provides some additional evidence in support of these points.

model for analyzing the expressive aspects of association is to mistake the extraordinary case for the average.[111]

The second flaw in the Court's analysis of purpose is its effort to divorce the question whether expression has been impaired from an analysis of a group's common beliefs and interests. Under the theory of group expression set forth in Part I, one cannot ascertain a group's expression, or whether it will be impaired by the admission of some person, without taking into account the group's expressive purposes. Impairment is a conclusion that describes a contradiction between the relevant characteristics of the person at issue and the beliefs, interests, and social practices that define a group and express its message.

As noted above, this theory of group expression is at least consistent with the Court's earlier cases. The Court had spoken of a "First Amendment freedom to gather in association for the purpose of advancing shared beliefs,"[112] and had worried that compelled association that might "impair the ability of the original members" of a group "to express only those views that brought them together."[113] *Dale's* rewording of the language in *Roberts*,[114] and the Court's emphasis on deference to a group's litigation position, represents a departure from the analytical method employed in earlier cases. I turn now to the justification for this departure and its implications.

B. DEFERENCE AS A SOLUTION TO THE PROBLEM OF GROUP EXPRESSION

In the group expression cases leading up to *Dale*, the Court asked whether the organization at issue had produced evidence demonstrating that compelled association with women would impair its expression. In *Roberts* the Court said that the "Jaycees has failed to demonstrate . . . any serious burden on the male members' freedom of expression" and that "there is . . . no basis in the record for concluding that the admission of women . . . will impede the organization's ability to engage in these protected activities or to disseminate its preferred

111. Although her general approach to these questions differs from mine, Professor Hunter makes a similar point in Hunter, 35 Harv. C.R.-C.L. L. Rev. at 25 (cited in note 2) ("Parades, however unselective or vague in their organizing principles, unquestionably exist primarily to serve expressive functions and are perceived as such, unlike most other group activities").

112. *Democratic Party of Wisconsin v. LaFollete*, 450 U.S. 107, 122 (1981).

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

114. See text accompanying note 34.

views."[115] In *Duarte* the Court said "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."[116] In *New York Club Association*, the Court said "it is conceivable . . . that an association might be able to show that it is organized for *specific expressive purposes* and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion."[117]

Perhaps for this reason, the *Dale* Court did not cite these cases to explain why it deferred to the assertions in the Scouts' briefs. The Court instead first cited *Democratic Party of Wisconsin v. LaFollete*,[118] which held that Wisconsin could not force the Democratic Party to accept at its national convention delegates elected in an open primary. The rule established there was "that only those who are willing to affiliate publicly with the Democratic Party may participate in the process of selecting delegates to the Party's National Convention."[119]

The Court in *LaFollette* did defer to the Democratic Party's claim that to allow non-Democrats to elect delegates to the Democratic convention would burden its speech. But *LaFollette* dealt with the question whether persons who did not wish to join a group could have a voice in its deliberations. Deferring to the claim that someone who was not willing to join the group would impair its expression was not a major step, and is consistent with the notion that group expression is based on beliefs and interests group members hold in common. If the persons at issue shared the beliefs and interests of the Democratic Party, why didn't they join?

LaFollette did not address the question whether a group's message would be contradicted by the admission of a member who endorsed its tenets or by the continued presence of such a person who wished to remain in the group.[120] Nothing in the case

115. 468 U.S. at 626.
116. 481 U.S. at 548.
117. 487 U.S. at 13 (emphasis added).
118. 450 U.S. 107 (1981).
119. Id. at 109. The Court cited with approval Professor Tribe's characterization of the expressive right as one keyed to a group's common beliefs and interests: "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Id. at 122 n.22, quoting L. Tribe, *American Constitutional Law* 791 (Foundation Press, 1978).
120. In *Democratic Party v. Jones*, 530 U.S. 567, 576 (2000), the Court described the

suggests that a court may not analyze the relationship between a group's common beliefs and interests and the personal characteristics of one who agrees to abide by its rules but whom the group wishes to exclude. The question was simply not presented.[121]

The *Dale* Court's second citation for its deference to the Scouts' litigation position was to *Thomas v. Review Board*,[122] a case that did not actually address a question of expressive association. Thomas worked at a foundry that closed, resulting in his transfer within the firm to a division that made tank turrets. Thomas's religious views allowed him to work at the foundry, which might have made metal that went into tanks, but not the turret-plant, which was directly involved in making weapons.

Perhaps finding this distinction elusive, and noting that other workers who shared Thomas's faith were willing to make tank turrets,[123] the Indiana courts denied Thomas unemployment benefits on the ground that he had quit because of personal philosophical beliefs rather than religious conviction. The Court reversed, saying "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[124]

Thomas holds that courts may not parse the tenets of a religion to assess the plausibility of a member's interpretation. Differences of interpretation within a faith are to be expected. Courts in free exercise cases may not try to choose between competing interpretations. The ruling makes clear that an indi-

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issue in *LaFollette* as whether a rule "allowing nonparty members to participate in the selection of the party's nominee conflicted with the Democratic Party's rules. We held that, whatever the strength of the state interests supporting the open primary itself, they could not justify this 'substantial intrusion into the associational freedom of members of the National Party.'" (quoting *LaFollette*, 450 U.S. at 126). Consistent with my analysis here, the Court in *Jones* defined the burden on First Amendment interests in *LaFollette* as "'intrusion by those with adverse political principles' upon the selection of the party's nominee . . . ." Id. at 576 n.7 (quoting *LaFollette*, 450 U.S. at 122, quoting *Ray v. Blair*, 343 U.S. 214, 221-22 (1952)).

121. The Court does not always read *LaFollette* as precluding the examination of record evidence. In *Jones* the Court relied on *LaFollette* while discussing survey evidence and expert testimony in the record. The Court invalidated California's blanket primary law in part on the ground that "the evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote—indeed, it is a clear and present danger." Id. at 578.

122. 450 U.S. 707 (1981).

123. The Indiana Supreme Court seemed to take this fact as evidence that Thomas's interpretation was an aberration of doctrine. 450 U.S. at 715.

124. Id. at 715-16.

vidual's free exercise rights extend to sincere religious convictions even if those convictions deviate significantly from the prevailing view of a religious group. In brief, *Thomas* rightly protects a highly individual conception of faith and a right to free exercise of that faith unconstrained by the views of others within the relevant denomination.

Because it protects such an individual conception of faith, *Thomas* is a weak precedent for problems of group expression. Thomas had a free exercise right to maintain and follow highly personal interpretations of doctrine. It does not follow that the Jehovah's Witnesses as a group expressed his interpretation, either internally or to the world at large. Indeed, so long as Thomas's beliefs satisfied the general standards the Court has established for sincere religious belief, his free exercise right would not expire even if the Jehovah's Witnesses unanimously rejected his interpretation by public ballot. It would be untenable in that case to claim that the denomination itself expressed Thomas's views, however.

Thomas serves more to highlight the differences between an individual's free exercise right and the expression of a group than to support the Court's opinion. In the context of Scouting, for example, religious organizations sponsoring Scout troops may each maintain a view on drinking wine or on the importance of Jesus. These views may vary among and within sponsors. Such variance does not restrict any sponsor's group or individual right to their religious beliefs. It does suggest that the Scouts as a whole have no common beliefs on wine-drinking or the importance of Jesus. Under the theory of group expression set out in Part One, it would follow that the Scouts, as a group, express no views on these subjects. The same is true with respect to homosexuality.

Complete deference would solve the problem of measuring group expression by saying that expression itself was not necessary for constitutional protection. The First Amendment would then protect disassociation in its own right on the ground that it related to freedom of conscience in general if not free exercise in particular. This position cannot be squared with the Court's statement that expressive associations cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its

message."[125] It also contradicts the many cases treating expressive association as an instrumental doctrine designed to facilitate expression. An alternative interpretation is therefore preferable.

On their facts, *LaFollette* and *Thomas* each seem less relevant to *Dale* than either *Roberts* or *Duarte*. In each of the latter cases the organization at issue had an "official position" with respect to women and their effect on the group's message, but in neither case was that official position "sufficient for First Amendment purposes."[126] On its face, the very general message of "moral straightness" the Scouts defended in *Dale* was closer to the case of the Rotary than of an organization with a well-defined message, such as the NRA.[127] If we assume that the state interests in each case were equivalent—the elimination of discrimination against a group the state's legislature chose to protect—then on the analytical approach in *Dale* both *Roberts and Duarte* would have been decided differently.[128]

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125. *Dale*, 530 U.S. at 653.

126. The Court in fact quoted the language from both *Roberts* and *Duarte* that referred to its scrutiny of evidence in those cases, but made no mention of such analysis in distinguishing those cases on the ground that in each of them that "the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws." *Dale*, 530 U.S. at 658.

127. As noted above, the Scouts gave particularized content to this message only in the context of litigation, and they made essentially no effort to connect their assertion to common beliefs or interests that define the Scouts and their practices.

128. A realist analysis of the case would ask whether the opinion reflects an unstated conviction that New Jersey's interest in securing equal access to public accommodations for gays and lesbians was not as strong as its interest in securing equal access for women or members of minority groups at whom such statutes have been directed in the past. Questioning at argument provides a basis for such speculation:

> QUESTION: Well, Mr. Wolfson, if we compare the antidiscrimination laws such as New Jersey has enacted with the sort of Fourteenth Amendment principles of equal protection, the—you know, we start out with people, with kind of immutable characteristics, blacks, national origin, and then presumably homosexuals are not quite the same. Supposing we would get even further. I—one of the briefs does, the City of Boston, includes in its prohibition against discrimination ex-convicts. Now, supposing New Jersey were to pass a law like that. At some point the compelling State interest is considerably dissipated, isn't it? . . . .
>
> QUESTION: But wouldn't the State's interest be weaker if we're talking about, say, ex-convicts being discriminated against than it would about blacks being discriminated against?
>
> MR. WOLFSON: Well, as this Court has clearly acknowledged, for example, in the *Romer* case and in the *Hurley* case, here it talked about the legitimacy and appropriateness of State Civil Rights laws that include sexual orientation discrimination within the cluster of prohibited classifications, in *Romer* the Court—
>
> QUESTION: Well, that doesn't really answer my question at all. I asked you if the State interest would be weaker if we were talking about ex-convicts.

2000 WL 489419 at *24-25.

Supreme Court transcripts do not identify questioners. Dale's Counsel responded to

Nevertheless, *Dale* was different from *Roberts* and *Duarte* in two respects the Court might have discussed as a basis for bringing its holding in line with these precedents. Most importantly, language in both *Roberts* and *Duarte* suggested that those groups had significant economic components to their activities and expression. They could to some extent be considered "networking" organizations. On the continuum between a retail store and the LDS Church, they fell closer to the former than the latter; for the Scouts the reverse is true. It is in this sense that *LaFollette* and *Thomas* might be considered more analogous to *Dale* than *Roberts* or *Duarte*.

One therefore may and probably should read the *Dale* Court as establishing a sliding scale of deference based on the Court's view of how central expression is to a group's purpose. Hybrid commercial groups get more exacting scrutiny, while more purely expressive groups get greater deference. This reading obviously makes the Court's initial purpose inquiry—in which it classifies a group as expressive, not expressive, or somewhere in between—tremendously important. This reading also suggests the Court was more willing to make decisions and draw distinctions about the Scouts' interests and practices than its deferential language suggests.

Second, and more speculatively, the expressive activities at issue in *Roberts* and *Duarte* involved adults.[129] The Scouts' expression is at least formally directed toward boys. The amicus brief from which I have drawn the views of Group Three suggests that boys cannot separate a message from the messenger conveying it.[130] Perhaps the Court could have analyzed the record and developed a theory of expressive identity bounded by the facts of the case and the limited ability of this young audience to parse the message at issue. We do not know whether this approach would have worked, however, because the Court did not make this effort.[131]

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the first question, however, by addressing Chief Justice Rehnquist. New Jersey's statute does not protect sexual orientation differently from race or gender. If the Court drew such a distinction, and if this influenced its holding, then the Court's opinion does not adequately explain the basis for its decision. Because the opinion does not address the issue, *Dale* should not be read as a holding one way or another with respect to the weight of New Jersey's interest.

129. The Jaycees admitted men from 18 to 35. *Roberts*, 468 U.S. at 613; the Rotary said it was an organization of "business and professional men." *Duarte*, 481 U.S. at 540.

130. 2000 WL at 235234.

131. Because the Court did not develop a theory of expressive identity, any such effort would be difficult. If there were evidence suggesting that boys were aware of Dale's

C. DEFERENCE AS SECOND-BEST?

A defender of the Court's opinion might respond to this critique as follows. Courts are not well suited to analyzing the messages of an organization. Perhaps the Court's approach prevented it from seeing that a majority of persons associated with Scouting might think that homosexuality is morally straight yet still be afraid of having gay men as Scoutmasters. And perhaps the Court's approach gave the protection of the speech clause to the Scouts even though as a group they express no message that Dale's presence would contradict. Even taking all that as true, a defender might argue, the Court's approach was correct because judicial scrutiny of a group's beliefs presents a risk of chilling rights of expressive association that outweighs any harm from excessive deference. Perhaps the Court had something like this in mind when it chose to defer to the Scouts' assertions about their expression and what would impair it.

Formalism has its places in law. The boundary between group expression and anti-discrimination laws is not one of them.[132] Assessing relative error costs requires that we assign values to the losses on each side. Doing that requires judgment. Saying that the speech clause may be invoked in defense of silence requires judgment about the purposes of expressive association and the facts of particular cases. Saying that Courts are competent enough to distinguish expressive organizations from other sorts, but not to determine whether an organization actually expresses a message, or whether that message relates to the characteristics of a person the organization wishes to exclude, requires judgment as well. To take these points as obvious is simply to duck the issue.

The fact of the matter is that courts cannot analyze expressive association claims sensibly without analyzing the expressiveness of a group and its actual expression. The only real questions are what purposes the expressive association doctrine serves, and how closely the Court's analysis, and its understanding of how groups express messages, will track those purposes.

"activist" expression, however, the Court might be able to develop a theory arguing that boys could not distinguish between a Scoutmaster's role in the Scouts and that person's conduct outside the Scouts.

132. A truly formal approach to the compelled expression argument would be that once New Jersey had forced the admission of gays into the Scouts then the presence of gays would communicate only compliance with the law, not approval of homosexuality.

VI. IMPLICATIONS AND AN ALTERNATIVE APPROACH

One who offers so much critique is obliged to explain how things could have been done better. I will begin by offering what I believe is the best distillation of the facts, rhetoric, and outcome in *Dale*. I then discuss an alternative approach to the case.

A. DISCRETION TO FACILITATE EXPRESSION

To make sense of *Dale* one has to take into account both the Court's statement that groups cannot defeat anti-discrimination laws "simply by asserting that mere acceptance of a member from a particular group would impair its message"[133] and its strong statements of deference to the Scouts' litigation claims. The former point means that the Court has not created a stand-alone right of disassociation. In particular, the Court has not extended constitutional protection to the managerial discretion of groups except to the extent that discretion is exercised to facilitate actual activity protected by the First Amendment. The latter point confirms that managerial discretion, including control over membership, is a material part of the doctrine.

Under the expressive association doctrine after *Dale*, managerial discretion is protected to give breathing space to actual expression. To receive constitutional protection against anti-discrimination laws an expressive association must actually express a message. At some point the relationship between that message and the exercise of managerial discretion will be too attenuated to warrant constitutional protection for managerial decisions such as the exclusion of prospective members. Dale does not explain how closely the exercise of discretion must relate to actual expression to obtain constitutional protection against anti-discrimination laws. We can conclude only that expression is the core of the doctrine and managerial discretion is penumbral.

The degree of discretion granted to an organization will vary with the facts of actual cases. As noted above, the more central expression is to a group's purpose, the more discretion it is likely to receive. Facts relating to persons seeking admission are relevant here as well. Because the Court characterized Dale as an activist, for example, the Scouts' leadership probably received more leeway than it otherwise would have. To the extent this is true, we may infer that the Court felt the Scouts could dis-

133. 530 U.S. at 653.

tance themselves from Dale at least in part because the Court seemed to perceive him as fairly shouting a message on a topic the Scouts wanted to avoid.

B. FOLLOW THE SPEECH

Dale is a hard case in large part because the Scouts are a decentralized group that expresses messages locally. This is probably not the last time courts will see such a structure in an expressive association context. Rather than ignoring the group's structure and using deference and quick peeks at the record to fill in the resulting gaps in evidence, the Court could have confronted the structure squarely and held that in expressive association cases constitutional protection attaches to the expression, at whatever level the expression occurs.

On this approach, the Court would look past the Scouts' formal litigation position to the troops that do the actual teaching and analyze those messages under the traditional expressive association doctrine. Whether openly gay men could be Scoutmasters would then be determined on a troop-by-troop basis in light of the expression actually at issue.

This approach has the virtue of confronting the evidence suggesting that Scout sponsors and troops do not have common beliefs and interests respecting homosexuality, and therefore express no group message on homosexuality. Under this approach, the Scouts as a group therefore would not have a right to exclude Dale. Troops that did express a message condemning homosexuality would have a right to exclude Dale. This would be particularly true of troops sponsored by groups, such as the Catholic Church or the LDS Church, that integrate Scouting into their youth ministries. (Group Two members would have no claim against admitting Dale, but by hypothesis they would not bring one.)

This approach also would give teeth to the Court's statement that mere assertions that compelled association would impair speech are not enough to defeat anti-discrimination laws. We can see this point by applying this approach to Group One members, who do not want gay Scoutmasters but who have no message on homosexuality. A decentralized approach in which constitutional protection follows expression implies that Group One members have no expressive association defense against New Jersey's laws.

This approach would prevent discrimination based on fears unrelated to protected expression, such as the fear that gay Scoutmasters might make sexual advances toward boys. Fear of sexual abuse is not speech in the constitutional sense, nor are representations and membership policies designed to keep up demand for the Scouts' services by palliating such fears.[134] If the Court does not tie its analysis to actual expression, it is hard to see how the Court could determine whether a membership policy was based on unprotected fears rather than protected expression.

This approach has costs. Looking past the Scouts' litigation position and engaging in a troop-by-troop analysis might fragment the Scouts' "morally straight" message even further, and reduce the cohesiveness of the national group. The message appears to be only nominal in any event, however. It is speculation to suggest that the Court's decision would result in further fragmentation.[135]

The Scouts could of course introduce evidence showing that the message they defended is actually widely expressed at the troop level. In that case this approach would produce the same result as the Court's deferential approach. That result would be grounded in the evidence, however, and would pose a lower risk of protecting unvoiced fears rather than constitutionally protected expression. In any event, this approach is not static. If the Scouts as a whole were able to develop a unified message on the question of homosexuality, whatever it might be, then presumably they could point to facts showing what the message was, that it was actually expressed, and explain how it related to the characteristics of a person the Scouts wished to exclude. Nothing more would be required.

Another objection to this approach is that there is no logical reason to stop at the troop level once the Court decides to look past the representations of the national organization. Troops are sponsored by groups; why not look past the sponsoring organiza-

134. Suppose, for example, that the Scouts' representations about policies designed to guard against sexual activity are false. If a parent of an abused child included a misrepresentation claim in a suit against the Scouts, assuming the parent could prove reliance and the other elements of the claim, could the Scouts assert a First Amendment defense? At least if we assume that the Scouts' representations, which are designed to induce trust, are instrumental, such a claim would be unlikely to succeed. See note 64.

135. As the Scouts pointed out, they litigated this issue for some time. That they did not introduce better evidence that the message they defended is actually expressed at the troop level suggests that, with respect to the term "morally straight" and its relationship to homosexuality, the Scouts have little in the way of a unified message to fragment.

tions to see what the individual members think? Where does one draw the line? It is true that focusing on the troop level is a choice. I suggest it here because, using the theory of group expression set out in Part I as the test of group expression, the facts recounted in Part III suggest that the troop level is where the Scouts' messages are expressed.

A last objection to this approach is that this level of scrutiny compels private citizens to declare private beliefs in order to avoid associating with persons to whom they object. Group One members who actually believe that homosexuality is morally wrong but who do not wish to say so would be able to avoid openly gay Scoutmasters only by teaching their convictions, thereby shifting themselves to Group Three. This objection is true, but it is not unique to the Scouts. Giving groups a free speech defense to an anti-discrimination rule creates an incentive to reveal private preferences. If we assume for the moment that the American Society of Professional Journalists could be subjected to an anti-discrimination law, then it would be open to racist members to create the American Society of White Journalists.

There are both costs and benefits to creating incentives to reveal such information. At a minimum, persons considering whether to join a group would have better information about its common tenets. In addition, some persons who might discriminate privately might be unwilling to do so if their actions could be perceived. Persons or legislators who seek to use anti-discrimination laws to alter social attitudes about the members of protected groups would count this effect a benefit. As noted, much case law and legislation follows this view.[136] Persons who fear majority imposition of values would see the disclosure incentives as harmful—an intrusion by the state into matters of conscience.

Legally the question again comes down to what the right is protecting. If it is expression, then the information-forcing effect of this structure is neutral and perhaps beneficial. If the right protects the managerial discretion of groups standing alone, then this effect counts as harm. Because *Dale* establishes neither a freestanding right of disassociation, nor a theory of complete managerial discretion, this objection is not conclusive.

136. See note 65.

VII. CONCLUSION

Dale was a hard case. There was a lot of noise surrounding the decision, but paying close attention to the facts yields usable signals as well. Personal characteristics are not inherently expressive; there is no free speech right to exclude persons from a public accommodation just because one finds them repugnant; and managerial discretion is protected only as an adjunct to actual expression, which is what the First Amendment protects. The extent to which discretion enjoys constitutional protection will probably vary with the degree to which expression is central to a group's purpose and with the facts relevant to the person whose admission to the group is at issue.

The relationship between discretion and expression is complex, and beyond these points *Dale* did little to clarify it. The Court's recasting of the Scouts as equivalent to an individual speaker instead of a group was not accompanied by any reasoning. The view of group expression implied by *Roberts* and discussed in Part I is more defensible and ultimately provides a sounder basis for the doctrine than either the *Dale* Court's personification of groups or its statements of deference. One hopes the Court will return to that view in future cases.