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FREEDOM TO EXCLUDE AFTER *BOY SCOUTS OF AMERICA V. DALE*: DO PRIVATE SCHOOLS HAVE A RIGHT TO DISCRIMINATE AGAINST HOMOSEXUAL TEACHERS?

*Karen Lim**

INTRODUCTION

Jim Doe was a teacher at Baden-Powell Academy, a secular private boys' school.¹ The school's mission is to instill values in its students and "prepare [them] to make ethical choices over their lifetimes" in achieving their full potential.² The values the school seeks to instill include those of being "morally straight" and "clean."³ The school defines "morally straight" as being "a person of strong character [who] respect[s] and defend[s] the rights of all people."⁴ "Clean" refers to cleanliness in "body and mind."⁵ It encompasses refraining from mouthing "racial slurs and jokes that make fun of ethnic groups or people with physical or mental limitations."⁶

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1. The following hypothetical closely parallels the facts in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), but reframes the issues in two key ways. First, it sets the right to freedom of expressive association, on which the Boy Scouts of America ("Boy Scouts") prevailed in *Dale*, directly against the firmly established civil rights proscription against invidious discrimination in employment. Second, it shifts the forum from a voluntary organization that instills values in its young members to a formal school environment, inviting consideration of the issues in light of the Supreme Court's previous decisions regarding the First Amendment in the specific context of education.

2. Boy Scouts of America, Mission Statement, at <http://www.scouting.org/media/values/newsletter/0102/mission.html> (last visited Apr. 4, 2003); see also *Dale*, 530 U.S. at 666 (Stevens, J., dissenting) (quoting mission statement of Boy Scouts of America).

3. Boy Scouts of America, Boy Scout Handbook 9 (11th ed. 1998) (listing qualities in Scout Oath and Scout Law) [hereinafter BSA, Scout Handbook]; see also *Dale*, 530 U.S. at 667 (Stevens, J., dissenting).

4. BSA, Scout Handbook, *supra* note 3, at 46; see also *Dale*, 530 U.S. at 667 (Stevens, J., dissenting).

5. BSA, Scout Handbook, *supra* note 3, at 53; see also *Dale*, 530 U.S. at 667 (Stevens, J., dissenting).

6. BSA, Scout Handbook, *supra* note 3, at 53; see also *Dale*, 530 U.S. at 668 (Stevens, J., dissenting).

Doe taught at Baden-Powell for twelve years, and his work was recognized by several awards for excellence in teaching. Two years ago, Doe acknowledged that he was gay and joined the Gay and Lesbian Organization in his city. He became co-president of the organization and was interviewed by the local paper on his views regarding the organization's role in the community. Doe had never expressed views on homosexuality to his students, nor was he responsible for teaching any sex education classes at Baden-Powell. Baden-Powell's sex education curriculum did not include any instruction on homosexuality. Soon after the interview appeared in the paper, however, Baden-Powell dismissed Doe. When Doe inquired about the reason for his dismissal, the school principal informed him that it was the school's policy not to employ openly gay teachers.

Doe filed a complaint against Baden-Powell in state court, alleging that the school violated the state's employment discrimination law which prohibits discrimination on the basis of sexual orientation. Baden-Powell responded that its action was constitutionally protected under the First Amendment's guarantee of freedom of expressive association. The state's anti-discrimination law cannot compel the school to continue to employ an openly homosexual teacher because it never had conveyed, and now declines to convey, a message that homosexuality is legitimate.

The above hypothetical demonstrates a longstanding conflict between two constitutional principles: the right to free speech, and the corresponding freedom to associate for the purpose of expressing a message; and the right to equality, and its correlative guarantee of freedom from discrimination.⁷ The hypothetical places this conflict within another debate: whether parental or state interests should prevail with regard to the education of children.⁸

The Supreme Court most recently addressed the conflict between freedom of association and anti-discrimination laws in *Boy Scouts of America v. Dale*. In a 5-4 decision, the Court held that freedom of association protected the right of the Boy Scouts of America ("Boy

7. See Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 Creighton L. Rev. 641, 642 (2002).

8. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that the state may not prevent Amish parents from taking their children out of school before they reach the age of sixteen); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that the state may not ban private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the state may not proscribe teaching of languages other than English below the eighth grade); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937 (1996) (offering defense of parental educational authority); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995 (1992) (arguing against parental educational authority).

Scouts”) to revoke the membership of an openly gay scoutmaster.⁹ The Court ruled that the Boy Scouts is an expressive association because its mission of instilling values in young people constitutes expressive activity;¹⁰ that the inclusion of James Dale, an openly gay scoutmaster, would force the Boy Scouts to send a message to its members and to the world that it condones homosexual behavior;¹¹ and that New Jersey’s anti-discriminatory public accommodations law requiring the Boy Scouts to re-admit Dale violated the Boy Scouts’ right of expressive association.¹² The Court’s decision implicated parental and state interests in education, although the Court did not explicitly mention these interests.¹³ The majority’s holding affirms the right of parents to direct the education of their children.¹⁴

In the two years since the Court decided *Dale*, many commentators have speculated on the reach of the holding. One First Amendment advocate has celebrated the decision as heralding stringent scrutiny of anti-discrimination laws when they conflict with First Amendment rights.¹⁵ This commentator opines that “*Dale* was about the right of non-profit, private, expressive organizations of all ideological stripes . . . to set their membership and employment rules free from government interference.”¹⁶ Another commentator, asserting that *Dale* “calls for the constitutional invalidation of much of the Civil Rights Act, including Title VII insofar as it relates to employment,” predicts that *Dale* will have an even more extreme impact on anti-discrimination laws.¹⁷

In contrast, a civil rights advocate deplores the decision for imperiling anti-discrimination laws, worrying that landlords and employers can shield themselves from housing and employment laws simply by “assert[ing] that a gay man’s or lesbian’s mere presence

9. See *Dale*, 530 U.S. at 644. Justice Rehnquist delivered the majority opinion, joined by Justices O’Connor, Scalia, Kennedy, and Thomas.

10. See *id.* at 649-50.

11. See *id.* at 653.

12. See *id.* at 656.

13. See Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841, 1856-61 (2001) (drawing relationship between educative function of associations and state regulation of schools); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917, 1953-54 (2001) (arguing that three cases decided in the Supreme Court’s 1999 term, including *Dale*, call for reassessment of the Court’s decisions involving the state’s ability to police private schools); Troum, *supra* note 7, at 688-90 (positing that Boy Scouts’ role in educating the young was essential factor in the majority’s holding).

14. See Paulsen, *supra* note 13, at 1953; Troum, *supra* note 7, at 689-90.

15. See David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 Mo. L. Rev. 83, 89 (2001).

16. *Id.* at 88.

17. Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119, 142 (2000).

violates their beliefs.”¹⁸ Other commentators, taking a more moderate view, maintain that *Dale*’s holding is narrowly circumscribed.¹⁹ One such commentator nevertheless contends that the freedom of expressive association protects the employment decisions of private schools in their choice of instructors.²⁰ In other words, even if *Dale* were construed narrowly, Jim Doe has no legal recourse against Baden-Powell for discriminatory dismissal.

This Note questions the conclusion that *Dale* necessitates the defeat of Doe’s employment discrimination claim. Part I.A gives an overview of the Supreme Court’s jurisprudence regarding the freedom of association, and Part I.B outlines the development of anti-discrimination laws, with particular attention paid to employment discrimination legislation. Next, Part I.C examines seminal cases in which the Court adjudicated claims of free association against claims of discrimination. This examination reveals that where the exclusionary practices of expressive associations have stifled the economic interests of disadvantaged groups protected by anti-discrimination laws, the Court has consistently upheld the discrimination claims. Finally, Part I.D delineates the debate over free association and anti-discrimination laws provoked by *Dale*, and lays out the major ideological arguments presented by opponents and supporters of the majority’s decision.

Part II focuses on two facets of the *Dale* debate that are particularly relevant to the Baden-Powell hypothetical. First, Part II.A details the solution Dale Carpenter offers to balance the conflicting mandates of free expression and anti-discrimination, which is to classify associations as being commercial, expressive, or quasi-expressive. Under this tripartite analysis, Carpenter argues that private schools are quasi-expressive associations and that *Dale* rightly protects a private school’s choice of teachers from interference by the state. Second, Part II.B outlines conflicting views on the relative interests of parents, the state, and the child with regard to the education of children. One view advocates the right of parents to direct the education of their children; the other promotes a trusteeship model of parental rights, suggesting that with regard to decisions on education, the child’s, rather than the parent’s, interests should come first.

18. Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 Minn. L. Rev. 1591, 1603 (2001).

19. See, e.g., Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 Minn. L. Rev. 1515, 1515-18, 1563-80 (2001) (proposing to reconcile claims for associational freedom and equality by varying constitutional protection for organizations based on whether they are commercial, expressive, or quasi-expressive); Troum, *supra* note 7, at 679-90 (positing that *Dale*’s holding is limited by three factors: (1) whether the organization engages in commercial or non-commercial expression; (2) the class of persons the organization seeks to exclude; and (3) whether the organization participates in childrearing).

20. See Carpenter, *supra* note 19, at 1577; *infra* Part II.A.

Part III analyzes the facts of the Baden-Powell hypothetical using the Court's framework in *Dale*, and contends that *Dale*'s demanding standard nevertheless allows for a more nuanced review of the issues than the above-mentioned commentators imply. This Note concludes that a state's interest in enforcing employment discrimination laws should be upheld against Baden-Powell's expressive association claims. Furthermore, a state's interest in regulating education, together with the child's right to participate in the marketplace of ideas, should prevail over parental interests in directing the education of children.

I. CIVIL LIBERTIES IN CONFLICT

The furor over *Dale* centers on two cherished civil liberties: freedom of association and freedom from discrimination.²¹ In a democracy, freedom to associate is an important civil liberty, because associations provide individual citizens with a means to exert their collective political will to keep government in check.²² The right to be free from discrimination is underpinned by the guarantee of "equal protection of the laws"²³ which is a fundamental principle of our society.²⁴ Freedom to associate, however, "presupposes a freedom not to associate."²⁵ In other words, a necessary cognate of the freedom to associate is the freedom to discriminate. Therefore, freedom of association and freedom from discrimination are irreconcilably opposed to each other.²⁶

This part provides an overview of these opposing rights. Section A reviews the development of the Supreme Court's freedom of association jurisprudence. Section B chronicles the enactment of anti-discrimination legislation, with emphasis on the passage of employment discrimination laws. Section C discusses seminal cases in which the Court addressed the conflict between free association and anti-discrimination claims. Section D outlines the critical reactions to the Court's decision in *Dale*.

A. The Supreme Court's Freedom of Association Jurisprudence

The Supreme Court first explicitly recognized a right of freedom of association in *NAACP v. Alabama ex rel. Patterson*.²⁷ In this civil

21. See *supra* note 7 and accompanying text.

22. See Garnett, *supra* note 13, at 1853.

23. U.S. Const. amend. XIV, § 1.

24. See House Judiciary Comm., Title VII of The Civil Rights Act of 1964, H.R. Rep. No. 88-914, at 18 (1963), reprinted in United States Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 2018 (1968) [hereinafter Legislative History of Titles VII and XI].

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

26. See Epstein, *supra* note 17, at 119-20.

27. 357 U.S. 449, 460 (1958); Jason Mazzone, *Freedom's Associations*, 77 Wash. L.

rights era case, the Court reviewed an Alabama statute that required the National Association for the Advancement of Colored People ("NAACP") to disclose the names of its Alabama members to the state.²⁸ Among its activities in Alabama, the NAACP had given financial and legal support to black students who sought to enter the state university, and had supported black citizens in boycotting bus lines in the hope of forcing desegregation in bus seating.²⁹ The Court held that the statute violated the right of the NAACP's members to freely associate in the pursuit of lawful interests, a First Amendment liberty guaranteed to private citizens against the states by the Fourteenth Amendment.³⁰

The *Patterson* Court acknowledged that the Constitution does not specifically mandate freedom of association, but rather that the right derives from the First Amendment guarantees of free speech and assembly.³¹ Relying on the Court's previous pronouncements that free speech and free assembly are closely linked because group expression contributes to the advocacy of private and public viewpoints, the *Patterson* Court declared 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."³² Further, any state action which infringes on free association must be closely scrutinized.³³

Consequently, the Court upheld freedom of association as a constitutional shield protecting from coercive state action the lawful collective efforts of individual citizens to effect political and social change.³⁴ Members of dissident organizations in particular benefited from this constitutional shelter.³⁵ In *Patterson*'s precursors and progeny, the right has protected Communists, white supremacists, and flag burners from state suppression.³⁶

Rev. 639, 649 (2002).

28. See *Patterson*, 357 U.S. at 451.

29. See *id.* at 452.

30. *Id.* at 466.

31. *Id.* at 460.

32. *Id.* (citations omitted).

33. *Id.* at 460-61.

34. See *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (summarizing the Court's free association jurisprudence since *Patterson*).

35. See *id.* (explaining that the right of free association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority"). For a history of how the First Amendment has protected dissident speech, and an argument that the Court's leading free speech cases are really about state intrusion on the freedom of expressive association, see Carpenter, *supra* note 19, at 1519-25.

36. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399, 406 (1989) (holding that burning of the American flag to protest the renomination of Ronald Reagan as a presidential candidate was symbolic political speech protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 444-49 (1969) (holding that an Ohio statute

Patterson established that state action offensive to freedom of association could take the form of either direct or indirect action.³⁷ A state could directly violate free association by bringing criminal charges against a disfavored organization's members, or by seeking to enjoin the production of publications accusing public officials of corruption.³⁸ State action that indirectly infringes free association does not purport to target the organization's activities or membership, but nevertheless has the incidental effect of impairing an organization's ability to continue its operations.³⁹ In *Patterson*, for example, compelled disclosure of the NAACP's membership lists would have unleashed harmful private activity against the organization's members in the form of economic reprisals and physical threats, resulting in a loss of membership to the organization and curtailment of its activities.⁴⁰ A state also could indirectly violate free association by compelling the organization to admit unwelcome members, thus indirectly causing a change in the organization's agenda.⁴¹ Only if an organization's advocacy was "directed to inciting or producing imminent lawless action and . . . [was] likely to incite or produce such action" would the state be permitted to regulate the organization.⁴²

The Court regarded the wide latitude accorded associations as necessary to prevent social and political upheaval.⁴³ As the Court emphasized, the "security of the Republic, the very foundation of constitutional government," depended on keeping the channels of communication open between the people and government.⁴⁴ Desired changes could only be achieved through government responding to the will of the people.⁴⁵

criminalizing voluntary assembly of group to advocate unlawful action violated Ku Klux Klan leader's First and Fourteenth Amendment rights); *De Jonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (holding that Oregon's Criminal Syndicalism Law violated due process rights of a plaintiff who assisted in the conduct of a Communist Party meeting).

37. See *Patterson*, 357 U.S. at 461. For an extended discussion of the types of state action which may violate freedom of association, see Mazzone, *supra* note 27, at 651-53.

38. See *Patterson*, 357 U.S. at 461 (citing *De Jonge*, 299 U.S. at 353; *Near v. Minnesota*, 283 U.S. 697 (1931)); see also *Near*, 283 U.S. at 722-23 (striking down Minnesota statute providing for injunction against defamatory publications); *supra* note 36.

39. See *Patterson*, 357 U.S. at 461-62.

40. See *id.* at 462-63.

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

42. *Healy v. James*, 408 U.S. 169, 188 (1972) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

43. See *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

44. *Id.*

45. See *id.*

More recently, in *Roberts v. United States Jaycees*,⁴⁶ the Court explained that freedom of association has taken on two meanings: (1) freedom of intimate association and (2) freedom of expressive association.⁴⁷ Freedom of intimate association shields “certain kinds of highly personal relationships . . . from unjustified interference by the State,” thus “safeguard[ing] the ability independently to define one’s identity.”⁴⁸ Such relationships are characterized by “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”⁴⁹ Although the Court declined to define the relationships that qualify for this protection, it gave as examples the formation and maintenance of a family, and the bringing up and instruction of children.⁵⁰

In contrast, the freedom of expressive association looks outward from the home towards societal and political engagement. This freedom involves the individual’s “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”⁵¹ Expressive association, therefore, is rooted in the *Patterson* line of cases discussed above. Although the Court’s recent cases concerning free association and anti-discrimination primarily have invoked this form of association, these cases differ in one striking respect from *Patterson* and its immediate post-civil rights era progeny.⁵² Whereas in *Patterson* the state could be seen as buttressing the agenda of conservative forces against the expressive association rights of civil rights reformists, now it is the state’s championship of civil rights that battens on the expressive association rights of conservative associations.⁵³

This curious reversal of positions illustrates the steadfast principle that in the ongoing dialogue between people and representative government, the free association right “shield[s] dissident expression from suppression by the majority.”⁵⁴ The *Dale* majority held that the state may not intrude on that prerogative even if it believes its actions are justified by an enlightened purpose.⁵⁵ In previous cases, however, the Court had upheld the state’s interest in eliminating invidious discrimination as one such purpose justifying infringement of the right

46. 468 U.S. 609 (1984).

47. *Id.* at 617-18.

48. *Id.* at 618-19.

49. *Id.* at 620.

50. *See id.* at 619.

51. *Id.* at 622.

52. For a discussion of these cases, see *infra* Part I.C.

53. *See, e.g.,* Carpenter, *supra* note 19, at 1516 (stating that some critics view freedom of association as the “frightful right-wing step-child” of the First Amendment, “principally useful . . . to protect the prerogatives of people in white hoods, of sexist old-boys networks, and of homophobes”).

54. *Roberts*, 468 U.S. at 622.

55. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

to free association.⁵⁶ The next section provides an overview of anti-discrimination legislation.

B. *Civil Rights and Employment Discrimination Laws*

The civil rights movement, which gave rise to the litigation in *Patterson*, also provided the impetus for Congress to enact the Civil Rights Act of 1964,⁵⁷ a comprehensive source of anti-discrimination legislation.⁵⁸ The same liberal political movement thus, ironically, informed and shaped both freedom of association and anti-discrimination laws.

The Civil Rights Act of 1964 enacted anti-discrimination legislation with an extensive reach. Title I of the Act deals with voting rights, Titles II and III with equal access to public facilities and accommodations, Title IV with discrimination in education, Title VI with discrimination in federally assisted programs, and Title VII with discrimination in employment.⁵⁹ Congress's Commerce Clause⁶⁰ power authorizes the Act to reach discrimination by private parties.⁶¹

56. See, e.g., *Roberts*, 468 U.S. at 623-24; *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

57. 42 U.S.C. § 1981 (2000).

58. See Mack A. Player, *Employment Discrimination Law* 199 (1988).

59. See *id.*

60. U.S. Const. art. I, § 8, cl. 3.

61. See Player, *supra* note 58, at 203 & n.6 (explaining that the Supreme Court confirmed the constitutionality of Congress's power to regulate discrimination by private parties in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964)). It should be pointed out that state employees, e.g. public school teachers, need not depend on Title VII for redress for wrongful dismissal or other employment decisions which affect them adversely. Since the state is their employer, they can bring suit under 42 U.S.C. § 1983 claiming violation of the Fourteenth Amendment's Equal Protection Clause by school officials acting under the color of state law. See *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1168 (S.D. Ohio 1998). Under an equal protection claim, a plaintiff suing on sexual orientation grounds would have to show that the state, through its policy-making authority, intentionally discriminated against him without some rational basis for its action. See *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1287 (D. Utah 1998). Gay and lesbian public school teachers have been relatively successful in obtaining redress for wrongful dismissal under an equal protection theory. Compare *Weaver*, 29 F. Supp. 2d at 1289, and *Glover*, 20 F. Supp. 2d at 1169 (citing *Romer v. Evans*, 517 U.S. 620 (1996), for proposition that animus towards homosexuals is not a rational basis for state action), with *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 956 (7th Cir. 2002) (holding that the record shows school officials responded positively to plaintiff's complaints and federal judges should refrain from using rational basis review to "impose their own social values" on school administrators). For a thesis that arguments based on privacy and equality are potentially more powerful than sex discrimination arguments for litigants suing for sexual orientation discrimination, see Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. Rev. 471 (2001). For an argument that sexual orientation discrimination is discrimination "because of sex" under Title VII, see Anthony E. Varona and Jeffrey M. Monks, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 Wm. & Mary J. Women & L. 67 (2000).

Title VII thus became the first broad-based legislation regulating employment discrimination in the private sector.⁶²

The Supreme Court has interpreted Title VII to require the “removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.”⁶³ Originally, Title VII exempted from its anti-discrimination mandate “educational institution employees connected with educational activities,” that is, employees primarily engaged in teaching.⁶⁴ In 1972, Congress revoked this exemption, having found that discrimination in education was as pervasive as in other employment settings.⁶⁵ The House Committee on Education and Labor emphasized the importance of combating discrimination in educational institutions.⁶⁶ The Committee stated that educational institutions expose the young to the ideas that shape their future development.⁶⁷ Therefore, permitting discrimination in these institutions would, “more than in any other area,” promote future discrimination through the perpetuation of stereotypes.⁶⁸

There is currently no federal statute prohibiting employment discrimination on the basis of sexual orientation.⁶⁹ Title VII prohibits discriminatory action against individuals on the basis of “race, color, religion, sex, or national origin.”⁷⁰ Courts have resisted expanding the interpretation of “sex” to include sexual orientation.⁷¹ Title VII

62. See Harold S. Lewis, Jr. & Elizabeth J. Norman, *Employment Discrimination Law and Practice* 1 (2001).

63. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

64. House Comm. on Educ. and Labor, *Equal Employment Opportunity Act of 1972*, H.R. Rep. No. 92-238, at 19 (1971) [hereinafter House Comm. on Educ. and Labor], reprinted in Subcomm. on Labor of the Comm. on Labor & Pub. Welfare, 92nd Cong., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 79 (1972) [hereinafter *Legislative History of the EEOA*]; *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 550 (3d Cir. 1980).

65. See House Comm. on Educ. and Labor, *supra* note 64, at 79.

66. See *id.* at 79-80.

67. See *id.* at 80.

68. *Id.*

69. See J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a “Separate But Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 Ohio St. L.J. 1529, 1535-36 (2000). The Employment Non-Discrimination Act (“ENDA”) proposes to extend federal anti-discrimination protection to gays and lesbians. It was introduced in the House in 1994 but has so far failed to be passed by Congress, failing in the Senate by one vote in 1996. See *id.* at 1535-36 & n.46; see also *id.* at 1545-47 (describing basic framework of ENDA).

70. 42 U.S.C. § 2000e-2 (2000).

71. The leading federal case holding that Title VII does not extend to sexual orientation discrimination is *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979). But see *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002), for a minority view that Congress did not intend the benefits of Title VII to be restricted to heterosexual employees.

expressly does not preempt state law,⁷² however, so long as the state law comports with or enlarges the rights granted by Title VII.⁷³ Thus, states, acting on the power reserved to them by the Tenth Amendment, may enact laws prohibiting employment discrimination on the basis of sexual orientation.⁷⁴ To date twelve states and the District of Columbia have passed such laws, modeled on Title VII, covering public and private employment.⁷⁵ In addition, over two hundred cities and counties have passed ordinances to the same effect,⁷⁶ and the President as well as governors of seven states have issued executive orders banning discrimination on the basis of sexual orientation in public employment.⁷⁷ States and cities have also enacted laws proscribing discrimination on the basis of sexual orientation in public accommodations, education, and housing.⁷⁸ As state anti-discrimination laws expand in number and scope, the potential for conflict with freedom of association rights has increased.⁷⁹

72. 42 U.S.C. § 2000e-7.

73. *Player*, *supra* note 58, at 203.

74. See Stephen P. Anway, Note, *The Restoration of States' Civil Rights Authority: An Alternative Approach to Expressive Association After Boy Scouts of America v. Dale*, 62 Ohio St. L.J. 1473, 1502-04 (2001) (outlining states' affirmative duty and voluntary authority to prevent invidious discrimination).

75. See Cal. Gov't Code § 12940 (West 1992 & Supp. 2003); Conn. Gen. Stat. Ann. § 46a-81c (West 1995); D.C. Code Ann. § 2-1402.11 (2001); Haw. Rev. Stat. § 368-1 (1993); Mass. Gen. Laws Ann. ch. 151B, § 4 (1999 & Supp. 2002); Minn. Stat. § 363.03 (1991 & Supp. 2003); Nev. Rev. Stat. Ann. 613.330 (Michie 2000); N.H. Rev. Stat. Ann. §§ 354-A:6, :7 (1995 & Supp. 2002); N.J. Stat. Ann. § 10:5-4 (West 2002); R.I. Gen. Laws § 28-5-7 (2000 & Supp. 2002); Vt. Stat. Ann. tit. 3, § 961 (1995); Vt. Stat. Ann. tit. 21, § 495 (1987 & Supp. 2002); Wis. Stat. Ann. § 111.36(1)(d) (West 2002); see also N.Y.A.B. No. 1971, 225th Leg., (N.Y. 2001) (amending N.Y. Exec. Law § 291 as of Jan. 16, 2003). See generally Lambda Legal, Summary of States Which Prohibit Discrimination Based on Sexual Orientation, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=185> (last visited Mar. 27, 2003) [hereinafter Summary of States].

76. See generally Lambda Legal, Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation, at www.lambdalegal.org/cgi-bin/iowa/documents/record?record=217 (last visited Mar. 27, 2003) [hereinafter Summary of Cities].

77. Summary of States, *supra* note 75. The states are Colorado, Delaware, Louisiana, New Mexico, Pennsylvania, Utah, and Washington. *Id.*

78. *Id.*; Summary of Cities, *supra* note 76.

79. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-57 & n.2 (2000). Justice Rehnquist discussed how New Jersey's use of the term "public accommodations"—traditionally applied to commercial enterprises such as inns, restaurants, and common carriers—expanded to include nonprofit membership associations such as the Boy Scouts, thus heightening potential for anti-discrimination laws to encroach on First Amendment expressive association rights. *Id.* The New Jersey Supreme Court held that in New Jersey, "place" refers to "more than a fixed location." *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1209 (N.J. 1999). Therefore, "[a] membership association, like Boy Scouts, may be a 'place' of public accommodation even if the accommodation is provided at 'a moving situs.'" *Id.* at 1210 (citation omitted); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (outlining history of Minnesota's public accommodations law).

C. Freedom to Exclude Cases

This section examines several key cases in which the Supreme Court has addressed the conflict between freedom of association and anti-discrimination laws, tracing the development of the Court's jurisprudence in this area up to *Dale*.

1. *Runyon*: Invidious Discrimination Is Not a Constitutionally Protected Right

In *Runyon v. McCrary*, the Supreme Court addressed whether private schools could refuse to admit students because of their race.⁸⁰ After the Court ordered the desegregation of public schools in *Brown v. Board of Education*,⁸¹ many white parents, particularly in the South, sent their children to private segregated schools.⁸² When black parents responded to advertisements placed by two such segregated schools, their children were denied admission because of their race.⁸³ The children filed a class action against the school proprietors alleging violation of 42 U.S.C. § 1981.⁸⁴

In an opinion by Justice Stewart, the Court held that the schools' practices of racial exclusion violated section 1981.⁸⁵ Next, the Court analyzed whether section 1981 as applied infringed the schools' rights of free association or the white parents' right to direct their children's education.⁸⁶

The Court noted that while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association . . . it

80. See *Runyon v. McCrary*, 427 U.S. 160, 164 (1976).

81. 347 U.S. 483 (1954).

82. See Mary-Michelle Upson Hirschhoff, Comment, *Runyon v. McCrary and Regulation of Private Schools*, 52 Ind. L.J. 747, 747 & n.5 (1977).

83. *Runyon*, 427 U.S. at 165.

84. *Id.* at 163-64. Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ." 42 U.S.C. § 1981(a) (2000); see also *Runyon*, 427 U.S. at 164 n.1.

85. Because the schools offered educational services to the general public, section 1981 obligated them to contract equally with white and nonwhite pupils. *Runyon*, 427 U.S. at 172-73. The Court discussed at length whether Congress intended section 1981 to reach racial discrimination by private parties. Concluding that it did, the Court noted that the breadth of the statute was within Congress's Thirteenth Amendment power. *Id.* at 168-72. Justice White, joined by Justice Rehnquist, filed a dissent. He objected that white citizens enjoyed no right to contract with an unwilling private party; likewise, under section 1981 black citizens did not have such a right, and therefore the statute failed to supply plaintiffs with a cause of action. *Id.* at 193-95 (White, J., dissenting). He expressed concern that section 1981 should not be extended to force admission of unwelcome members to social clubs with racially exclusionary policies, warning that Congress had intended that racial discrimination should be banned only in employment and housing. *Id.* at 212 (White, J., dissenting). This concern foreshadowed the conflict between anti-discrimination laws and the free association rights of private organizations in the *Roberts* trilogy and in *Dale*.

86. *Id.* at 175.

has never been accorded affirmative constitutional protections.”⁸⁷ Therefore, while parents were entitled to send their children to schools that teach the desirability of racial segregation, and children were entitled to attend them, it did not follow that the schools were entitled to practice racial discrimination.⁸⁸ The admission of nonwhite students would not offend the schools’ freedom of association because there was no evidence that their presence would impinge on the schools’ ability to teach any ideas or beliefs.⁸⁹

Section 1981 as applied also did not abrogate any recognized parental rights.⁹⁰ The Court’s previous cases had established the right of parents to send their children to private rather than public schools,⁹¹ and to schools that offered specialized instruction,⁹² but not to replace state educational requirements with their own educational agendas.⁹³ In this case, parents could send their children to private schools, and the schools could continue to teach whatever ideals they valued.⁹⁴ Noting the correlation between “equality of opportunity to obtain an education and the equality of employment opportunity[.]”⁹⁵ the Court decided that the application of section 1981 to private schools was permissible because it furthered Congress’s goal of eliminating racial discrimination in contracting between private parties.⁹⁶

In *Runyon*, the Court weighed Congress’s anti-discriminatory agenda in enacting section 1981 against the defendants’ constitutionally protected rights. In *Roberts v. United States Jaycees*,⁹⁷ the Court developed this approach into a compelling state interest balancing test.

87. *Id.* at 176 (alteration in original) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1972)).

88. *Id.* at 175-76.

89. *Id.* at 176.

90. *Id.* at 177.

91. In *Pierce v. Society of Sisters*, the Court affirmed the liberty right of parents to “direct the upbringing and education of children under their control.” 268 U.S. 510, 534-35 (1925); see *Runyon*, 427 U.S. at 176-77 (quoting *Pierce*).

92. In *Meyer v. Nebraska*, the Court validated the due process right of parents to send their children to schools that offered specialized instruction in German. 262 U.S. 390 (1923); see *Runyon*, 427 U.S. at 176 (discussing *Meyer*).

93. In *Wisconsin v. Yoder* the Court emphasized that *Pierce* did not extend to the proposition that parents “may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society.” 406 U.S. 205, 239 (1972); see *Runyon*, 427 U.S. at 177 (quoting *Yoder*).

94. *Runyon*, 427 U.S. at 177.

95. *Id.* at 179 n.16.

96. See *id.* at 179.

97. 468 U.S. 609 (1984).

2. The *Roberts* Trilogy: The Compelling State Interest Balancing Test

The *Runyon* Court was careful to point out that neither section 1981 nor the facts of the case presented a question of the right of private clubs to discriminate in their membership decisions.⁹⁸ In *Roberts*, the Court was presented with just such a question.

The Jaycees, a non-profit membership organization dedicated to encouraging the personal development of young men through participation in local and national education and philanthropic activities, allowed women to join only as associate members.⁹⁹ After the Minneapolis and St. Paul chapters admitted women as regular members, the national organization advised them that it was considering revoking their charters.¹⁰⁰ Members of both chapters filed charges against the national organization alleging violation of the Minnesota Human Rights Act that banned discrimination in public accommodations on the basis of sex.¹⁰¹ The national organization asserted that application of the Act would infringe the male members' free speech and association rights.¹⁰²

Justice Brennan delivered the opinion of a unanimous Court of seven Justices.¹⁰³ The Court held that an organization's right of free association could be abridged justifiably 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."¹⁰⁴ Here, the state's compelling interest in

98. *Runyon*, 427 U.S. at 167.

99. *Roberts*, 468 U.S. at 612-13.

100. *Id.* at 614.

101. *Id.* at 614-15. The Minnesota Human Rights Act provides, in pertinent part, that "[i]t is an unfair discriminatory practice: . . . To deny to any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex." Minn. Stat. § 363.03 subd. 3 (1991 & Supp. 2002); see also *Roberts*, 468 U.S. at 615.

102. *Roberts*, 468 U.S. at 615.

103. *Id.* at 612; see also *id.* at 631 (stating that Chief Justice Burger and Justice Blackmun took no part in decision).

104. *Id.* at 623. Justice O'Connor filed a concurrence expressing concern that the Court's test both overprotected activities that should not be constitutionally safeguarded and underprotected those that deserve First Amendment shelter. *Id.* at 632 (O'Connor, J., concurring). Rather than conditioning constitutional protection for an association's membership choices on the content of, or reason for, its message, Justice O'Connor proposed a test that distinguished between commercial and expressive associations. *Id.* at 632-34 (O'Connor, J., concurring). Commercial associations would be subject to rational government regulation, but regulations applied to expressive associations would have to be "'narrowly drawn' to serve a 'sufficiently strong, subordinating interest.'" *Id.* at 634 (O'Connor, J., concurring) (citation omitted). The determinative factor in deciding whether an association is commercial or expressive should be whether the organization engages primarily in activity that has traditionally been privileged by the First Amendment. *Id.* at 635 (O'Connor, J., concurring). With regard to *Roberts*, Justice O'Connor concluded that the Jaycees' activity was predominantly commercial: the organization primarily

eliminating discrimination against women warranted any infringement of the male members' free association rights.¹⁰⁵ Through full membership in the Jaycees, women would be able to benefit from equal access to "goods, privileges, and advantages" such as leadership training and business networking.¹⁰⁶ The Minnesota Human Rights Act did not purport to suppress speech, did not single out proscribed and permissible activity based on viewpoint, and did not rest enforcement on unconstitutional measures.¹⁰⁷ Finally, the Act promoted the state's interests through the least restrictive means: it did not impair the Jaycees' ability to pursue its activities or promulgate its views; neither did it obligate the Jaycees to change its mission or to admit members who embraced tenets different from those of its present members.¹⁰⁸

In its next two free association cases presenting similar membership issues, the Court continued to apply the *Roberts* compelling state interest test. The first case, *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹⁰⁹ presented a situation very similar to that in *Roberts*. The Rotary Club, a large organization composed of business and professional men engaged in philanthropy, restricted

engaged in promoting business skills; it "refer[red] to its members as customers and membership as a product it [was] selling." *Id.* at 639 (O'Connor, J., concurring) (quoting *United States Jaycees v. McClure*, 534 F. Supp. 766, 769 (D. Minn. 1982)). Hence, Justice O'Connor agreed with the Court that the Jaycees could not use the First Amendment as a shield against Minnesota's law requiring the organization to open its membership on a non-discriminatory basis. *Id.* at 640 (O'Connor, J., concurring). Post-*Dale*, several commentators have proposed that the Court adopt a test based on Justice O'Connor's concurrence as a way to accommodate both expressive association and anti-discrimination laws. See, e.g., Carpenter, *supra* note 19, at 1563-87; Sean B. Druyon, Note, *A Call for a Modified Standard: The Supreme Court Struggles to Define When Private Organizations Can Discriminate in Contravention of State Antidiscrimination Laws in Boy Scouts of America v. Dale*, 79 Neb. L. Rev. 794, 819 (2000); Adrienne K. Zahner, Note, *A Comprehensive Approach to Conflicts Between Anti-Discrimination Laws and Freedom of Expressive Association After Boy Scouts of America v. Dale*, 77 Chi.-Kent L. Rev. 373, 391-92 (2001).

105. *Roberts*, 468 U.S. at 640. The Court approved Minnesota's expansive view of public accommodations that included "quasi-commercial" activity like that pursued by the Jaycees. *Id.* at 625. Such a view recognized the necessity, for individuals and for society, of facilitating "economic advancement and political and social integration" for historically disadvantaged groups such as women. *Id.* at 626.

106. *Id.* at 626.

107. *Id.* at 623.

108. *Id.* at 626-27. The Court rejected the argument that women would bring a different perspective to the organization's goals, thus effecting changes in the Jaycees' ideology if allowed to vote. *Id.* at 627. It also rejected the allegation that accepting women as full members would alter the group's expression because of the audience's "gender-based assumptions." *Id.* The Court explained that these contentions were based on unwarranted stereotypes that men and women have differing outlooks and aspirations, and were insufficient to support the Jaycees' assertion that full admission of women would change the substance or effect of the organization's message. *Id.* at 627-28.

109. 481 U.S. 537 (1987).

membership to men only.¹¹⁰ The Rotary Club in Duarte, California, admitted three women, prompting Rotary International to revoke its charter.¹¹¹ The Duarte Club sued the head organization, alleging violation of California's Unruh Civil Rights Act which proscribed sex discrimination in public accommodations.¹¹² Rotary responded that its members enjoyed the fellowship afforded by the men-only policy, and this policy facilitated the club's operation in foreign countries.¹¹³

Using the *Roberts* test, the Court, in another unanimous decision in which seven Justices participated,¹¹⁴ held that the admission of women did not impose unconstitutionally on the organization's freedom of expressive association.¹¹⁵ Justice Powell, delivering the opinion of the Court, explained that the Unruh Act did not force the club to relinquish or change any of its activities.¹¹⁶ The Act's furtherance of California's compelling interest in combating discrimination against women justified any infringement on the organization's expression.¹¹⁷

Decided one year after *Duarte*, *New York State Club Ass'n v. City of New York*¹¹⁸ demonstrated how far the Court was prepared to go in upholding anti-discrimination laws against free association claims. In this case, a consortium of private clubs brought suit against New York City in response to a 1984 amendment to the city's Human Rights Law.¹¹⁹ The previous law had exempted any club that proved itself "distinctly private" from its discrimination prohibitions.¹²⁰ The amendment allowed the city to define which clubs were "distinctly private" by sweeping within its purview such private clubs that the city determined to be "sufficiently public."¹²¹ The city's purpose was to target organizations where business deals were struck, or professional

110. *Id.* at 539.

111. *Id.* at 541.

112. *Id.* at 541. The Unruh Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code Ann. § 51 (West 1982 & Supp. 2003); see also *Duarte*, 481 U.S. at 541 n.2.

113. *Duarte*, 481 U.S. at 541.

114. See *id.* at 550 (stating that Justice Scalia concurred in the judgment, and that Justices Blackmun and O'Connor took no part in the decision).

115. *Id.* at 549.

116. *Id.* at 548.

117. *Id.* at 549.

118. 487 U.S. 1 (1988).

119. *Id.* at 5-7. The Human Rights Law now extended to any institution, club or place of accommodation that has "more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business." N.Y.C. Admin. Code § 8-102(9) (1996); see also *New York Club Ass'n*, 487 U.S. at 6.

120. *N.Y. Club Ass'n*, 487 U.S. at 5.

121. *Id.*

connections forged, so as to make those commercial benefits accessible to women and minorities.¹²²

The consortium alleged that the law violated the clubs' right of expressive association.¹²³ All nine Justices voted to uphold the amended Human Rights Law.¹²⁴ Justice White, writing for the Court, reasoned that the law did not mandate any changes in the clubs' protected First Amendment activities: The clubs remained free to exclude anyone who did not share their ideals, but they simply were prevented from making membership decisions using any of the statute's proscribed criteria.¹²⁵ As a final recourse, a club could apply for a case-by-case analysis of whether the law hampered its associational or expressive activities, but the Court cautioned that a state's compelling interest in eliminating discrimination would be weighed in the consideration.¹²⁶

Under *New York Club Ass'n*, therefore, New York City was entitled to create what was effectively a rebuttable presumption that an association was "public" enough to be subject to its anti-discrimination laws. The reach of anti-discrimination laws appeared expansive, but in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,¹²⁷ the Court signaled that in some situations the First Amendment would curtail the scope of such laws.

3. *Hurley*: The Right Not To Speak

In 1993, the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") applied to march in an annual St. Patrick's Day parade organized by representatives from several veterans groups in South Boston.¹²⁸ By participating in the parade, GLIB intended to celebrate its members' Irish heritage and sexual orientation, and to express solidarity with a counterpart group in New York.¹²⁹ When the

122. *Id.* at 12. Benevolent associations and religious organizations remained outside the reach of the amendment. *Id.* at 6-7.

123. *Id.* at 13. The consortium also alleged that the amended law's exemption for benevolent and religious organizations violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 15. The Court held that New York City had a rational basis for exempting these organizations, namely, these organizations did not afford the same commercial opportunities as the consortium's clubs. *Id.* at 16-17.

124. *Id.* at 3. Justice O'Connor wrote a concurring opinion which Justice Kennedy joined, arguing that the expressive purposes of some organizations that fell within the reach of the amendment might nevertheless be considerably impeded if they were not able to restrict their membership, and that their right of free association must be protected. *Id.* at 18-19 (O'Connor, J., concurring).

125. *Id.* at 13.

126. *Id.* at 14 & n.5.

127. 515 U.S. 557 (1995).

128. *Id.* at 560-61. GLIB had also applied to march in 1992. The parade organizers had denied GLIB's application, but the group marched anyway pursuant to a state court order. *Id.* at 561.

129. *Id.*

parade organizers denied GLIB's application, the group sued alleging that the organizers had violated the Commonwealth's public accommodations law prohibiting discrimination on the basis of sexual orientation.¹³⁰

Employing a traditional free speech rather than free association analysis, a unanimous Court, speaking through Justice Souter, upheld the organizers' First Amendment right not to adopt GLIB's message.¹³¹ Key to the Court's decision was the fact that both GLIB and the parade organizers sought to convey messages.¹³² The problem was that GLIB's message, celebrating its members' sexual identity, was not one the parade organizers wished to express. The organizers did not object to openly gay, lesbian, or bisexual individuals marching in other units in the parade, but they drew the line at GLIB marching as a distinct unit under its own banner.¹³³ The Court agreed that every unit participating in a parade is customarily perceived as contributing to the message of the parade organizers.¹³⁴ Here, GLIB's presence would signal that the organizers approved of, or at least tolerated, the sexual orientation of the GLIB members.¹³⁵ Application of the Massachusetts anti-discrimination law would thus force the organizers to modify their message in conformity with the state's agenda.¹³⁶ Such state action is anathema to the First Amendment, even if the state's purpose is not to co-opt the speaker's expression, but rather to achieve a bias-free society.¹³⁷

Reconciling its decision with its previous cases, the Court pointed out that in *Roberts* and *New York State Club Ass'n*, state law left the associations free to exclude applicants with views contrary to those of

130. *Id.* The relevant Massachusetts law prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws Ann. ch. 272, § 98 (1992); see *Hurley*, 515 U.S. at 561.

131. *Id.* at 566. The Court stated that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* at 573 (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)); cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.").

132. Analogizing a parade to a protest march, the Court reasoned that parade marchers intend to convey a collective message to bystanders, hence "[p]arades are . . . a form of expression, not just motion." *Hurley*, 515 U.S. at 568. Similarly, GLIB's purpose in marching in the parade, celebrating its members' sexual identity, was also expressive. *Id.* at 570. GLIB had handed out flyers outlining its members' objectives, and intended to march behind a banner inscribed with the group's name. *Id.* at 570, 572.

133. *Id.* at 572.

134. *Id.* at 576.

135. *Id.* at 574.

136. *Id.* at 578.

137. *Id.* at 578-79.

the organization.¹³⁸ Similarly, GLIB could lawfully be excluded because its expression contradicted the organizers' message.¹³⁹

In *Boy Scouts of America v. Dale*,¹⁴⁰ the Court extended the free speech analysis of *Hurley* to the Boy Scouts' free association claim that it had a constitutionally protected right to exclude a gay scoutmaster.

4. *Dale*: The Right Not To Associate

The Boy Scouts is a private, non-profit organization whose main activity is instilling its values in its young male members.¹⁴¹ James Dale, a member of the Boy Scouts from ages eight to eighteen, was "an exemplary Scout" who became an assistant scoutmaster.¹⁴² While holding this position, he also became co-president of his college's gay and lesbian association and, in this capacity, gave an interview to a newspaper on the need of gay teenagers to have homosexual role models.¹⁴³ Soon after the interview was published, the Boy Scouts revoked Dale's membership in accordance with its policy of not accepting homosexual members.¹⁴⁴ Dale filed suit against the Boy Scouts alleging violation of New Jersey's public accommodations law which proscribes sexual orientation discrimination.¹⁴⁵

The Court, in a 5-4 decision, upheld the Boy Scouts' expressive association right to revoke Dale's membership. The Court first determined that the Boy Scouts qualified as an expressive association because it engaged in the communication of values to its members by way of the scoutmasters' instruction and example.¹⁴⁶ Then, departing from previous practice in free association cases, Chief Justice Rehnquist announced that the Court must "give deference to an association's assertions regarding the nature of its expression, [and to] an association's view of what would impair its expression."¹⁴⁷

138. *Id.* at 580.

139. *Id.* at 580-81.

140. 530 U.S. 640 (2000).

141. *Id.* at 644.

142. *Id.* Dale had attained the rank of Eagle Scout, a very high honor awarded by the Boy Scouts. *Id.*

143. *Id.* at 645.

144. *Id.* In a letter responding to Dale's inquiry into the reason for the revocation of his membership, an executive of the Monmouth Council replied that the Boy Scouts "specifically forbid membership to homosexuals." *Id.* (citation and quotation marks omitted).

145. The New Jersey public accommodations law provides that "[a]ll persons shall have the opportunity to obtain . . . all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . sexual orientation This opportunity is recognized as and declared to be a civil right." N.J. Stat. Ann. § 10:5-4 (West 2002); see *Dale*, 530 U.S. at 661-62.

146. *Dale*, 530 U.S. at 649-50.

147. *Id.* at 653. The dissenters, in an opinion by Justice Stevens, vigorously opposed the majority's standard of deference. *Id.* at 663-65 (Stevens, J., dissenting).

Accordingly, the Court accepted as sufficient proof of the Boy Scouts' view of homosexuality its assertions in its Brief that homosexuality was "not morally straight" or "clean" and that the Boy Scouts refused to endorse homosexual conduct as legitimate.¹⁴⁸

Explaining that Dale was a leader in the gay community and a crusader for gay rights, the Court concluded that his readmission would force the Boy Scouts to express a message to its members and to the world that it condoned homosexual behavior as legitimate.¹⁴⁹ Countering Dale's argument that the Boy Scouts had not revoked the membership of heterosexual scoutmasters who had openly disagreed with the organization's position on homosexuality, the Court stated that an organization may retain dissenting members without giving up its First Amendment rights.¹⁵⁰ The Court rationalized that a dissenting scoutmaster "sends a distinctly different message" from a scoutmaster who is openly homosexual and advocates gay rights.¹⁵¹

Finally, the Court concluded that New Jersey's interest in combating discrimination did not outweigh the "severe intrusion" on the Boy Scouts' expressive association rights.¹⁵² The Court

Citing *Roberts* and *Duarte*, the dissenters insisted that the Court must independently inquire whether a group is in fact expressing the message it claims during litigation, although it may not allow its disapproval with the message to color its constitutional determination. *Id.* at 684-86 (Stevens, J., dissenting). Failure to conduct an independent review would make a mockery of civil rights laws because an association could disguise any unlawful discrimination as constitutionally protected expression simply by claiming it as such in litigation. *Id.* at 687 (Stevens, J., dissenting). The dissenters would require an organization to demonstrate that it has taken and promoted an unambiguous stance conflicting with that represented by the person it wishes to reject. *Id.* (Stevens, J., dissenting). In this case, the Boy Scouts' statement disapproving homosexuality lacked any underpinning in its creed and was unrelated to a common aim or expressive endeavor of the association. *Id.* at 673 (Stevens, J., dissenting). Simply, it was a discriminatory exclusionary policy which, on its own, was insufficient to support a free association claim. *See id.* at 672 (Stevens, J., dissenting).

148. *Id.* at 650-51.

149. *Id.* at 653. Nonetheless, the Court took care to emphasize that an expressive association cannot "erect a shield against anti-discrimination laws" just by claiming that admitting certain types of people would thwart its message. *Id.* The determinative factor here was that Dale was a leader in the gay community. *Id.* The expressive significance that the Court placed on Dale's leadership position is revealed in its comparison of this case to *Hurley*. In both cases, according to the Court, the presence of the unwanted member would "interfere with the [organization's] choice not to propound a point of view contrary to its beliefs." *Id.* at 654. The dissenters would have placed the constitutional threshold at Dale "present[ing] himself as a role model inconsistent with" the organization's tenets. *Id.* at 691-92 (Stevens J., dissenting) (citation and emphasis omitted). That threshold was not met here because Dale had never used his position as a scoutmaster to advance gay rights views or any beliefs about homosexuality to his troop. *Id.* at 689 (Stevens, J., dissenting). The dissenters pointed out that the Boy Scouts allowed its scoutmasters to engage in expressive activity in contravention of its policies as long as that activity was kept outside of the organization. *Id.* at 690-91 (Stevens, J., dissenting).

150. *Id.* at 655-56.

151. *Id.* at 656. The Court did not elaborate on the nature of the difference.

152. *Id.* at 659.

distinguished *Roberts* and *Duarte* by explaining that the evidence in those cases failed to show that any material disruption in the organizations' messages would result from the application of anti-discrimination laws.¹⁵³ In contrast, here, as in *Hurley*, the forced inclusion of an unwelcome member would compel the organization to alter its message to adhere to state policy, a result that the First Amendment forbids.¹⁵⁴

The next section reviews the critical reactions of commentators both in support of and in opposition to the majority's holding.

D. Dale's Aftermath

Dale has provoked a storm of impassioned debate on free association and anti-discrimination, including a call for the Court to overhaul its approach to freedom of association by returning it to its political roots as a "right of self-governance" rather than as a "right of expression."¹⁵⁵ Commentators have expansively described the areas of doctrine for which the case has implications: Title VII, free exercise, fair housing, and parents' rights to direct the education of their children, to name a few.¹⁵⁶ This section outlines the arguments offered both in opposition to and in support of *Dale*.

1. Opponents of *Dale*

Dale's detractors see the case as denying gays and lesbians equal access to meaningful participation in civil society.¹⁵⁷ According to opponents of *Dale*, sexual orientation claims are about "a right to presence" in the nation's cultural and political discourse.¹⁵⁸ The economic model of equal opportunity is thus outmoded as a paradigm

153. *Id.* at 658.

154. *Id.* at 659. The dissenters took issue with the majority's reliance on *Hurley*. Justice Stevens noted that "[u]nlike GLIB, Dale did not carry a banner or a sign." *Id.* at 694-95 (Stevens, J., dissenting). Therefore, according to the dissent, Dale more closely resembled the homosexual individuals marching in the parade's other units—who did not express any messages about gay sexuality by their participation—than GLIB. *Id.* at 694 (Stevens, J., dissenting). Further, a parade communicates messages very differently from a large membership organization like the Boy Scouts. The expression of all units in a parade is perceived as the organizers' own message. *Id.* (Stevens, J., dissenting). In contrast, Dale's acknowledgement of his sexual orientation in a local newspaper would not be seen as conveying a message on behalf of the Boy Scouts in the same way, because an organization as large as the Boy Scouts is not understood to sanction the opinions that each of its members makes in milieus outside of scouting. *Id.* at 697 (Stevens, J., dissenting).

155. Mazzone, *supra* note 27, at 647.

156. See, e.g., *supra* notes 16-18 and accompanying text; Bernstein, *supra* note 15, at 126-38 (forecasting effects of *Dale* on religious organizations, hostile environment law, campus speech codes, and housing discrimination).

157. See Hunter, *supra* note 18, at 1591.

158. *Id.* at 1626-27.

for gay rights.¹⁵⁹ Drawing on that model, the line between what is public (open to state regulation) and private (protected from state regulation) tracks the line between commercial and non-profit spheres.¹⁶⁰ By pegging civil rights to the attainment of economic benefits, whether tangible or intangible, the market model disserves the claims of homosexual individuals to open participation in a democracy.¹⁶¹ What is at stake is not goods and services so much as “the power to create and contest social meaning,”¹⁶² activity that takes place in non-profit as well as commercial venues.¹⁶³

One way in which social meaning is shaped is through the characterization of speech and speaker. Critics take issue with the *Dale* majority’s characterization of “coming out” speech as hostile expression, an assumption that underlies the majority’s conclusion that Dale’s presence would force the Boy Scouts to convey a message that it endorses homosexuality.¹⁶⁴ As one commentator states, the “invisible nature of homosexuality renders speech a more central issue for lesbian and gay equality than it usually is for race, sex, or disability.”¹⁶⁵ Coming out speech is commonly seen as confrontational, hence the mere presence of an openly gay person may be construed as subverting the expression of an organization that opposes—or at least refrains from endorsing—homosexual conduct.¹⁶⁶

These critics maintain that the *Dale* majority’s conflation of the act of coming out with hostile speech robs gay and lesbian individuals of the right to define themselves, and instead gives that prerogative to

159. *Id.* at 1630.

160. *Id.* at 1628.

161. *Id.* at 1629.

162. *Id.* at 1632 (quoting Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 49 *Stan. L. Rev.* 143, 144 (1996)).

163. *Id.* at 1629-34.

164. See Nan D. Hunter, *Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 *N.Y.L. Sch. J. Hum. Rts.* 565, 577 (2000) [hereinafter Hunter, *Sexuality and Civil Rights*] (explaining how “mere presence of an openly [gay] person demands a rebuttal”); Hunter, *supra* note 18, at 1606-09 (analyzing Court’s “demonization” of Dale); Christopher S. Hargis, Note, *Romer, Hurley, and Dale: How the Supreme Court Languishes with “Special Rights,”* 89 *Ky. L.J.* 1189, 1218-19 (2000-01) (extrapolating that the presence of a homosexual scoutmaster was perceived as an “immediate challenge” to the Boy Scouts’ creed). *But see* Carpenter, *supra* note 19, at 1551-53 (arguing that the *Dale* majority’s implicit recognition that the act of coming out is culturally and politically significant speech will help government employees who are discriminated against for being open about their homosexuality); Nancy J. Knauer, “*Simply So Different*”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 *Ky. L.J.* 997, 999-1003 (2000-01) (stating that “[t]here is nothing particularly surprising or new about the contention that an openly gay individual speaks volumes,” and contending that liberal commentators ignore the political significance of coming out, when in fact such acknowledgement will lead to more and not less First Amendment protection for openly gay people).

165. Hunter, *Sexuality and Civil Rights*, *supra* note 164, at 576.

166. *Id.* at 577.

the very group seeking to expel them.¹⁶⁷ Thus, critics argue that homosexuals, by being open about their sexuality, will automatically be seen as pitting their message against that of an organization seeking their exclusion, and that this will result in their automatic exemption from state protection against discrimination.¹⁶⁸ A critic has argued that to obtain this benefit from the constitutional right to exclude, organizations will need to vocalize policies of hostility towards certain groups about which they would rather have stayed silent.¹⁶⁹ Thus, an organization should be required to have the “courage of its convictions.”¹⁷⁰ In other words, the organization, too, must “come out,” and take the consequences of declaring its policies.¹⁷¹

2. Supporters of *Dale*

Dale's supporters assert that the decision heralds a new dawn for First Amendment rights which have been increasingly and unjustifiably trampled on, in the name of eliminating discrimination, since *Roberts*.¹⁷² These commentators contend that a state's interest in combating discrimination should not take precedence over constitutionally guaranteed rights.¹⁷³ According to this line of reasoning, the First Amendment, in particular, codifies a democratic society's rightful distrust of a state's police power over social and political discourse; thus so-called compelling state interests that encroach on the constitutionally protected freedoms of speech and association should be viewed with suspicion.¹⁷⁴ Indeed, one commentator has suggested that gay rights activists should champion

167. See Christopher S. Hargis, *The Scarlet Letter “H”: The Brand Left After Dale*, 11 *Law & Sexuality* 209, 234 (2002).

168. See *id.* at 240-41.

169. See Hunter, *supra* note 18, at 1610 (explaining that litigating *Dale* required the Boy Scouts to “loudly declare a policy that they had apparently wanted to keep below the social radar screen unless necessary to eject someone”).

170. *Id.* at 1612.

171. “Coming out” has consequences for homophobic organizations as it does for individuals. After *Dale*, the Boy Scouts lost as well as gained both private and public support. For details on the repercussions to the Boy Scouts of the organization's anti-gay policies, see Jeremy Patrick, *A Merit Badge for Homophobia? The Boy Scouts Earn the Right to Exclude Gays in Boy Scouts of America v. Dale*, 10 *Law & Sexuality* 93, 119-20 (2001); Lisa D. Angelo, Note, *Boy Scouts of America v. Dale: The Delay in a Necessary Change with Time*, 23 *Whittier L. Rev.* 803, 833-34 (2002).

172. See, e.g., Bernstein, *supra* note 15, at 85-89 & 85 n.11.

173. See, e.g., *id.* at 138-39; Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 *Minn. L. Rev.* 1639, 1665-66 (2001).

174. See, e.g., Bernstein, *supra* note 15, at 139; Johnson, *supra* note 173, at 1667 (arguing that the health of private associations is critical to prevent democracy from succumbing to “tyrannical majoritarianism, in which every aspect of society is ordered as 51 percent of the citizens prefer” (quoting Stephen L. Carter, *The Culture of Disbelief* 37 (1993))).

Dale for precisely this reason.¹⁷⁵ He argues that governments are fickle defenders of the rights of homosexuals, hence the integrity of private associations should be fiercely defended so as to provide safe havens from which homosexuals may exercise their political power should the tide turn against them once more.¹⁷⁶

One *Dale* supporter contends that more than acting as a defense against Big Brother, freedom of association is a positive force in creating a diverse society that provides the greatest benefits to individual citizens.¹⁷⁷ Free association ensures the smooth operation of the free market, keeping open a wide range of choices and allowing for “efficient self-sorting.”¹⁷⁸ Even if the price of free association is to deny certain options to some individuals, the array of opportunities available to them would still be greater in a free market than if a state regulation closed them out of the market altogether.¹⁷⁹

Finally, *Dale*’s supporters reason that expressive association preserves the substantive due process rights of parents to direct the upbringing of their children, which lies at the core of intimate associational rights of families.¹⁸⁰ According to its advocates, *Dale* stands for the proposition that the “opportunity to influence the upbringing of other people’s children” is not a civil right.¹⁸¹ They further argue that parents “speak” when they choose schools and instructors for their children, and they communicate indirectly to their children through teachers, tutors, and other educational agents.¹⁸² Schools amplify the messages that parents wish to transmit to their children, and parents retain the right to exclude messages and messengers which subvert their communications.¹⁸³

Part II discusses in detail two aspects of the *Dale* controversy which offer critical insight into the issues at stake in the Baden-Powell hypothetical.

175. See, e.g., Carpenter, *supra* note 19, at 1519.

176. See, e.g., *id.* at 1525-33 (declaring that “[t]he First Amendment created gay America” and outlining the history of state oppression of gay rights associations); *id.* at 1588 (noting capriciousness of governments’ policy towards gays); accord Johnson, *supra* note 173, at 1666-67 (supporting Carpenter’s argument that *Dale* preserves the right of gay organizations to limit their leadership to homosexuals).

177. See Epstein, *supra* note 17, at 132-34.

178. *Id.* at 133.

179. See *id.* at 132-33 (providing example that in a free market, a female lawyer who is discriminated against by one law firm will be able to find other firms that discriminate in her favor); see also Hirschhoff, *supra* note 82, at 759-60 (warning that *Runyon* reduces diversity among private schools and limits availability of alternatives to state schools, thus threatening to “standardize” children by subjecting them to a uniform educational system).

180. See *supra* notes 48-50 and accompanying text.

181. Johnson, *supra* note 173, at 1666.

182. Garnett, *supra* note 13, at 1870 (citing Gilles, *supra* note 8, at 1016).

183. See Paulsen, *supra* note 13, at 1943.

II. SCHOOLS AS QUASI-EXPRESSIVE ASSOCIATIONS AND THE DEBATE OVER EDUCATIONAL AUTHORITY

The Court's "freedom to exclude" cases and *Dale*'s critical aftermath pose two questions fundamental to the determination of whether Baden-Powell's free expression defense should prevail over Doe's employment discrimination claim. The first question is whether, under *Dale*, a private school's free association right includes exemption from anti-discrimination laws. In *Runyon*, the Court accepted that private schools enjoy a right of free association but held that they may not discriminate against black students.¹⁸⁴ The Boy Scouts' expressive activity is analogous to that of schools, as both seek to inculcate values in young people. Yet in *Dale*, the Court held that the Boy Scouts' free association right entitled the organization to discriminate against an openly homosexual scoutmaster.¹⁸⁵ Section A asks whether *Runyon* and *Dale* can be reconciled and examines one commentator's effort to square the two cases by classifying associations as commercial, expressive, or quasi-expressive.

The second question is whether a private school's free association right protects the expression of parents or children. Section B explores the argument of *Dale*'s supporters that free association protects the expressive right of parents to transmit messages to their children through the expression of schools. The section then contrasts this with an alternative view of parents as trustees responsible for safeguarding the free expression rights of their children.

A. *The Carpenter View*

Dale Carpenter seeks to "reclaim the freedom of expressive association" from both its critics and its supporters by contending that *Dale* will not lead to the far-reaching consequences that either side envisages.¹⁸⁶ He posits a tripartite approach¹⁸⁷ to resolve conflict between expressive association and anti-discrimination law after *Dale* which is based on Justice O'Connor's suggestion, in her concurrence to *Roberts*, that First Amendment protection for an association should depend on whether it is expressive or commercial.¹⁸⁸ Carpenter develops a third category of quasi-expressive associations to describe those organizations that both engage in expression and participate in the commercial marketplace.¹⁸⁹ He argues that private schools fall into this third category because they deliver moral instruction yet

184. See *supra* Part I.C.1.

185. See *supra* Part I.C.4.

186. Carpenter, *supra* note 19, at 1516-17.

187. See *id.* at 1563-87.

188. See *supra* note 104.

189. See Carpenter, *supra* note 19, at 1576.

maintain large facilities, employ many people, and hold themselves open to members of the general public who can pay the fees.¹⁹⁰

According to Carpenter, quasi-expressive associations present the hard cases that require further examination of the specific activity challenged by an anti-discrimination claim.¹⁹¹ Primarily expressive activities should be beyond the reach of anti-discrimination laws, but primarily commercial activities should be subject to such regulations.¹⁹²

Carpenter contends that teaching is an inherently expressive activity.¹⁹³ Teachers “directly transmit” the school’s values when instructing students.¹⁹⁴ Therefore, a private school’s choice of instructors should be shielded from anti-discrimination laws by the freedom of expressive association.¹⁹⁵ In contrast, a school’s janitor or secretary does not perform an expressive function, and the school’s employment actions relating to them must comply with the state’s anti-discrimination mandates.¹⁹⁶ According to Carpenter, the *Dale* majority reached the right decision because scoutmasters perform the same expressive function as teachers. Thus, the Boy Scouts’ choice of scoutmasters is rightly protected by the freedom of association.¹⁹⁷

Carpenter reconciles *Dale* with *Runyon*, a case where the Court upheld an anti-discrimination law against a private school’s free association claim, by noting that the schools could not show that the admission of black students would impair their segregationist message.¹⁹⁸ In this view, the application of anti-discrimination law in *Runyon* did not restrict the schools’ expressive activity. This explanation rests on a conception of teachers as deliverers and students as recipients of messages that Part III questions.¹⁹⁹

Before proceeding to Part III, however, it is important to address the right of parents to speak to their children through the expressive activities of schools, an issue that underlies Carpenter’s analysis and that is implicated in *Dale*.²⁰⁰ The next section discusses in more depth

190. *See id.* (mentioning media outlets—such as newspapers—and large private clubs, including the Boy Scouts, as other types of quasi-expressive associations).

191. *See id.* at 1576-77.

192. *Id.*

193. *Id.* at 1577.

194. *Id.*

195. *See id.*

196. *See id.* For a similar conclusion, see Troum, *supra* note 7, at 684 (positing that the Boy Scouts would have a weaker free association claim if the organization discriminated against homosexual factory employees as opposed to scoutmasters). However, Troum reaches his conclusion through a different theory based on whether expression is “internal versus external,” and “intrinsically versus instrumentally expressive exclusion.” *Id.* at 671-79.

197. *See* Carpenter, *supra* note 19, at 1580.

198. *See id.* at 1577-78; *see also supra* note 89 and accompanying text.

199. *See infra* notes 303-10 and accompanying text.

200. *See supra* note 13 and accompanying text.

the philosophical debate surrounding parental authority in the education of children.

B. Parents' Rights and the Education of Children

As Stephen G. Gilles notes, the Supreme Court has affirmed that parents have an undisputed right to direct the education of their children, but the Court has never explained why parents have this prerogative.²⁰¹ Gilles refers to *Pierce v. Society of Sisters*²⁰² and *Meyer v. Nebraska*,²⁰³ two cases from the 1920s in which the Court held that parents have a Fourteenth Amendment liberty right to control their children's education.²⁰⁴ Both cases involved state statutes that infringed the parental right: In *Meyer*, the Court struck down a state statute prohibiting the teaching of foreign languages in schools below the eighth grade,²⁰⁵ in *Pierce*, the Court upheld the injunction of a state statute requiring compulsory attendance at public school.²⁰⁶ Forty years later, in *Wisconsin v. Yoder*,²⁰⁷ the Court pronounced the right of parents to direct the education of their children to be "beyond debate."²⁰⁸ In *Yoder*, this right, combined with a free exercise claim asserted by Amish parents, defeated a state law mandating that children attend public or private school until the age of sixteen.²⁰⁹

Gilles offers a constitutional underpinning for the Court's affirmation of parental educational authority by arguing that these cases are primarily about the First Amendment free speech rights of parents.²¹⁰ Parents have a right to decide who shall educate their children because the choice of schools and educators is a form of speech.²¹¹ Consistent with the free speech doctrine, any viewpoint-based prohibition on speech would be unconstitutional.²¹² Hence, a state could not forbid parents or the schools through which they speak to teach racism.²¹³ Conversely, the state cannot compel parents and

201. See Gilles, *supra* note 8, at 937.

202. 268 U.S. 510 (1925).

203. 262 U.S. 390 (1923).

204. See *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-400.

205. *Meyer*, 262 U.S. at 397.

206. *Pierce*, 268 U.S. at 530, 536. The Court emphasized that "[t]he child is not the mere creature of the State," and that the constitution prevents the state from "standardiz[ing] its children" by insisting that they attend only public schools. *Id.* at 535.

207. 406 U.S. 205 (1972).

208. *Id.* at 232.

209. See *id.* at 207, 234.

210. See Gilles, *supra* note 8, at 944.

211. See *id.* at 1016-19. Richard W. Garnett incorporates this idea of school choice as a form of speech in his argument that the Supreme Court affirmed the prerogative of parents to determine the education of their children in three cases decided in the October Term 1999, including *Dale*. See Garnett, *supra* note 13, at 1841, 1875-82.

212. See Gilles, *supra* note 8, at 1019-20.

213. See *id.* (arguing further that viewpoint-based speech restrictions are rarely permitted, even those that "advance a compelling state interest").

their chosen schools to speak by endorsing messages which are contrary to their beliefs.²¹⁴

Barbara Bennett Woodhouse presents a darker view of *Meyer* and *Pierce* as affirming the idea that parents have a property interest in their children.²¹⁵ Parents not only speak to, but speak through, their children.²¹⁶ Instead of possessing individual identities, children are perceived as voiceless “conduit[s] for the parents’ religious expression, cultural identity, and class aspirations.”²¹⁷ Woodhouse contrasts the idea of parents as owners with the concept of parents as trustees of their children.²¹⁸ According to her view, the notion that parents hold their children in trust for the greater community reflects the high value that democratic republics place on individual liberty.²¹⁹ No longer subject to the sole ownership of his or her parents, the child as an individual is a member of the “national family,” with his or her own rights and claims on society.²²⁰ The child’s first duty, then, is not to obey his or her parents but to prepare for citizenship.²²¹

In an argument similar to that offered by Woodhouse, James G. Dwyer refutes the idea of parents’ rights and contends that “the child is . . . not the mere creature of the parent.”²²² Instead, Dwyer believes that children’s welfare should be protected by children’s rights rather than parents’ rights, because the moral precept underlying our legal culture is that “no individual is *entitled* to control the life of another person, free from outside interference.”²²³

214. *See id.* at 1020-21; *see also supra* note 149 and accompanying text (discussing the *Dale* majority’s holding that a state may not compel the Boy Scouts to endorse the legitimacy of homosexuality against its avowed policy).

215. *See* Woodhouse, *supra* note 8, at 997, 1090-91. Woodhouse links the liberty right of parents to control their children’s educations to the liberty right given bakers in *Lochner v. New York*, 198 U.S. 45 (1905), to work long hours in unwholesome conditions. *See* Woodhouse, *supra* note 8, at 1099 n.577. She concludes that in both *Lochner* and *Meyer* “liberty became a yoke.” *Id.*; *see also* James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 Cal. L. Rev. 1371, 1413 (1994) (suggesting that parents’ control over children’s lives “can manifest some of the ‘badges and incidents’ of slavery”). *But see* Garnett, *supra* note 13, at 1877 (responding that *Pierce* is best read as a reminder of “moral limits on the claims of the liberal state, the independence of associations, and the importance of civil society”).

216. *See* Woodhouse, *supra* note 8, at 1114.

217. *Id.*

218. *See id.* at 1038-39. Woodhouse argues that *Meyer* was a deeply reactionary response to ideas such as this which posed a threat of “radical social reform.” *Id.* at 1085. Although *Meyer*’s result was “pluralist and libertarian,” it was in fact driven by a conservative agenda to bolster patriarchal and property interests. *Id.* at 1084-85.

219. *See id.* at 1039.

220. *Id.* at 1002, 1051.

221. *See id.* at 1051.

222. Dwyer, *supra* note 215, at 1446. Dwyer was responding to the Court’s statement in *Pierce v. Society of Sisters* that “[t]he child is not the mere creature of the State.” 268 U.S. 510, 535 (1925).

223. Dwyer, *supra* note 215, at 1373.

Conceding that the interests of parents and children are often in harmony and interdependent, and that family life is an important part of a child's self-conception, Dwyer nevertheless maintains that the focus in legal disputes over child-rearing should be on the child's interests rather than on the rights of parents.²²⁴ He argues that focusing on the child's interests will enable the state to play a bigger role in the care and education of children, and to support state intervention on behalf of children where parents engage in harmful parenting practices.²²⁵

Dwyer asserts that the focus on the child's interests will not result in unwarranted state intrusion into the family by suggesting that such a focus will also serve to limit the extent of permissible state intervention.²²⁶ Acting as agent for the child, the parent may act against the state in the child's best interests should the state intrude too far.²²⁷ With regard to education, increased state regulation of schools will not result in children being standardized, because parents will continue to convey their beliefs to their children at home and because schools value individuality and diversity.²²⁸

Part III takes up these themes in a discussion of the state's interest in education. This part examines the Baden-Powell hypothetical within the analytical framework established by the Court in *Roberts*.

III. ANALYZING THE BADEN-POWELL HYPOTHETICAL UNDER THE COMPELLING STATE INTEREST TEST

The *Roberts* test, as articulated by the *Dale* Court, sets out a three-step inquiry into whether an anti-discrimination law abrogates the right of free association: (1) whether the organization engages in expressive activity; (2) whether the inclusion of the plaintiff interferes with the organization's expression; and (3) whether the state has a compelling interest which justifies any interference with the organization's expression, and if so whether it has advanced its interest through the least restrictive means of achieving its end.²²⁹

This part analyzes the Baden-Powell hypothetical using the above three-step inquiry. Section A concludes that Baden-Powell engages in expressive activity and is entitled to the right of free association. Section B argues that the inquiry into whether Doe's continued

224. *Id.* at 1378-79.

225. *See id.* at 1372.

226. *See id.* at 1438.

227. *Id.*

228. *See id.* at 1444. Dwyer was probably responding to concerns raised by the Court in *Meyer v. Nebraska* in its disturbing evocation of Plato's Commonwealth and of Sparta, where children were separated from their parents and placed under state supervision, so as to "submerge the individual and develop ideal citizens." 262 U.S. 390, 401-02 (1923).

229. *See supra* Part I.C.4 (discussing *Dale*).

presence at Baden-Powell interferes with the school's expression is fact-specific and not foreclosed by *Dale*. Section C contends that the state's compelling interests in employment and education should prevail over Baden-Powell's expressive association claim.

A. Expressive Activity

The first inquiry is easily answered. In *Runyon*, the Court clearly treated private schools as organizations enjoying the right of expressive association, and the educational process as implicating the right of intimate association.²³⁰ In *Roberts*, the Court again identified the education of children as an activity protected by the intimate association right,²³¹ and Justice O'Connor, in her concurrence, listed the "instruction of the young" as an example of expressive activity.²³² Under Carpenter's theory of schools as quasi-expressive associations, the school's choice of teachers is an expressive activity shielded by the freedom of association. There is no question that Baden-Powell, a private school engaged in the education of boys and young men, is entitled to claim that its dismissal of Doe is protected by the First Amendment rights of expressive and intimate association.

B. Interference with Expression

The second inquiry would appear to be foreclosed by the *Dale* majority's deference to the organization's statement of what its expression is and what would impair that expression.²³³ Baden-Powell has asserted that it does not approve of homosexuality and refuses to endorse any statement that legitimizes such conduct. The majority's conclusion that an instructor, by virtue of being openly gay, necessarily imports a pro-homosexual message into an organization,²³⁴ also seems to cut off further examination of the issue.

The equation of "coming out" with pro-homosexual speech, however, deserves closer attention. In support of its conclusion that *Dale's* presence would force the Boy Scouts to express a message to its members and to the world that it condoned homosexual behavior, the Court noted that *Dale* was both a leader in the gay community and a gay rights activist.²³⁵ If *Dale* had, instead, been merely a member of his college's gay and lesbian organization, and had never prominently participated in gay rights activities, it would not logically

230. See *supra* notes 86-94 and accompanying text.

231. See *supra* notes 46-50 and accompanying text.

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

233. See *supra* note 147 and accompanying text.

234. See *supra* note 149 and accompanying text.

235. See *supra* note 149 and accompanying text.; see also Paulsen, *supra* note 13, at 1933 (stating that "*Dale's* public homosexuality, and public press attention to his views" caused his expulsion from the Boy Scouts).

follow that his presence would force the Boy Scouts to send any message endorsing homosexuality. In fact, one year after the *Dale* decision, a Washington, D.C., commission on human rights ordered a local Boy Scouts organization to reinstate a gay troop leader, explaining that, unlike the facts in *Dale*, the scoutmaster in question had not been a leader in the gay rights movement.²³⁶ Therefore, it would appear that the outcome in the Baden-Powell hypothetical should depend on nuances in the facts. Specifically, the result should hinge upon the nature of the message expressed by Doe and the context in which it was conveyed.

The following three scenarios provide examples of Doe's involvement in the hypothetical gay and lesbian organization, illustrating a spectrum of expression from passive to activist. In the first scenario, Doe, in his capacity as co-president of the gay and lesbian organization, represents the organization to a local newspaper as a support group for homosexual individuals rather than as a lobbyist for gay rights. Under these facts, it would be difficult for Baden-Powell to claim that Doe's presence as a teacher forced the school to send a message endorsing homosexual behavior because Doe's message would lack the confrontational tone customarily coupled with a more activist agenda.

In the second hypothetical, Doe makes a statement concerning gay and lesbian individuals' need for homosexual role models. A court could regard this statement as being part of a more assertive agenda, similar to GLIB's intent to celebrate homosexual identity and to express solidarity with New York's Irish gay and lesbian marchers.²³⁷ According to the analysis in *Hurley*, this may be enough to violate Baden-Powell's free association right by altering the school's expression that homosexuality is unacceptable.²³⁸ It is questionable, however, whether a school, like a parade, could reasonably be viewed as endorsing its employees' communications outside of work.²³⁹

In the final scenario, Doe makes a statement exactly like Dale's, stating that homosexual teenagers need gay role models.²⁴⁰ Given Doe's position as a teacher in a boys' school, such a statement falls at the activist end of the spectrum because a court might reasonably view

236. The scoutmaster, Michael Geller, had joined the Boy Scouts when he was eleven and, like Dale, had attained the rank of Eagle Scout before becoming a scoutmaster. See Fox News: Special Rep. with Brit Hume (Fox Broadcasting Co., June 22, 2001), available at 2001 WL 5000750. But see Spencer S. Hsu, *U.S. House Vote Backs Gay Benefits; D.C. Workers' Partners Would Get Coverage*, Wash. Post, Sept. 26, 2001, at B1 (reporting that the House voted 262 to 152 to set aside the commission's ruling), available at 2001 WL 28359856.

237. See *supra* text accompanying note 129.

238. See *supra* text accompanying notes 135-37.

239. See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (stating that the determination whether a teacher was fit to teach should not hinge on his affiliations outside of school); *supra* note 154.

240. See *supra* note 143 and accompanying text.

it as tantamount to a declaration of intent on Doe's part to serve as advisor and role model to any of his students who might wish to discuss their sexual orientation with him, or even as an invitation to his students to do so. Following the *Roberts* line of cases, this situation should be easily resolved in the school's favor under the organization's undisputed right to exclude members who express views at odds with the views of the organization.²⁴¹

The *Dale* Court articulated a standard of deference to expressive organizations that raise a free association defense in an anti-discrimination action, but its claim to rely solely on the litigation claims of the organization is belied by its own (admittedly minimal) review of the facts.²⁴² More important, the Court voiced the caveat that an expressive association may not insulate itself from anti-discrimination laws just by claiming that inclusion of an unwelcome member would hamper its message.²⁴³ The Court's warning implies that some bottom line assessment of the record must be made by the Court, otherwise all expressive association claims could readily be tailored to state a *prima facie* case of infringement.²⁴⁴

Even if one were to take the Court's pronouncements at face value, however, and to assume that *Baden-Powell's* litigation claims are sufficient to show both that the school expresses disapproval of homosexuality and that Doe's inclusion would unconstitutionally abridge that expression, the inquiry does not end there. The Court would still need to undertake the compelling state interest prong of the inquiry.

C. *Compelling State Interest*

In the *Baden-Powell* hypothetical, there are two interests that the state could claim to be compelling: the regulation of employment and the overseeing of education. The Court has established the standards to be applied. The state's interest will not validate a "severe intrusion" on the organization's free association right.²⁴⁵ The Court must determine whether the application of state anti-discrimination law would present a "serious burden[]"²⁴⁶ or have a significant effect on associational activities or compel organizations to "abandon their basic goals."²⁴⁷ A "slight infringement" of associational rights may be justified by a state's compelling interests.²⁴⁸

241. See *supra* note 125 and accompanying text.

242. See *supra* notes 147-49 and accompanying text.

243. See *supra* note 149.

244. See *supra* note 147 (outlining the *Dale* dissenters' views on the majority's deferential standard to an organization making a free association claim).

245. *Supra* note 152 and accompanying text.

246. *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

247. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

248. *Id.* at 549.

1. Employment

The Court's freedom of association cases have consistently tracked the economic model of equal opportunity. In *Runyon*, the Court supported its holding by equating opportunity to obtain an education with employment opportunity.²⁴⁹ The *Roberts* trilogy of cases emphasized the importance of increasing access to benefits that carried the promise of future economic advancement for historically disadvantaged groups.²⁵⁰ *Hurley* and *Dale*, in contrast, were about access to "civic space," that is, the full participation of homosexuals in social and political discourse.²⁵¹ Although the latter may be the front where gay rights activists choose to wage their battle in the culture war,²⁵² it is apparent from the outcomes in *Hurley* and *Dale* that the Court perceives a greater constitutional dilemma in sustaining this discursive right against an expressive association claim than in protecting the right to equal economic opportunity. This section argues that where economic interests such as employment are at stake, however, the Court has upheld a state's interest in ensuring equal opportunity against an expressive organization's free association claim.

That the federal government itself regards equal employment opportunity in the field of education to be a compelling interest is evident in Congress's inclusion of educational institutions and educators within the purview of Title VII in 1972, repealing an initial grant of exemption.²⁵³ Congress was well aware of the importance of diversifying the teaching staff of educational institutions.²⁵⁴ The House Committee on Education and Labor emphasized that women and members of racial minorities had been denied opportunities to undertake serious scholarship in positions of comparable responsibility and prestige to those available to white males, and that these opportunities should now be made accessible to them.²⁵⁵ The government's compelling interest was to stem the unreflecting transmission of stereotypes about these underrepresented groups, which would perpetuate continuing discrimination.²⁵⁶

The Committee also highlighted the important role of educational institutions in exposing the young to a variety of ideas that would influence their later development.²⁵⁷ Congress thus considered combating irrational prejudice to be crucial enough to overcome

249. See *supra* note 95 and accompanying text.

250. See *supra* Part I.C.2.

251. See *supra* notes 157-63 and accompanying text.

252. See *id.*

253. See *supra* notes 64-65 and accompanying text.

254. See House Comm. on Educ. and Labor, *supra* note 64, at 79-80.

255. See *id.*

256. See *supra* notes 67-68 and accompanying text.

257. See *supra* note 67 and accompanying text.

scruples about interfering with the prerogative of academic institutions to decide “who may teach,” long a treasured part of our “tradition of academic freedom.”²⁵⁸ Although courts must take care not to appropriate a role best undertaken by educators themselves in judging the qualifications of their colleagues,²⁵⁹ academic freedom does not encompass the right to engage in discriminatory employment practices.²⁶⁰ Courts have the duty of ensuring that legislative goals are honored.²⁶¹

Although Title VII does not protect individuals on the basis of sexual orientation, states that treat sexual orientation as a protected class have used it as a model in enacting their own employment discrimination laws.²⁶² Since Title VII only allows the enactment of state laws which expand or are consistent with its provisions,²⁶³ Title VII’s framework and legislative history demonstrate co-extensive parameters governing the permissible reach of state employment discrimination laws.

Courts have staunchly upheld Title VII claims within the limits of the legislative mandate. For example, lower courts in three cases decided disputes involving private sectarian schools which had dismissed unmarried pregnant employees—two were teachers and one a librarian—claiming that they had violated the moral codes laid down by the schools.²⁶⁴ The courts ruled that if the employees’ pregnancies prompted their dismissal, that would be discrimination on the basis of sex and prohibited by Title VII.²⁶⁵ However, if the schools could prove that they applied their moral codes equally in making employment decisions regarding both male and female employees, then they could rely on the exemption that Title VII allows to

258. *Lieberman v. Gant*, 630 F.2d 60, 67 (2d. Cir. 1980) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)). Senators Allen (Alabama) and Ervin (North Carolina) brought an amendment to exclude religious and educational institutions from Title VII. See 118 Cong. Rec. 1977 (1972), reprinted in *Legislative History of the EEOA*, *supra* note 64, at 881. In the Congressional debate over this amendment, Senator Allen argued that the “overzealous proposal” to repeal the initial exemption for educational institutions would “subvert academic freedom.” 118 Cong. Rec. 1993 (1972) (statement of Sen. Allen), reprinted in *Legislative History of the EEOA*, *supra* note 64, at 1254. He emphasized that the passage of the proposal would seriously jeopardize “[o]bjective criticism, independent judgment, [and] the search for truth unhampered by transient political interests.” *Id.* Nonetheless, the amendment was defeated by fifty-five votes to twenty-five. See 118 Cong. Rec. 1995 (1972), reprinted in *Legislative History of the EEOA*, *supra* note 64, at 1259.

259. See *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 547-48 (3d Cir. 1980).

260. See *Lieberman*, 630 F.2d at 67.

261. See *Kunda*, 621 F.2d at 552.

262. See *supra* notes 74-78 and accompanying text.

263. See *supra* notes 72-73 and accompanying text.

264. *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 345 (E.D.N.Y. 1998); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 804-05 (N.D. Cal. 1992); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 267-68 (N.D. Iowa 1980).

265. *Ganzy*, 995 F. Supp. at 349; *Vigars*, 805 F. Supp. at 806; *Dolter*, 483 F. Supp. at 270.

religious institutions to discriminate on the basis of religion.²⁶⁶ Two courts pointed out, however, that because only women could ever be fired for becoming pregnant outside of wedlock, there was a strong inference that the dismissals involved sex discrimination.²⁶⁷

One school challenged Title VII on constitutional grounds, claiming that it violated the First Amendment's Establishment and Free Exercise Clauses.²⁶⁸ The court held that Title VII violated neither. Title VII had a secular purpose and did not "promote or inhibit religion"; its proscriptions were not targeted at either religious beliefs or practices.²⁶⁹

Doe's case is analogous. Baden-Powell objects that Doe's openly gay status offends its expressive position that homosexuality is immoral. It claims constitutional protection under the First Amendment free association right. In *Dale*, an expressive organization's objection to homosexuality on moral grounds was sufficient to justify the exclusion of a volunteer gay scoutmaster in contravention of a state's public accommodations law, even though he had made a prima facie case of discrimination on the basis of sexual orientation.²⁷⁰ In an employment context, however, given the Court's past recognition that a state's interest in ensuring equal economic opportunity is compelling, it is not self-evident that *Dale* should defeat a homosexual employee's prima facie case of discrimination where the state has made sexual orientation a protected class in its employment discrimination law. Instead, the pregnancy cases decided under Title VII indicate that Doe should have at least as strong a case as the unmarried women plaintiffs.

Unlike the sectarian schools in the pregnancy cases, Baden-Powell is a secular institution. Title VII does not exempt secular entities from its proscriptions on the basis of moral beliefs. That limited carve-out is only for religious organizations.²⁷¹ Even against Establishment clause and Free Exercise claims by a religious school, however, the Court upheld Title VII's constitutionality.²⁷² Free association is only a derivative right compared to the Establishment and Free Exercise prerogatives which are fundamental.²⁷³ Given that Title VII does not violate the religion clauses, it is hard to see how a court could hold

266. *Ganzy*, 995 F. Supp. at 349; *Vigars*, 805 F. Supp. at 806-07; *Dolter*, 483 F. Supp. at 270 n.5. Title VII carves out a limited exception for religious institutions. Section 702 allows a religious organization to discriminate only with respect to the employment of individuals of a particular religion in the carrying on of any of its activities, whether religious or secular. Title VII's other proscriptions against discrimination still apply. See *Vigars*, 805 F. Supp. at 806-07.

267. *Ganzy*, 995 F. Supp. at 344; *Vigars*, 805 F. Supp. at 808.

268. *Vigars*, 805 F. Supp. at 809.

269. *Id.* at 809-10.

270. See *supra* Part I.C.4.

271. See *supra* note 266 and accompanying text.

272. See *supra* note 269 and accompanying text.

273. See *supra* note 31 and accompanying text.

that a state law modeled on Title VII would be unconstitutional as applied to a secular school's derivative free association right.

The state's compelling interest in regulating employment provides one strong argument against the expressive association right of a private school to discriminate against homosexual teachers. The next section contends that the state has a second compelling interest in the regulation of education.

2. Education

The free association claim of a private school implicates a matrix of closely intertwined competing interests: the school's right, as an expressive association, to conduct its expressive activities free of state intervention; the state's interest in regulating education, which necessitates supervision of schools; the parents' intimate association prerogative to direct the education of their children; and the children's entitlement to exercise their First Amendment rights in the educational process.

The Court's jurisprudence on schools has never declared any of these rights to be paramount as a matter of law. In *Meyer* and *Pierce* the Court affirmed that states may not ban the existence of private schools, dictate what they shall teach, nor prevent parents from sending their children to private schools.²⁷⁴ The Court has also long recognized that the state has an unquestionable interest in regulating both private and public schools.²⁷⁵ In *Pierce*, for example, the Court stated that the state may "inspect, supervise, and examine [all schools], their teachers and pupils."²⁷⁶ Thirty years later, in *Brown v. Board of Education*,²⁷⁷ the Court declared that "education is perhaps the most important function of state and local governments."²⁷⁸

The question, then, is not whether, but the extent to which the state may permissibly regulate private schools. The answer depends on two inter-related issues: (1) what we deem to be the purpose of education, and (2) who shall have the authority to decide between competing conceptions of educational purpose. This section argues that liberal education best prepares the young to be citizens in a democratic society. It further contends that a conception of parental authority as one of trusteeship rather than ownership is more consistent with this model of education, and that the authority to make educational decisions should be balanced between state and parent with reference to the interests of the child. Applying these principles to the Baden-Powell hypothetical, this section concludes that private schools should

274. See *supra* notes 204-06 and accompanying text.

275. See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

276. *Id.*

277. 347 U.S. 483 (1954).

278. *Id.* at 493.

not be exempt from the application of state anti-discrimination laws. This conclusion is further supported by the recognition that liberal education plays an important role in fighting discrimination. It is also supported by the fact that the Court's jurisprudence on schools indicates that *Baden-Powell*, as a secular institution, is less entitled to shield its discriminatory actions behind First Amendment mandates than a sectarian school.

The Court has observed that in a democracy, education plays a vital role in preparing the nation's youth for citizenship and civic participation.²⁷⁹ The model of education that best serves this purpose has been famously described by the Court thus:

The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.²⁸⁰

Freedom to explore and examine ideas, then, is the touchstone of this model of education, one informed by the values of liberalism.²⁸¹ This theory of education requires the child to participate actively in the discovery of truth through exploring and questioning a variety of received ideas.²⁸²

The requirement of liberal theory that the child actively participate in the educational process is inconsistent with the conception of parental educational authority advocated by Gilles and other supporters of *Dale*. Building on Gilles' argument that parents have a First Amendment right to determine their children's education, *Dale*'s supporters have contended that parents exercise their free speech rights by choosing schools and by speaking to their children through the medium of schools and instructors.²⁸³ The free association

279. See *id.*; see also Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 131 (1995).

280. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal citations and quotations omitted).

281. See Stanley Fish, *Children and the First Amendment*, 29 Conn. L. Rev. 883, 883-86 (1997) (outlining liberalism as the philosophical basis for the "marketplace of ideas" model of American education, but pointing out the fundamental flaw that this ideal "is itself an agenda informed by values that are themselves unexamined and insulated from challenge"); cf. Gilles, *supra* note 8, at 946-51 (arguing that liberal theories of education undermine parents' rightful authority to decide what values their children should be taught).

282. See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* 155-60 (1980); Brian Crittenden, *Education and Social Ideals* 71 (1973); Paolo Freire, *Pedagogy of the Oppressed* 72, 79-81 (Myra Bergman Ramos trans., 30th anniversary ed. 2001); Amy Gutmann, *Democratic Education* 89-90 (1987); Patricia White, *Beyond Domination* 109-10 (1983); Sherry, *supra* note 279, at 172-75.

283. See *supra* notes 182, 210-11 and accompanying text.

privilege of schools to exclude messages and messengers follows from parents' First Amendment right not to endorse messages with which they disagree.²⁸⁴ By framing the issue of educational decision-making as a conflict between parents' First Amendment rights and state coercion, however, the free speech justification for parental educational authority propels the child into the middle of a discursive tug-of-war between parents and the state, one in which the voice of the child cannot be heard.²⁸⁵ Ironically, then, the free speech right of parents accomplishes the silencing of the child.²⁸⁶ Such a result contradicts liberal education's conception of children as active explorers of ideas, exercising their First Amendment rights in the discovery of truth.²⁸⁷

The concept of parents as having an ownership interest in their children²⁸⁸ is a disturbing aspect of the justification for parental educational authority that tends to be overlooked when the issue is framed as one of parents' free speech rights. Underlying the free speech justification for parents' rights is a notion that parents are entitled to shape their children into "conduit[s]" for the parents' own expression by controlling what messages their children receive.²⁸⁹ Thus, while it is generally true, as Woodhouse and Dwyer note, that the interests of parents and children are aligned, and that parents are the child's best guardians, "constitutionalizing this presumption" as a parental "right" is potentially oppressive.²⁹⁰ Further, it would subvert the goals and methods of liberal education by allowing parents to regulate the marketplace of ideas to which their children are exposed.²⁹¹

The obvious alternative of permitting the state to regulate the classroom is equally disturbing and unacceptable,²⁹² but it is not the only alternative available. The idea proposed by Woodhouse and Dwyer, that parents should be viewed as trustees of their children, avoids the undesirable consequences of vesting educational authority

284. See *supra* notes 183, 214 and accompanying text.

285. In Gilles' articulation of his theory of parental educational authority, for example, discussion of the child's interests is substantially overshadowed by discussion of the competing rights of state and parents. See generally Gilles, *supra* note 8.

286. See *supra* note 217 and accompanying text.

287. That children have First Amendment rights, and that they do not leave them behind "at the schoolhouse gate," is a well-established proposition in Supreme Court jurisprudence. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The Court has upheld the First Amendment rights of school children to protest the Vietnam War, see *id.* at 514, and to refuse to salute the flag. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

288. See *supra* note 215 and accompanying text.

289. *Supra* note 217 and accompanying text.

290. Woodhouse, *supra* note 8, at 1115; see *supra* note 224 and accompanying text.

291. See *supra* note 280 and accompanying text.

292. See *Tinker*, 393 U.S. at 506-07 (citing cases); *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923).

solely in either parent or state.²⁹³ If parents are viewed as holding the child in trust for fully participatory membership in a democratic society,²⁹⁴ then it is possible to conceive of educational authority as an ongoing dialogue between parent, state, and the maturing child.

Dwyer has suggested that one way trusteeship would work is for courts to employ a “substituted-judgment” procedure when adjudicating conflicts between state and parent over the upbringing of a child.²⁹⁵ Under this procedure, both state and parent would argue their case with reference to what a child would likely choose for himself or herself, were he or she capable of doing so.²⁹⁶ By making the safeguarding of the child’s future right to choose the guiding interest in educational decision-making, the trusteeship concept is faithful to the democratic ideal of individual self-determination.²⁹⁷ Under the trusteeship model of parental responsibility, the vitality of liberal education’s marketplace of ideas would be preserved as an essential training ground for the child’s exercise of choice.²⁹⁸

Applying the trusteeship concept of parenthood to the hypothetical case of *Baden-Powell v. Doe*, there is a strong argument that the state’s compelling interest in eliminating discrimination should prevail over Baden-Powell’s expressive association and parents’ intimate association rights to exclude the “idea” expressed by an openly gay teacher. When parents are viewed as trustees rather than as owners, the child’s right to receive ideas and explore them in the classroom marketplace overrides the right of parent or state to exclude those ideas, because it is reasonable to believe that children would prefer to receive an education that promotes their interest in exercising autonomous judgment and choice as they develop into independent adults.²⁹⁹ It is through “exposure to [the] robust exchange of ideas”³⁰⁰ that the child prepares to exercise such choice.

Lending support to this argument is Congress’s recognition that schools play a crucial role in combating discrimination, expressed in the report of the House Committee on Education and Labor in connection with the 1972 repeal of Title VII’s exemption for educational institutions and educators.³⁰¹ The ideas to which youth are exposed in the classroom strongly influence their development;

293. See *supra* notes 218-19, 222-25 and accompanying text.

294. See *supra* notes 219-21 and accompanying text.

295. Dwyer, *supra* note 215, at 1430-31.

296. See *id.* at 1430. For an argument that elevating children’s interests over parents’ rights will not result in greater state intrusion into the family, see *id.* at 1438 (contending that it is in the child’s interest to ensure that parents are happy in the parenting role).

297. See *supra* note 224 and accompanying text.

298. See *supra* notes 280-81 and accompanying text.

299. See Dwyer, *supra* note 215, at 1434.

300. *Supra* note 280 and accompanying text.

301. See *supra* note 66 and accompanying text.

allowing discrimination there would, "more than in any other area," perpetuate stereotypes and discriminatory behavior.³⁰²

The recognition that liberal education plays a crucial role in fighting discrimination strongly informed the Court's decisions in *Brown* and *Runyon*. Prejudice, the refusal to examine received ideas, is precisely the kind of unreflective attitude this model of education aims to challenge.³⁰³ The *Brown* court declared that desegregation was key to eliminating the inferior status of blacks in the community.³⁰⁴ Underlying that idea was the recognition that the interaction of the races would provoke reassessment of previously held misconceptions. The *Runyon* court reasoned that the admission of black students would not hinder the schools from teaching the desirability of segregation,³⁰⁵ but that was not a wholly honest conclusion. In the wake of *Brown*, the Court must have understood that a racially integrated environment would subvert the successful transmission of the schools' message.³⁰⁶ Thus, the Court's formalistic argument that the schools were free to propound their message of segregation co-existed with a realization that the freedom was an empty one.³⁰⁷ Implicitly, the Court decided that the state's interest in regulating education superseded the private schools' rights of expressive association.

Liberal educational theory also undercuts Carpenter's argument, discussed in Part II, that *Runyon* is distinguishable from a case such as *Doe* where the school wishes to exclude a teacher rather than a student.³⁰⁸ Carpenter contends that a teacher who expresses values opposed to those of the school would subvert the school's expression, but a dissenting student poses no threat to the school's ability to carry out its expressive agenda.³⁰⁹ This analysis rests on a false distinction between teacher-senders and student-recipients. The liberal theory of education contradicts the idea of communication as going one way in the classroom, from teacher to student.³¹⁰ The classroom that represents a marketplace of ideas operates through the bartering of ideas from which truth will be discovered.³¹¹

302. *Supra* notes 67-68 and accompanying text.

303. *See* Freire, *supra* note 282, at 72-74. Freire discusses the dynamics of "banking" as opposed to the humanist concept of education in the context of adult literacy programs in the Third World. *See* Richard Shaull, *Foreword* to Freire, *supra* note 282, at 29.

304. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

305. *See supra* note 89 and accompanying text.

306. *See* Hirschhoff, *supra* note 82, at 751.

307. *See id.*

308. *See supra* Part II.A.

309. *See supra* notes 193-95, 198 and accompanying text.

310. *See supra* note 282.

311. *See* Freire, *supra* note 282, at 77. The above discussion of the teacher-student dynamic in a liberal education system is based on normative premises, not necessarily actual practice. As one commentator has pointed out, a "respected and progressive"

Experience demonstrates that the expression of students may be perceived as impinging on the message of the school, while the expression of teachers may not. For example, in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*,³¹² a private Catholic university refused to give two gay and lesbian student organizations official recognition because it did not wish to be perceived as approving the positions taken by the organizations on a variety of issues.³¹³ The District of Columbia Circuit Court of Appeals held that free speech and free exercise, guaranteed by the First Amendment, prohibited the state from compelling the university to endorse views repugnant to its own beliefs.³¹⁴ In contrast, in *Shelton v. Tucker*,³¹⁵ the Supreme Court held that most associational affiliations of teachers outside the school had no bearing on their fitness to teach,³¹⁶ despite the fact that a teacher's role in "shap[ing] the attitude of young minds" makes the classroom a particularly "sensitive" place.³¹⁷

One way, then, to understand the different outcomes in *Runyon* and *Dale* is the special value the Court has placed on the role of liberal education in our society. Simply stated, *Runyon* involved the state's interest in liberal education and *Dale* did not. The state has a compelling interest in its schools, both public and private, to prepare young citizens for civic participation.³¹⁸ The Boy Scouts also instills values in the young, but the state has a lesser interest in regulating its activity because it does not rely on the Boy Scouts to prepare the young for citizenship. School attendance is compulsory; participation in the Boy Scouts is not. The work of schools lies at the core of a state's interest in education; the activity of the Boy Scouts is peripheral.

The fact that the hypothetical Baden-Powell is a secular school further supports the argument that state anti-discrimination laws should prevail over the school's right of free association. The Court

school system may in fact promote "conformity, anti-intellectualism, passivity, alienation, classism, and hierarchy." Sherry, *supra* note 279, at 173 (quoting Stephen Arons, *Compelling Belief: The Culture of American Schooling* 78 (1983)).

312. 536 A.2d 1 (D.C. Cir. 1987).

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

314. *See id.* at 25. The court also ruled, however, that the Free Exercise Clause did not immunize the university from compliance with the state's anti-discrimination statute with regard to the provision of tangible benefits to the gay and lesbian organizations. Here, the burden imposed on the university's free religious exercise was outweighed by the District of Columbia's compelling interest in fighting sexual orientation discrimination. Hence, the university was obligated to make its facilities and services available to the gay and lesbian organizations on the same basis as to student organizations whose views it did approve. *See id.* at 39.

315. 364 U.S. 479 (1960).

316. *See id.* at 488.

317. *Id.* at 485.

318. *See supra* notes 279-80 and accompanying text.

has consistently distinguished between secular and sectarian claims for constitutional exemption from state regulation of education.³¹⁹ In *Wisconsin v. Yoder*, the Court stated that “[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations.”³²⁰ Where, however, parental interests in directing children’s religious education are reinforced by a free exercise claim, the state’s interest must give way before the free exercise prerogative of the First Amendment.³²¹ This distinction acknowledges that the liberal model of education, inclusive as it strives to be, is necessarily opposed to the religious model, which liberal theorists portray as valuing orthodoxy and discouraging the questioning of revealed truths.³²² The difference between humanistic and religious ideals of education, then, is not “between a closed environment and an open one, but between environments that are differently closed.”³²³ Thus, the Court honors the religion clauses of the First Amendment by creating exemptions from certain state regulations when religious convictions are opposed to state doctrine. These narrow exemptions for religious exercise imply, however, that the expressive association claim of a private school grounded in purely secular principles—for example, a belief that homosexuality is illegitimate—is entitled to less weight in the compelling state interests balancing test than an identical claim grounded in deeply held religious convictions.³²⁴

319. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215, 233 (1972).

320. *Id.* at 215.

321. See *id.* at 233. The Court has emphasized that this is a very limited exemption from generally applicable state regulations that are not directed at religious practices but may have an incidental effect on them. Unless a free exercise claim is connected with expression or parental rights, the First Amendment does not shield individuals from having to obey such laws. See *Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990) (citing cases); cf. Dwyer, *supra* note 215, at 1378 (observing that judicial treatment of constitutional rights where parental interests are concerned departs from well-settled principles of constitutional and common law).

322. See Fish, *supra* note 281, at 885; see also Sherry, *supra* note 279, at 174 (stating that “[t]hose who believe that truth lies in faith . . . find an education in critical thought offensive to their basic belief systems”).

323. See Fish, *supra* note 281, at 886.

324. The Court explained, however, that the combination of free association and free exercise rights may be limited “if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” *Yoder*, 406 U.S. at 234. The Court referred to its decision in *Prince v. Massachusetts*, where the due process right of a nine-year old child’s guardian, and the free exercise right of the child, to have the child sell Jehovah’s Witnesses magazines on the street, were subject to the state child labor law. See 321 U.S. 158 (1944). The *Yoder* Court took care to emphasize that courts must proceed carefully when “weighing a State’s legitimate social concern [against] religious claims for exemption from generally applicable education requirements.” *Yoder*, 406 U.S. at 235. Even when a free exercise claim reinforces a free association claim, therefore, parents’ rights may be superseded by a state’s compelling interests.

Dale supporters have argued that the Court's decision reinforces the case for parental educational authority because parents "speak" to their children through the expressive association of the school. The paradigm of combative speakers set up in *Dale*,³²⁵ however, drowns out the child's voice. Yet, it is the child who has the most at stake in the educational process.³²⁶ The concept of parents as trustees, which focuses on the child's interests rather than those of the parents and the state, would yield a more fruitful, and more just, consideration of who gets to "create and contest social meaning"³²⁷ in our schools.

CONCLUSION

The *Dale* dissenters remind us that states are laboratories of economic and social change.³²⁸ State and local laws laid the groundwork for the enactment of federal statutes in successive civil rights movements, first to secure equal opportunity for racial minorities, then to gain access to social and economic advancement for women.³²⁹

The gay rights movement wishes to expand the market model of civil rights legislation, seeking full participation for homosexuals in the social and political life of the nation.³³⁰ States are again leading the way in this latest civil rights movement, and it is clear that the battleground will move from public commercial space to private non-profit spheres.

Future litigation involving the expressive association rights of private schools will lead us to examine a question of vital concern for our society: Who will have a say in the shaping of tomorrow's citizens? This Note proposes that the state can raise two arguments to counter a private school's claim of a free association right to discriminate against homosexual teachers. First, the state has a compelling interest in ensuring equal employment opportunity, one that the Supreme Court has affirmed by upholding anti-discrimination laws against expressive association claims where economic interests have been at stake. Second, the state has an interest in educating the young for citizenship and civic participation, in particular by promoting access to

325. See *supra* Part I.C.4.

326. See, e.g., *Yoder*, 406 U.S. at 243-45 (Douglas, J., dissenting in part) (arguing that the Court should hear the views of the child where the views of the parent are the subject of a suit because "[i]t is the future of the student, not the future of the parents, that is imperiled by [the Court's] decision").

327. *Supra* note 162 and accompanying text.

328. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting).

329. See Hunter, *supra* note 18, at 1617-24 (outlining the history of the civil rights movements); see also Legislative History of Titles VII and XI, *supra* note 24, at 5 (noting that even before the Civil Rights Act was adopted in 1964, more than half the states had enacted equal employment opportunity legislation).

330. See *supra* note 158 and accompanying text.

the classroom, which represents the marketplace of ideas. The state's compelling interests in employment and education should prevail over the private school's freedom to exclude.