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THE EXPRESSIVE INTEREST OF ASSOCIATIONS

Erwin Chemerinsky* & Catherine Fisk**

Professors Erwin Chemerinsky and Catherine Fisk take issue on several grounds with Boy Scouts of America v. Dale, in which the Supreme Court held that the Boy Scouts have a First Amendment right to exclude gays, even though state law prohibits such discrimination. They first criticize Dale's holding that courts must accept the group leadership's characterization of the group's expressive message. The Court's approach short-circuited the process by which an organization ordinarily develops or transforms its expressive message—internal deliberation, public articulation of a message, and recruitment of like-minded members—and it did so at the expense of many current and former scouts who reasonably believe that homophobia is not the Boy Scouts' expressive message.

Second, Professors Chemerinsky and Fisk argue that inclusion of gays would not undermine the Boy Scouts' expressive message. They also point out that having gays as scouts or scout leaders is conduct, not speech. Governments can regulate expressive conduct when there is an important governmental interest (such as ending discrimination) unrelated to the suppression of the expressive message, and the impact on communication is no greater than necessary to achieve its goal.

Finally, even if the Boy Scouts does have an expressive associational interest in excluding gays, Professors Chemerinsky and Fisk argue that Dale is wrong for two reasons. First, antidiscrimination laws are neutral laws of general applicability with which individuals and groups must comply even when the laws impinge on protected First Amendment speech or conduct. Second, the elimination of discrimination is a compelling governmental interest which antidiscrimination laws are narrowly tailored to achieve.

* * *

INTRODUCTION

Boy Scouts of America v. Dale was a hard case, and in this instance a hard case made very bad law.¹ The tension between freedom of association and antidiscrimination laws is inherently difficult. Freedom of association is unquestionably a fundamental right, and one of its core aspects is the right of a

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¹ 530 U.S. 640, 120 S.Ct. 2446 (2000).

group to choose who is in and who is out. However, antidiscrimination laws seek to keep people from being excluded based on invidious characteristics such as race, gender, religion, disability, and sexual orientation. Enforcing antidiscrimination laws against groups that want to exclude on such grounds intrudes on associational decisions. Refusing to apply antidiscrimination laws on this basis compromises the commitment to equality.

Prior to *Boy Scouts of America v. Dale*, the Supreme Court's cases concerning this conflict, such as *Roberts v. United States Jaycees*² and *Board of Directors of Rotary International v. Rotary Club of Duarte*,³ emphasized the compelling interest in ending discrimination, even when it compromises freedom of association. *Dale*, however, held that the Boy Scouts has a First Amendment right to exclude gays, even though such discrimination is prohibited by New Jersey law.⁴ The Court reached that conclusion without meaningful analysis of the expressive interest of the Boy Scouts or of the governmental interests in ending private discrimination.

It is tempting to see *Boy Scouts of America v. Dale* as just being about the Justices' feelings about the Boy Scouts and their views about homosexuality. This, of course, would not excuse the ruling—the Boy Scouts' exclusion of gays is based on homophobia and the worst stereotypes about homosexuals. But seeing the case as limited in this way would lessen its impact on the ability to enforce antidiscrimination laws against others. Unfortunately, there is no way to cabin the Court's approach in *Dale* so that it applies only to the Boy Scouts, or only to sexual orientation discrimination, or only to New Jersey's law.

Part I of this Article argues that *Boy Scouts of America v. Dale* suggests that any group that wants to discriminate may do so based on claims of freedom of association. Part II contends that the flaw in the decision is in how it determined the Boy Scouts' expressive message. The Court used a corporate governance approach in which it let the Boy Scouts' directors define the group's message during litigation. In doing so, the Court ignored the expressive rights of the group's members. Under a more nuanced view of the right of expressive association, the Boy Scouts' message likely *was not* anti-gay at all. Finally, Part III argues that the Court fundamentally erred in not recognizing a compelling interest in stopping discrimination. The framework created in *Roberts v. United States Jaycees*, and followed in *Dale*, is flawed in that it fails to consider whether there is a compelling interest in infringing expressive association so as to achieve equality.

Boy Scouts of America v. Dale is a ruling in favor of discrimination and intolerance that is wrapped in the rhetoric of freedom of association. Those who want to discriminate can always invoke freedom of association; all enforcement of antidiscrimination laws forces some degree of unwanted association. It was not

² 468 U.S. 609 (1984).

³ 481 U.S. 537 (1987).

⁴ See *Dale*, 120 S.Ct. at 2446.

surprising that the five most conservative Justices on the Court favored the Boy Scouts and its condemnation of homosexuality. This, though, does not make it any more right than other decisions throughout history that have upheld bigotry and discrimination. Someday, *Boy Scouts of America v. Dale* will be repudiated by the Court like other rulings that denied equality to victims of discrimination.⁵

I. OPENING THE DOOR TO DISCRIMINATION:
THE IMPACT OF *BOY SCOUTS OF AMERICA V. DALE*

No one—not the Boy Scouts, not the New Jersey courts, and not a single Justice on the Supreme Court—denied that James Dale was kicked out of the Boy Scouts solely because he was gay.⁶ Dale was a lifelong scout who had reached the rank of Eagle Scout and had become an Assistant Scoutmaster. While in college he became involved in gay rights activities. Dale was quoted in a newspaper article after attending a seminar on the psychological needs of gay and lesbian teenagers and was identified in the article as the copresident of the Gay/Lesbian Alliance at Rutgers University. A scout official saw this article and then sent Dale a letter excluding him from further participation in the Scouts.

There was no dispute that, in every way, Dale was an exemplary member of the Boy Scouts. Dale was discriminated against solely because of his sexual orientation. Dale sued the Scouts under the New Jersey law that prohibits discrimination by places of public accommodation.⁷ The New Jersey Supreme Court found that the Boy Scouts is a “public accommodation” within the meaning of the law⁸ and rejected the Boy Scouts’ claim that freedom of association protected its right to discriminate based on sexual orientation.⁹

The Boy Scouts sought United States Supreme Court review on the ground that the New Jersey decision violated its freedom of association by forcing it to include gays whom it wished to exclude.¹⁰ Freedom of association is unquestionably a fundamental right. Although “association” is not enumerated as a right in the Constitution, the Supreme Court has nonetheless declared that “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of

⁵ See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (allowing the state-imposed racial segregation of railway passengers); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856) (holding that neither a slave of African origin, nor his descendants, could ever become United States citizens).

⁶ See *Dale*, 120 S.Ct. at 2449 (describing the facts of the case).

⁷ N.J. STAT. ANN. §§ 10:5-4 and 10:5-5 (West 1992).

⁸ Because this aspect of the New Jersey Supreme Court’s decision was based entirely on state law it was not reviewable by the United States Supreme Court.

⁹ *Dale v. Boy Scouts of Am.*, 160 N.J. 562, 734 A.2d 1196 (1999), *rev’d by* 530 U.S. 640, 120 S.Ct. 2446 (2000).

¹⁰ *Dale*, 120 S.Ct. at 2450-51.

the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."¹¹ The Supreme Court has explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."¹²

Group membership is integral to all of the rights mentioned in the First Amendment. The Court has observed that an "individual's freedom to speak, to worship, and to petition the Government for the redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."¹³ Association is also important as people benefit from being with others in many ways.¹⁴

Boy Scouts of America v. Dale is not the first time that the Supreme Court has confronted the tension between freedom of association and laws advancing equality. The leading case articulating the Court's approach to this difficult issue is *Roberts v. United States Jaycees*.¹⁵ The Jaycees, a national organization of young men between ages eighteen and thirty-five, challenged the application of the Minnesota Human Rights Act,¹⁶ which prohibited private discrimination based on characteristics such as race and sex, to its organization.¹⁷ The Jaycees claimed that freedom of association protected its right to exclude women and to be a place where men associated only with each other.

The Supreme Court reaffirmed that freedom of association is a fundamental right and agreed that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."¹⁸ However, the Court said that freedom of association is not absolute and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."¹⁹ The Court concluded that the state's goal

¹¹ NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

¹² *Id.*

¹³ *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). For an excellent discussion of the rights of groups under the Constitution, see Ronald R. Garet, *Communitarity and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

¹⁴ The Court, however, generally has been unwilling to extend protection of freedom of association outside situations where it relates to First Amendment purposes. For instance, in *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), the Court upheld a city ordinance which limited the ability of adults to gain access to teenage dance halls. The Court rejected a challenge based on freedom of association and emphasized that the restriction did not limit association for expressive purposes.

¹⁵ 468 U.S. 609 (1984).

¹⁶ MINN. STAT. § 363.03 (1982).

¹⁷ *Roberts*, 468 U.S. at 609.

¹⁸ *Id.* at 623.

¹⁹ *Id.*

of prohibiting discrimination was unrelated to the suppression of any message and “plainly serves compelling state interests of the highest order.”²⁰ The Court found no evidence that requiring the Jaycees to include women would undermine its expressive activities and the Jaycees obviously was too large to be considered “intimate association.”

Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court held that it did not violate the First Amendment rights of the Rotary Club to force it to admit women in compliance with a California law that prohibited private business establishments from discriminating based on characteristics such as gender.²¹ In *New York State Club Association, Inc. v. City of New York*, the Court upheld the constitutionality of a city’s ordinance that prohibited discrimination by clubs that have more than four hundred members and that provide regular meal service.²²

The Court in these cases recognized, however, that freedom of association would protect a right to discriminate in two limited circumstances. First, if the activity is “intimate association”—a small private gathering—freedom of association would protect a right to discriminate.²³ Second, the Court said that freedom of association would protect a right to discriminate where discrimination is integral to expressive activity. For example, the Klan likely could exclude African Americans or the Nazi party could exclude Jews because discrimination is a key aspect of their message.²⁴

Thus, the issue in *Boy Scouts of America v. Dale* was whether the Boy Scouts’ desire to exclude gays fit within either of these exceptions. Since the Boy Scouts is a large national organization, it could not realistically claim to be an “intimate association.”²⁵ Instead, its central argument was that it had an expressive message that was anti-gay and that forcing it to include homosexuals undermined this communicative goal.

The key question, then, was how to determine the expressive message of the Boy Scouts and whether forced inclusion of gays harms this First Amendment

²⁰ *Id.* at 624.

²¹ 481 U.S. 537 (1987).

²² 487 U.S. 1 (1988).

²³ For an excellent discussion of the concept of intimate association, see Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

²⁴ In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), the Court held that a private group that organized a St. Patrick’s Day Parade could exclude a gay, lesbian, and bisexual group from participation. The unanimous decision said that organizing a parade is an inherently expressive activity and those doing so have a right to exclude messages inimical to their own.

²⁵ The Boy Scouts have tried to argue in other cases that the focus should be on individual troops which it claims to fit within the meaning of intimate association. See *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (1998).

right. In answering this question, the Supreme Court greatly expanded the ability of groups to discriminate, in violation of antidiscrimination laws like New Jersey's, in two separate ways. First, the Court held that courts must accept the group leadership's characterization of the group's expressive message, even if the message was articulated nowhere except by the lawyers in litigation. Second, the Court found that forced association undermines the expressive message of any group that wishes to exclude certain categories of people. Together, these holdings likely will allow any group that wants to discriminate to do so by claiming, once challenged in court, a desire to exclude based on any characteristics that it chooses.

Consider the implications of how the Court answers each of these key questions: 1) How is a group's expressive message determined? 2) How should courts decide whether ending discrimination undermines the expressive message?

A. *How Is a Group's Expressive Message Determined?*

Determining a group's expressive message obviously is crucial in evaluating whether discrimination is integral to that message. The Boy Scouts claimed to have an anti-gay expressive message, but as Justice Stevens pointed out in a lengthy dissent, there is virtually nothing in the organization's literature communicating this.²⁶ Justice Stevens carefully reviewed the Boys Scouts' mission statement,²⁷ handbook, and publications and found nothing expressing an anti-gay message.²⁸ There is one line stating that Boy Scouts should be "morally straight."²⁹ But this obviously had nothing to do with sexual orientation when it was written.³⁰

²⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 2460-63 (200) (Stevens, J., dissenting).

²⁷ The Boy Scouts' Mission Statement describes the organization's purpose as being to teach boys to "serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Id.* at 2460. The Boy Scouts' federal charter asserts that the organization seeks "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values . . ." 36 U.S.C.S. § 30902 (2000).

²⁸ *Dale*, 120 S.Ct. at 2460-63 (Stevens, J., dissenting).

²⁹ The Boy Scout Oath states:

On my honor I will do my best
To do my duty to God and my country
And to obey the Scout Law;
To help other people at all times;
To keep myself physically strong, mentally awake, and morally straight.

See *id.* at 2451-52; Boy Scouts of Am., *Scout Oath, Law, Motto, and Slogan*, available at <http://www.scouting.org/factsheets/02-503a.html> (last visited Mar. 13, 2001).

³⁰ At the time the language "morally straight" was included in the Scout Oath, "straight" had not yet acquired the colloquial meaning of heterosexual. See XVI OXFORD ENGLISH DICTIONARY 817, 818 (2d ed. 1991) (identifying the first colloquial uses of "straight" to

In fact, the Boy Scouts' literature instructs scout leaders and their assistants to refrain from discussing matters of sexuality.³¹ As everyone knows, the Boy Scouts inform members of the goals of the organization by encouraging boys to develop certain skills and by awarding badges for those who achieve proficiency in specified areas. Boy Scouts earn badges for service, for learning to tie knots, for camping and the like; the organization does not award badges for homophobia or for having sexual attraction to girls.

Chief Justice Rehnquist's majority opinion acknowledged that "[o]bviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation."³² But Chief Justice Rehnquist was willing to find such a goal based on the Boy Scouts' lawyers' interpretation of the Scout Handbook and Oath, such as its command that scouts be "morally straight," and from the position it had taken during litigation.³³

In other words, the Court in *Boy Scouts of America v. Dale* essentially held that during litigation a group (or its lawyers) can define the group's expressive message. Chief Justice Rehnquist said that a group's failure to state clearly such a communicative goal in advance is not determinative: "The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."³⁴

This means that any group that wants to discriminate and exempt itself from state anti-bias laws can do so by claiming, during litigation, that it has a discriminatory purpose. The Court purports to be following, not overruling, *Roberts v. United States Jaycees*. Yet, in practical effect, the Court totally undermines that decision. In *Jaycees*, the Court rejected the argument that the inclusion of women would change the Jaycees' expressive message on some issues because it found no evidence in the record.³⁵ In *Dale*, the Court appeared to conclude that evidence was irrelevant. After *Dale*, the Jaycees could go back to court and claim that its expressive message was advancing only men's careers. The Board of Trustees of an Ivy League university presumably could decide that

mean heterosexual in the 1960's, although one 1941 book on sexual deviance used the term.) (citing G. W. HENRY, II SEX VARIANTS 1176 (1941)).

³¹ The Scoutmaster Handbook states that the Boy Scouts believes that "boys should learn about sex from their parents, guardians, or others empowered by their families to guide them." BOY SCOUTS OF AMERICA, SCOUTMASTER HANDBOOK 132 (2000). Scoutmasters are further instructed that "[i]f a Scout comes to you with questions of a sexual nature, answer them as honestly as you can and, whenever it is appropriate, encourage him to share his concerns with his parents or guardian, spiritual leader, or a medical expert." *Id.*

³² *Dale*, 120 S.Ct. at 2452.

³³ *Id.* at 2452-54.

³⁴ *Id.* at 2455.

³⁵ 468 U.S. 609, 626 (1984).

the university's expressive message is the superiority, advancement, and education of white Christian manhood and could expel all other students and fire all other faculty. At most, an organization's leaders would need to find a couple of innocuous lines in their literature that they could interpret as conveying this message. The reality is that any group organization can claim that its expressive message is discriminatory and, under the rationale of *Dale*, would be entitled to violate state antidiscrimination laws.³⁶

B. *How Should the Courts Decide Whether Ending Discrimination Undermines the Expressive Message?*

Even if it is assumed that the Boy Scouts had an expressive message that was anti-gay, there still must be a determination of whether stopping it from discriminating undermined this communication. The Supreme Court in *Dale* recognized that this is crucial to any First Amendment claim. Chief Justice Rehnquist explained: "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association *if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.*"³⁷

But James Dale being a scoutleader does not keep the Boy Scouts from expressing and advocating any message that the group may choose. Simply acknowledging his being gay does not mean that Dale himself advocates any particular point of view, any more than being heterosexual or white expresses any particular view about the desirability or superiority of a particular sexual orientation or race. The Boy Scouts can advocate any viewpoint it wants with regard to sexual orientation in its publications, its legal briefs, its legislative testimony, and its statements to the media.

The Court never clearly explained why ending discrimination against gays prevents the Boy Scouts from effectively communicating the message the Boy Scouts' current leadership wants with regard to homosexuality. That a Catholic university employs a Jew as a law professor does not undermine the ability of the president or trustees of the university to express their views on religion, nor does

³⁶ Moreover, as Professor Bill Marshall pointed out, the difficulty with allowing any organization to claim an expressive message in exclusion is the overbreadth of the claim in many circumstances. As Professor Marshall noted, an environmental organization could, under such a rule, claim to have a First Amendment right to exclude black females even though the exclusion has nothing to do with the positions that the organization maintains. See William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 79 (1987). The Court in *Dale* fell into precisely the overbreadth problem that Professor Marshall warned against years ago.

³⁷ 120 S.Ct. at 2451 (emphasis added) (citation omitted).

it connote that the university has somehow abandoned its commitment to Catholicism.

Chief Justice Rehnquist attempted to avoid this problem by saying that “we must also give deference to an association’s view of what would impair its expression.”³⁸ Unless the Court is prepared to abandon any effort to decide whether First Amendment expression is occurring and whether legal regulation infringes it (which the Court plainly has not been willing to do in any other area of First Amendment doctrine), the Court cannot simply defer to the group’s lawyers. This, too, opens the door to groups being able to discriminate and violate public accommodations laws simply by asserting that forced inclusion will undermine their expressive message.

Chief Justice Rehnquist also said that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to youth organizations and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”³⁹ As noted above, that is simply not true. A Catholic university need not undertake special efforts to assure Catholics that the Church still believes in the superiority of Catholicism simply because the university employs Jews or Presbyterians. Even if it were true, the Boy Scouts easily could proclaim to the world that it is anti-gay and that it was accepting gay scoutleaders, like James Dale, because the law required it to do so. In other words, the Boy Scouts could use the forced inclusion of homosexuals as the occasion for making clear its anti-gay message, and that the inclusion of Dale was a result of legal compulsion and not a matter of condoning his sexual orientation.

There also is a more subtle First Amendment problem with the Court’s view that including Dale would cause the Boy Scouts to communicate that it “accepts homosexual behavior.” Under the First Amendment, it is well established that the government can regulate communicative *conduct* if it meets intermediate scrutiny. Having gays as scouts or scout leaders is conduct, not speech. Under *United States v. O’Brien*,⁴⁰ the government can regulate conduct that communicates if it has an important interest unrelated to the suppression of the message and if the impact on communication is no greater than necessary to achieve its goal. The government’s interest in ending discrimination against homosexuals is unrelated to the suppression of any message and there is no other way to achieve it except forced inclusion. Under the Court’s own analysis, the application of the New Jersey law should have been upheld if the elimination of discrimination constitutes an important governmental interest, and if prohibiting discrimination by the Boy Scouts is substantially related to that interest. The Court has previously recognized that eliminating discrimination against “discrete and insular” minorities is at least

³⁸ *Id.* at 2453 (citation omitted).

³⁹ *Id.* at 2454.

⁴⁰ 391 U.S. 367 (1968).

an *important* governmental interest, and there is no more direct way of doing so than preventing the exclusion of boys and scout leaders who are members of that minority group. The Court plainly did not see this implication of its analysis, did not apply intermediate scrutiny, and did not recognize that the New Jersey law passes muster.

Chief Justice Rehnquist also analogized the Boy Scouts' situation to that of the St. Patrick's Day parade organizers in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*⁴¹ In *Hurley*, the Court ruled that the organizers of the St. Patrick's Day Parade in Boston had a First Amendment right to exclude the Gay, Lesbian, and Bisexual Group of Boston (GLIB). In *Dale*, Rehnquist said:

As the presence of GLIB in Boston's St. Patrick's Day Parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.⁴²

But *Hurley* rested on the premise that a parade is inherently expressive and that those running the parade get to decide its message. The membership of an association is not inherently expressive in the way that the membership of a parade is, and there is no reason why Dale's continuing involvement in the Boy Scouts interferes with the organization's ability to "propound a point of view." Dale does not advocate a message simply by being gay in the way that GLIB would advocate a gay pride message if it were to march in the parade. With or without Dale, the Boy Scouts can propound whatever view it wants in any way it desires.

After *Dale*, any group that wants to discriminate merely need assert that it has an expressive message that it deems to be undermined by forced inclusion. The Court's decision defers to the group *both* in determining its expressive message and in deciding whether the application of antidiscrimination laws interferes with it. It is hard to imagine a group that wants to discriminate that cannot avoid the application of state and local antidiscrimination laws after *Dale*.

II. DETERMINING THE EXPRESSIVE MESSAGE OF THE GROUP: LOOKING TO ITS MEMBERS

How should the Supreme Court determine the expressive message of organizations in applying the test from *Roberts v. United States Jaycees*? The central flaw in the Court's approach is that it used a corporate-governance model to determine the expressive interest of the Boy Scouts of America. In other words,

⁴¹ 515 U.S. 557 (1995).

⁴² *Dale*, 120 S.Ct. at 2154.

the Court allowed the leadership of the organization total discretion in deciding the expressive message of the group, in the manner that the law allows directors of a corporation to determine its policies.

Chief Justice Rehnquist's majority opinion said that a court need look only to statements in the briefs filed by the Boy Scouts of America to determine the expressive interests of the group. Rehnquist wrote:

The Boy Scouts asserts that it "teach[es] that homosexual conduct is not morally straight," . . . and that it does "not want to promise homosexual conduct as a legitimate form of behavior" We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality.⁴³

Even the additional information that the Court cited, which it said was unnecessary but "instructive, if only on the question of the sincerity of the professed beliefs,"⁴⁴ emphasized only the expressive views of the Boy Scouts' Board of Directors. The Court made no inquiry whatsoever as to whether individual Boy Scouts and their families all over the country understand, know of, and share the directors' beliefs about homosexuality.⁴⁵

But expressive associational rights are, at least in large part, the rights of the individual members of the group. The entity asserts these rights derivatively on behalf of the individuals who express themselves through membership in the organization. Freedom of association is protected as a fundamental right because of the benefits it provides individuals, *instrumentally* in aiding their First Amendment activities and *intrinsically* because of the gains realized from being part of a group. Although a group may have some rights as a group,⁴⁶ all of the

⁴³ *Id.* at 2453 (citations omitted).

⁴⁴ *Id.* at 2453.

⁴⁵ The Court's invocation of the need to determine "sincerity" is troubling for two reasons. First, how is a court to evaluate whether a group's professed expressive goal is sincere, especially since the Court eschews the need for the group to have proclaimed such a view in advance of the litigation? The problem is that there is no measure of sincerity, as the Court has discovered in the only other place where the Court has inquired into the sincerity of beliefs—religious beliefs protected by the Free Exercise Clause of the First Amendment. See *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). As Justice Jackson observed, "any inquiry into intellectual honesty in religion raises profound psychological problems." *Id.* at 93 (Jackson, J., dissenting).

Second, in assessing sincerity in the context of religious freedom, courts evaluate the sincerity of an *individual's* beliefs. Sincerity connotes a subjective mental state that only people as individuals can have. An association, as a legal fiction, has no mental states and thus it is simply incoherent to speak of the "sincerity" of its expressive interests.

⁴⁶ See Garet, *supra* note 13, at 1065-75; Marshall, *supra* note 36, at 77-90.

Supreme Court's decisions concerning freedom of association have emphasized its protection based on the rights of the individuals involved.

We are not making the strong claim that there is no constitutional protection for an association apart from the interests of its members. Rather, our point is that the expressive message chosen by the corporate governors of a group is not the only, or even the primary, element to be considered. The views of the members of the group are crucial in determining the expressive message of the organization. The problem with the corporate-governance model used by the Supreme Court in *Boy Scouts of America v. Dale* is that it completely overlooks the expressive interests of the members of the group.

Until *Dale*, the Court had assessed the expressive associational rights of groups by reference to the expressive interests of the individual members. In *Roberts v. United States Jaycees*, Justice Brennan's majority opinion spoke of the state antidiscrimination law's interference "with *individuals'* selection of those with whom they wish to join in a common endeavor."⁴⁷ More to the point, Justice Brennan's eloquent explanation for protecting freedom of association centered on the interests of the individual members:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . .

....

. . . Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection. . . .

....

. . . Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. We need not mark the potentially significant points on this terrain with any precision. We note only that factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.⁴⁸

⁴⁷ 468 U.S. 609, 618 (1984) (emphasis added).

⁴⁸ *Id.* at 618-20 (citations omitted).

As Justice Brennan showed, *Roberts* based its freedom of association protection on the *individual* members' interests. Similarly, in other cases, such as *Rotary International v. Rotary Club of Duarte*⁴⁹ and *New York State Club Association v. City of New York*,⁵⁰ the Court emphasized the individuals' interests in association. The Constitution protects the right of association because of the benefits to individuals of "associating," and the Court takes that as its purpose in assessing the proper scope for the First Amendment.

Nor is *Hurley* to the contrary. The focus in *Hurley* was on the ability of the organizers of a parade to determine its message. The Court, in an opinion by Justice Souter, said that organizing a parade is an inherently expressive activity and that it violated the First Amendment to force the organizers to include messages that they find inimical to the message conveyed by the parade.⁵¹ A war victory parade need not include marchers protesting the victors' alleged war crimes; a parade for a World Series-winning team need not include marchers protesting an umpire's dubious call, the high ticket prices at the stadium, or the accomplishments of some other team. The Court implicitly analogized putting on a parade to writing a book or putting words on a poster: the author gets to decide the message. Justice Souter explained that compelling the Veterans Council to include the Irish-American Gay, Lesbian, and Bisexual Group "violates the fundamental rule . . . under the First Amendment, that a speaker has the autonomy to choose the content of his own message."⁵² Justice Souter explained that "the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."⁵³

Hurley was based on the Court's conclusion that the group staging a parade is the speaker in a public forum. The analogy to *Dale* is that the Boy Scouts' directors can decide what message to put in their handbook and other publications. *Hurley* did not involve determining a group's expressive message in terms of its right to exclude others from being a part of an association.

Under a more nuanced view of the right to expressive association, the focus should be on the association's members' interests, and not simply those of the group as a group. From this perspective, the inquiry should include, and be primarily about, what the individual members of the organization understand to be its associational message. This is a completely different probe from that undertaken by either the majority or the dissent in *Dale*.

⁴⁹ 481 U.S. 537 (1987).

⁵⁰ 487 U.S. 1 (1988).

⁵¹ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 568 (1995).

⁵² *Id.* at 573.

⁵³ *Id.* at 574.

Under this approach, the Boy Scouts would have to prove that its members see the group as being about disapproval of homosexuals as expressed through their exclusion. Maybe the Boy Scouts could prove this, but we are skeptical. The Boy Scouts do not award badges for sexuality; they award badges for leadership and outdoor skills. Our sense is that the vast majority of parents and children associate with the Boy Scouts because of the activities and experiences it offers; unlike the Nazis, the Boy Scouts' views on homosexuality is peripheral to the goals of the group. Most of the Boy Scouts' literature cited in the majority and dissenting opinion confirms what most people probably thought the Boy Scouts was all about until the Court said otherwise in *Dale*: service to the community, leadership, self-reliance, and the appreciation of nature. Until the publicity associated with the *Dale* litigation and similar state court cases before it, many likely did not know of the Boy Scouts leadership's anti-gay views, and if they did, many probably saw it as irrelevant to the reasons they affiliated with the Scouts.⁵⁴ Perhaps this is wrong and the Boy Scouts of America could prove that opposition to homosexuality was a key part of its members' choice to affiliate with the organization. The point is, the Court should have inquired into the group members' beliefs about the group's message, not merely what the lawyers said in their brief.

Of course, it is possible that over time, through self-selection and through the systematic efforts of the current scout leadership to drive gays out of the organization and the likely departure of those who support gay rights, homophobia could become a core expressive message of the vast majority of members of the Boy Scouts. The problem with *Dale* is that the Boy Scouts had never, until recently, made homophobia a crucial part of its public message. The Court in *Dale* simply short-circuited the ordinary process by which an organization develops or transforms its expressive message—through internal deliberation, public articulation of a message, and recruitment of like-minded members—and allowed the Boy Scouts leadership to turn an organization that once was about camping into one that is about homophobia.⁵⁵ It did so at the expense of the significant number of current and former scouts who reasonably believed that scouting was, and should be, about camping.

⁵⁴ An array of anecdotal information suggests that at best there is sharp division among scouts as to homosexuality. See, e.g., Karen Brandon, *Court Ruling Didn't End Scout Debate; Towns, Schools, Facing Questions of Inclusion*, CHI. TRIB., Feb. 2, 2001, at 1 (noting that the Boy Scouts of America had revoked the charters of eight Chicago-area chapters that had opted to follow local non-discrimination policies).

⁵⁵ Ironically, it is much more likely that the Boy Scout's expressive message will be about anti-homosexuality in the future because the Supreme Court's decision has validated and greatly publicized the Boy Scouts' discriminatory policy. Many are now leaving the Boy Scouts after learning of this, making it more likely that the Boy Scouts could prove that their members choose to affiliate because of, rather than in spite of, its anti-gay policy.

Simply put, the Court's failing in *Dale* was its determining the expressive message of the group without any consideration of the views or rights of the members. This more nuanced determination of a group's expressive message is preferable to the corporate-governance approach used by the Court. First, it avoids problems discussed in Part I that are inherent to allowing a group to define its own message by its statements during litigation. As explained earlier, the Court's approach permits any group to avoid antidiscrimination laws simply by claiming to have a discriminatory message that is undermined by forced inclusion. On the Court's analysis, Princeton University's trustees could decide one day that the employment or admission of blacks at the university was contrary to its expressive message and ipso facto exempt itself from the application of the New Jersey antidiscrimination law.

Second, our approach avoids the silly textualism that is employed by the majority in *Dale*. Chief Justice Rehnquist was forced to say that phrases in the Boys Scouts' Oath and Handbook, like "morally straight" and "clean," can be used to demonstrate its anti-gay bias.⁵⁶ As Justice Stevens pointed out in dissent, "[i]t is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality."⁵⁷

Third, focusing on the expressive interests of individual members serves the objective of *Roberts*, which recognized the need to allow groups to discriminate only where discrimination is integral to the expressive message of the group.⁵⁸ There is no doubt that those who associate with the Klan understand and almost certainly support its racist message. Likewise, it is difficult to imagine a person joining the Nazi party except with knowledge and support of its anti-semitic and racist views. In other words, the members in these organizations support and define the group's views. The issue in *Dale* should have been whether the Boy Scouts' members have the same knowledge and support for its anti-gay position. Do the members of the Boy Scouts join it because of, or in spite of, or even knowing of, its anti-gay message?

A focus on whether the discriminatory policy is core to the group members' understanding of the organization explains why ruling against the Boy Scouts in *Dale* would not have forced it to accept girls, nor would it have compelled the Girl Scouts to include boys. All of the members understand that the Boy Scouts is for boys and the Girl Scouts is for girls. All presumably believe that same sex experiences offer valuable developmental opportunities for children. But it is far more dubious that the members see the organization as "the Boy Scouts for straights only."

⁵⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 2452 (2000).

⁵⁷ *Id.* at 2461 (Stevens, J., dissenting).

⁵⁸ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

Fourth, this more nuanced view of determining a group's expressive message would make it more difficult for a faction of the organization to seize control and seek an exception from a state's antidiscrimination law. The leadership should not be the sole determinant of an organization's views, but instead the focus always should include attention to the members' understandings and positions.

This might be objected to as undue intrusion by courts in groups' internal activities. In the context of internal disputes within religions, the Supreme Court has made it clear that it is impermissible for the courts to decide questions of religious doctrine in handling such cases. Moreover, the Court has said that when a religion has a hierarchical structure for deciding church matters, the judiciary must defer to decisions emanating from that decision-making structure. For example, in *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevic*, the judiciary was asked to review the decision of a religion to defrock and remove one of its bishops.⁵⁹ The Court noted that "[t]he basic dispute is over control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada[,] . . . its property, and its assets."⁶⁰ The Court reversed a state court decision resolving the dispute and said that the state court ruling "rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity."⁶¹

The Court said that

where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept the decisions as binding on them, in their application to the religious issues of doctrine or polity before them.⁶²

The Court thus concluded that it was not for the judiciary to review the appropriateness of the defrocking and removal of the bishop.

The claim might be that the approach we advocate entails exactly the type of judicial interference that the Court has disapproved in the religion context. Yet, the analogy to religion is not apt. Unlike with religion, there is no prohibition of

⁵⁹ 426 U.S. 696 (1976).

⁶⁰ *Id.* at 698.

⁶¹ *Id.* at 708.

⁶² *Id.* at 709.

excessive government entanglement in the affairs of private associations.⁶³ There are obvious Establishment Clause problems with having courts determine who speaks for a religion. Who speaks for a religion itself is usually a religious question. No such problems are posed when courts look to determine the views of the members of groups in assessing whether expressive association is involved. Courts need not constitute themselves as the interpreter of religious teachings to determine whether a nonreligious organization does or does not have a discriminatory message at its core. They simply need to examine the evidence about the views and practices of the group's members, evidence that the Court seemed to think largely irrelevant in *Dale*.

Moreover, even in the religion context, the Court is quite willing to inquire into the views of individuals. For example, in *Thomas v. Review Board of the Indiana Employment Security Division* the Court ruled that an individual could claim a religious belief even though it was inconsistent with the doctrines of his or her religion.⁶⁴ In assessing the sincerity of individuals' claimed religious beliefs, the courts look to the behavior of the person over time.⁶⁵ Our position is that courts in deciding the expressive message of a group also must look to the views of the individual members.

Most basically, the analogy to religion does not work because it ignores that freedom of association is protected, as explained above, to safeguard the rights of members to associate with one another. Discrimination inherently interferes with the ability of people to engage in this association. Therefore, it is the desires of the people, and not the hierarchy, that must be key in the inquiry.

We do not deny that there are profound implications to rejecting the corporate-governance approach to determining a group's expressive message. This likely will limit the number of groups that can successfully claim a discriminatory message; there probably are many groups whose leaders want to discriminate, but whose discrimination is not understood by the membership to be a central tenet of the organization. For example, if as we suspect, Boy Scouts of America is understood to be about honesty, self-reliance, service, leadership, and camping, it cannot become being about homophobia without the support of the majority of its members. Maybe, of course, this is exactly what Boy Scouts' members understand it to be about, in which case the majority in *Dale* correctly characterized its message. But this cannot be known based on the record before the Court because there was no inquiry into the views of the membership.

Thus, our insight is simple: freedom of association is protected because of the

⁶³ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 611-14 (1971) (outlining excessive government entanglement with religion as one prong of the *Lemon* test for Establishment Clause violations).

⁶⁴ 450 U.S. 707, 719 (1981).

⁶⁵ See *id.* at 717-18.

benefit individual members gain from groups. The focus therefore should be on the members, particularly in defining the group's expressive message. Of course, it might be said that group members make this choice through the leaders that they select. If the members of the Boy Scouts want to change its message, they just need to elect different leaders. The problem with this approach is that it is at odds with how many groups choose their leaders. The existing directors slate and often choose their successors; the ability of the members to participate is often limited or non-existent. It is doubtful that Scout members play any role in choosing its corporate governors.

Even where individual members do have a role in choosing their leaders, the choice of leaders cannot be deemed to be an endorsement of a particular position unless that position was one that the leader articulated in the selection process. In selecting leaders who explicitly advocate that the Boy Scouts should exclude gays, the members of the organization may be choosing to make homophobia a core part of the organization. Of course, they may not be—it would depend on whether the homophobia or other qualities of the leaders were what inspired their selection. Our point is simply that the courts cannot know whether the leaders' own views are core to the association without examining evidence of the views of the members.

In short, the Court's error in *Dale* was allowing the corporate governors of the Boy Scouts complete latitude in defining the organization's expressive message and in ignoring the views of the members, which should be at the center of any determination of the group's communicative goal. Such an inquiry is more consistent with the underlying reasons why freedom of association is protected and would greatly limit the ability of groups to engage in invidious discrimination.

III. A COMPELLING INTEREST EXISTS IN ENDING DISCRIMINATION BASED ON SEXUAL ORIENTATION

Even if the Boy Scouts does have an expressive associational interest in excluding gays, the Court's holding in *Dale* is wrong. It is wrong for two reasons. First, antidiscrimination laws are neutral laws of general applicability with which, the current Court has held, individuals and groups must comply even when the laws impinge on protected First Amendment speech or conduct. Second, the elimination of discrimination is a compelling governmental interest, and antidiscrimination laws are narrowly tailored to achieve that interest; there is simply no way that the law at issue in *Dale* would fail to survive the strict scrutiny that the Court's existing cases indicate should have been applied.

In other areas of First Amendment law, the conservative majority in *Dale*—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—have held that the First Amendment cannot be used to challenge neutral laws of general applicability. For example, in *Cohen v. Cowles Media Co.*, the Court held that freedom of the press

cannot be used to invalidate a neutral law of general applicability.⁶⁶ A newspaper published the identity of a source who had been promised that his name would not be disclosed. The Court rejected the argument that holding the newspaper liable for breach of contract would violate the First Amendment. The Court stressed that the case involved the application of a general law that in no way was motivated by a desire to interfere with the press. The Court said:

Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.⁶⁷

Most dramatically, in 1990, in *Employment Division v. Smith*, the law of the Free Exercise Clause changed significantly.⁶⁸ The Court held that the Free Exercise Clause cannot be used to challenge a neutral law of general applicability.⁶⁹ In other words, no matter how much a law burdens religious practices, it is constitutional under *Smith* so long as it does not single out religious behavior for punishment and it was not motivated by a desire to interfere with religion. For example, in *Smith*, the Court said that a law prohibiting consumption of peyote, a hallucinogenic substance, did not violate the Free Exercise Clause even though such use was required by some Native American religions.

Under this approach,⁷⁰ the conservative majority in *Dale* should have held that the New Jersey public accommodations law is a neutral law of general applicability and rejected the Boy Scouts' First Amendment challenge. The New Jersey law is neutral in the sense that it was not motivated by a desire to restrict speech; it is entirely about ending invidious discrimination. The law is also of general applicability in that it applies to all entities in the state. The conservative majority, by ignoring a principle which has become increasingly important to its view of First Amendment jurisprudence, reinforces the sense that *Dale* is really about how these five Justices feel about homosexuality.

A critic of this position might assert that antidiscrimination laws are not neutral laws of general applicability, but are instead laws targeted at eliminating the expressive message of discrimination. Discrimination, they might assert, is

⁶⁶ 501 U.S. 663, 669 (1991).

⁶⁷ *Id.* at 669-70.

⁶⁸ 494 U.S. 872 (1990).

⁶⁹ *Id.* at 890.

⁷⁰ Also, in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 307-10 (2000) (plurality opinion), Justices Scalia and Thomas in a concurring opinion said that the First Amendment cannot be used to challenge laws regulating speech, in this instance public nudity, if they are neutral laws of general applicability.

inherently expressive in that it asserts the view that some groups are superior to others or that separation of groups is desirable. There are two serious problems with this contention.

First, no court has ever held that all discrimination is expressive, and the Court itself has suggested that some discriminatory speech is not protected speech but is instead harmful conduct.⁷¹ Antidiscrimination laws are motivated by and targeted toward ending harmful conduct, not toward silencing the view that discrimination is desirable. Indeed, even Justice Scalia recognized in *City of Erie v. Pap's A.M.* that a law prohibiting public nudity, which is arguably more expressive conduct than discrimination, was targeted at conduct, not at expression.⁷² Laws that prohibit discrimination have the incidental effect of prohibiting discrimination in those instances where discrimination is expressive, just as laws that prohibit nudity or peyote use have the incidental effect of prohibiting nudity and peyote use where they are expressive, but these laws are not motivated by or targeted toward eliminating expression.

A second, and perhaps more serious, problem with the view that antidiscrimination laws are not neutral laws of general applicability is this: if discrimination is inherently expressive such that antidiscrimination laws are necessarily targeted toward silencing that expression, then all antidiscrimination laws are constitutionally suspect. One problem with the Court's blithe statement in *Dale* that any discrimination is expressive when the group's lawyers so claim⁷³ is that the Court's reasoning casts constitutional doubt on all antidiscrimination laws.

Our problem with criticizing *Dale* on the ground that the New Jersey law is a neutral law of general applicability is that we disagree with the principle that the First Amendment is not violated by the application of neutral laws of general applicability that burden free exercise of religion, freedom of the press, and speech. We believe that laws that significantly interfere with the exercise of First Amendment freedoms should have to meet strict scrutiny.

Therefore, the key question in *Boy Scouts of America v. Dale* should have been whether the government meets strict scrutiny in requiring that the Boy Scouts accept James Dale, and other gays, as scout leaders. We believe that the answer is clear: ending discrimination based on characteristics such as race, gender, religion, disability, and sexual orientation is an interest of the highest order.

⁷¹ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (noting that sexually harassing speech can be prohibited as conduct just as other harmful conduct that is achieved solely by speech—such as treason and conspiracy—can be prohibited).

⁷² See 529 U.S. at 307-08 (Scalia, J., concurring); see also *R.A.V.*, 505 U.S. at 389-90 (noting that Title VII's prohibition on sexual harassment is not a restriction on speech because discrimination is conduct not speech).

⁷³ See *supra* note 53 and accompanying text.

Ending discrimination by organizations like the Jaycees, the Rotary Club, and the Boy Scouts—the entities involved in the leading Supreme Court cases—serves many compelling purposes. Such associations provide benefits to their members, ranging from training, to business contacts, to the opportunity for school children to have fun and learn life skills.⁷⁴ All in society should have access to these benefits. Indeed, ending discrimination advances freedom of association: it allows those excluded to associate with the group and its members.

Moreover, ending discrimination sends a social message that racism, sexism, anti-semitism, and homophobia are no longer tolerable; allowing discrimination transmits exactly the opposite message. As Justice Stevens noted in his dissent:

Unfavorable opinions about homosexuals ‘have ancient roots.’ Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. . . .

....

That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers.⁷⁵

Thus, the Court should have found that even if the application of the New Jersey law interfered with the Boy Scouts’ freedom of association, this was justified because the government met strict scrutiny. In *Roberts v. United States Jaycees*, the Court expressly held that even though forcing the Jaycees to include women interfered with the group’s freedom of association, this was justified to serve the compelling interest of ending discrimination.⁷⁶ In *Roberts*, the Court said that “[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁷⁷ The Court concluded that the state’s prohibition of discrimination against women “plainly serves compelling state interests of the highest order.”⁷⁸ The Court should

⁷⁴ See, e.g., *Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546–47 (1987) (discussing the benefits of membership); *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (same).

⁷⁵ *Dale*, 120 S.Ct. at 2477–78 (Stevens, J., dissenting) (citations omitted).

⁷⁶ 468 U.S. 609, 623 (1984).

⁷⁷ *Id.*

⁷⁸ *Id.* at 624.

have come to the same conclusion in *Dale* about stopping discrimination against gays.

The Court, however, never reached the issue of whether strict scrutiny was met. This is because of an analytical flaw in the framework used in earlier decisions such as *Roberts*. In these cases, the Court said that the government has a compelling interest in ending discrimination, but it recognized two exceptions that justify exclusion: intimate association and expressive association. The Court in *Dale* applied the latter exception to find that the Boy Scouts could discriminate based on its expressive message.

The Court's error was in not recognizing that strict scrutiny should be applied at this stage in the analysis as well. Freedom of expression has never been regarded as an absolute; the government can engage in content-based speech restrictions if it meets strict scrutiny.⁷⁹ The right to engage in expressive association under *Roberts* and its progeny is not absolute, nor are any speech rights absolute. The government should be able to interfere with expressive association, like all content-based restrictions on speech, so long as strict scrutiny is met.⁸⁰ Ending discrimination based on sexual orientation should have been deemed to meet strict scrutiny.

CONCLUSION

One wonders if the decision in *Boy Scouts of America v. Dale* would have been the same if the Boy Scouts were discriminating based on race rather than on sexual orientation. The answer seems obvious that the Court likely would not have been willing to sanction racism in that way. In all likelihood, the Court would have said that racism is not integral to the expressive message of the Boy Scouts. The Court would have pointed out that there is nothing in the Boy Scouts' literature that expresses a racist message. The Court likely would have discussed the importance of allowing boys of all races to have the benefits of associating with each other in scouting activities. The Court would have noted the psychological damage inflicted on children when some are stigmatized as separate or worse than others.⁸¹

⁷⁹ See, e.g., *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987) (holding that content-based restrictions are constitutional if strict scrutiny is met).

⁸⁰ In fact, there is a strong argument that the government only should have to meet intermediate scrutiny. The New Jersey law prohibiting discrimination can be argued to be content-neutral under Supreme Court precedents because it is facially not about restricting speech at all and because it is designed to prevent the adverse secondary effects of discrimination. See, e.g., *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 52 (1986) (determining that a law is content neutral if it prevents adverse secondary effects). However, we believe that the better approach is to use strict scrutiny and find that it is met by the interest in ending discrimination.

⁸¹ Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

The Court certainly would have explained how stopping race discrimination meets strict scrutiny.

That the Court did none of these things in *Dale* speaks volumes about what really underlies the majority's decision. Even worse, because of its ruling in *Dale*, it will be much more difficult for the Court in the future to stop any group that wants to discriminate based on race, or any other characteristic, from doing so. This hard case made really bad law.