# Antidiscrimination Laws and the First Amendment *

by David E. Bernstein

The Supreme Court's decision last term in *Boy Scouts of America v. Dale*[1] holding that the Boy Scouts had a First Amendment right to exclude a gay adult scoutmaster is one of the most significant, and positive, recent developments in civil liberties jurisprudence. To understand why, consider the dilemma facing Sister Maria Hernandez, principal of St. Helen's Catholic High School for Girls.

Overall, Sister Hernandez's (fictional) school, located in a run-down area of Los Angeles, is doing extremely well. Sister Hernandez and the rest of the staff of St. Helen's are proud of the difference the school makes in the lives of its students. 90% of the students at St. Helen's are from families with incomes below the poverty line, and most are from neighborhoods where teenage pregnancy is rampant. Tuition is low, 90% of St. Helen's students go on to college, and only two students out of hundreds enrolled at St. Helen's have become pregnant over the last decade.

Sister Hernandez's problem is that Mary Smith, an unmarried tenth-grade English teacher, revealed her pregnancy to Sister Hernandez this morning. Ms. Smith told Sister Hernandez that the father was "out of the picture." Not surprisingly, Sister Hernandez expressed great concern about the effect Ms. Smith's pregnancy would have on the school's religious message of abstaining from sex until marriage, and on its practical message of personal responsibility, which, the school

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[1] 120 S. Ct. 2246 (2000).

* Michael Abramowicz, Neal Devins, and Eugene Volokh provided helpful comments. The author benefited from discussions of *Dale* and related issues on the ConLawProf listserv, and from lengthy discussions on conflicts between antidiscrimination laws and civil liberties with Richard Epstein and Andy Koppelman. James Winn and Nathan Oman provided outstanding research assistance.

The author advised Gays and Lesbians for Individual Liberty on GLIL's amicus brief in *Dale*.

teaches, includes not getting pregnant without the expectation of emotional support and financial assistance from a responsible father. Sister Hernandez reminded Ms. Smith that Ms. Smith agreed to abide by Catholic teachings and serve as a role model for students when she took the job three years ago. Sister Hernandez expressed sympathy for Ms. Smith's situation, but asked her to resign quietly for the sake of the school and its students.

Ms. Smith refused, and added that an attorney advised her that St. Helen's would be liable for both sex discrimination and pregnancy discrimination if it fired her. She offered to resign in exchange for $100,000, one-tenth of St. Helen's's annual budget. "I need the money for my child," she explained.

If this scenario had arisen from the 1970s until June of 2000, the school's attorney would likely have advised Sister Hernandez to either retain Ms. Smith or negotiate a settlement. Courts often were extremely reluctant to find that enforcement of antidiscrimination laws conflicted with First Amendment rights, so they interpreted the relevant facts to avoid any such conflict.[2] Moreover, courts generally held that even if First Amendment rights were infringed by antidiscrimination laws, the government had a compelling interest in eradicating discrimination sufficient to trump enforcement of those rights. Precedent thus suggested that St. Helen's's (and its faculty's, parents', and students') rights to freedom of speech,[3] freedom of expressive of

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[2] *Cf*. David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 Sup. Ct. Rev. 203, 243.

[3] Free speech rights are potentially implicated because having a pregnant, unmarried woman on the faculty may send a message to the public that the school does not wish to convey. *Cf*. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995) (holding that parade organizers could not be compelled to allow a group with a message not endorsed by the organizers to march in their parade; the court did not clearly state whether this was a free speech right or an expressive association right).

association,[4] and free exercise of religion[5] would all have had to yield to antidiscrimination law.[6]

When conflicts between antidiscrimination laws and First Amendment rights first arose in the 1970s, courts refused to acknowledge that antidiscrimination laws sometimes trespassed on constitutional rights.[7] Courts instead relied on Supreme Court dicta to the effect that invidious private discrimination is not accorded affirmative constitutional protection even when constitutional rights appear to be at issue.[8]

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[4] Expressive association rights are potentially implicated because having Ms. Smith on the faculty may interfere with the ability of the schools' students and faculty to associate for the purposes of learning and promoting Catholic values, and of learning and promoting the school's view view of what constitutes personal responsibility. *Cf.* Pines v. W.R. Tomson, 206 Cal. Rptr. 866 (Cal. Ct. App. 1984) (holding that restricting listings in the "Christian Yellow Pages" implicated the right to expressive association, but upholding a ban on the practice anyway).

[5] Free exercise rights are potentially implicated because being forced to retain Ms. Smith may interfere with the school's ability to fulfill its religious missions, and with the parents' and students' rights to arrange an education in an appropriate religious environment. *Cf*. Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission, 766 F.2d 932 (6th Cir) (holding that state interference with a Christian school's ability to make employment decisions on religious grounds violated the free exercise clause), *vacated on ripeness grounds*, 477 U.S. 619 (1986).

Ministerial employment decisions are constitutionally exempt from scrutiny excessive entanglement of religion under the establishment clause. However, courts have defined the ministerial role narrowly, and have explicitly excluded lay teachers at Catholic schools from that definition. *See* Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324, 331 (3d Cir. 1993); DeMarco v. Holy Cross High School, 4 F.3d 166, 172-73 (2d Cir. 1993).

[6] *See infra*. As we shall see, Sister Hernandez would be in especially big trouble if in the past she had counseled, rather than fired, other members of the staff who had violated Catholic doctrine in less visible ways. *See infra* note 15.

[7] *E.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (implausibly denying that forcing a segregationist school to integrate would have any impact on the school's ability to propound its pro-segregation message); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977) (evading a conflict between a school's claimed religious belief in segregation and the free exercise clause by denying that the school's segregationist views were based in religious doctrine).

[8] Hishon v. King & Spalding, 467 U.S. 69, 78 (1984); Runyon v. McCrary, 427 U.S. 160 (1976); Norwood v. Harrison, 413 U.S. 455, 470 (1973). Some courts continued to ignore obvious constitutional conflicts with antidiscrimination laws through the 1990s. *See, e.g.*, Wisconsin ex. rel. Sprague v. City of Madison, 1996 Wisc. App. Lexis 1205 (Wis. Ct. App. 1996) (denying that an ordinance forcing housemates to rent a room in their house to a lesbian implicated any First Amendment right, despite clear implication of the right of intimate association).

The Supreme Court finally acknowledged in the 1980s that antidiscrimination laws could potentially impinge on First Amendment rights.[9] Instead of enforcing those rights, however, the Court either denied that the First Amendment was implicated in any particular case,[10] or applied a toothless "compelling interest" test that in effect exempted antidiscrimination laws from the strictures of the First Amendment.[11]

Lower courts seized and expanded upon these decisions to the point where antidiscrimination laws gradually became a significant menace to freedom of speech, freedom of expressive association, and religious freedom. For example, courts held that an injunction creating a prior restraint on speech was appropriate in a hostile environment case;[12] that a Black separatist organization could be compelled to admit whites to its meetings;[13] and that the government could force a Catholic university to fund student organizations that engaged in political and social

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[9] Roberts v. United States Jaycees, 468 U.S. 609 (1984) (acknowledging potential conflict between right of expressive association and public accommodations law); Bob Jones University v. United States, 461 U.S. 574 (1983) (assuming arguendo that the IRS impinged on a religious organization's free exercise rights when it denied the organization tax-exempt status because of the organization's religiously-based policy against interracial dating).

[10] *E.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (arguing unpersuasively that forcing an organization dedicated to promoting the interests of young men to admit women would not affect the organization's expressive association rights).

[11] *See* Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (denying in both cases that First Amendment rights were impinged, but adding that if they were impinged, the impingement was justified by the government's compelling interest in eradicating discrimination); *see generally* Bob Jones University v. United States, 461 U.S. 574 (1983) (assuming *arguendo* that free exercise rights were violated by the government, but ruling against the university because of the government's compelling interest in eradicating discrimination in private education against African-Americans).

[12] Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991). For other examples of free speech rights yielding to antidiscrimination laws, see *infra*.

[13] Southgate v.United African Movement, 1997 WL 1051933 (N.Y.C. Com. Hum. Rts. June 30). For other examples, of expressive association rights yielding to antidiscrimination laws, see *infra*.

advocacy contrary to Catholic doctrine.[14]

Private religious schools like our fictional St. Helen's found their rights in jeopardy. For example, three federal district court precedents almost directly on point—one of which was decided just two years ago—vindicated Ms. Smith's position that a Christian school may not fire an unmarried teacher for becoming pregnant.[15]

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[14] Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C. 1987). For other examples of free exercise rights yielding to antidiscrimination laws, see *infra*.

[15] One case involved a librarian at a fundamentalist religious school who was allegedly fired for giving birth out of wedlock. Vigars v. Valley Christian Center, 805 F. Supp. 802 (N.D. Cal. 1992). The court held that the librarian's status as a role model for students did not make obedience to church doctrine regarding sex a bona fide occupational qualification, and that the school had no viable First Amendment defense to the librarian's discrimination claim.

In the second case, Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980), an English teacher at a Catholic school sued the school for sex discrimination after being fired for becoming pregnant out of wedlock. The court denied the school's motion for summary judgment, holding that if the school dismissed the teacher specifically because of her pregnancy, as opposed to a more general concern about violating the school's moral code, it would be liable for sex discrimination regardless of constitutional considerations.

The third and most recent case, also involving an unmarried teacher fired by a Christian school, held plainly that "[r]estrictions on pregnancy are not permitted because they are gender discriminatory by definition." Ganzy v. Allen Christian School, 995 F. Supp. 340, 348 (E.D.N.Y. 1998). The court denied the school's summary judgment motion, and instead sent the case to the jury to decide whether the teacher's dismissal was based on fornication—in which case the school would not be liable for sex discrimination because both men and women can engage in that particular sin—or if the dismissal was illicitly based on the teacher's pregnancy. The court repudiated the school's constitutional defenses. *Id*.; *but cf.* Lewis ex. rel. Murphy v. Buchanan, 1979 WL 29147 (D. Minn.) (holding that a Catholic school had a constitutional right to refuse employment to a gay music teacher since the decision was based on the school pastor's sincerely-held religious beliefs).

Precedents are divided on the related issue of whether a religious school may lawfully fire a married pregnant teacher who wishes to keep teaching in contravention of the school's religiously-based view that mothers with young children should not work outside the home. *Compare* Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission, 766 F.2d 932 (6th Cir.) (reversing the district court and holding, over a dissent, that a church school had a constitutional right to do so), *vacated on ripeness grounds*, 477 U.S. 619 (1986), *with* McLeod v. Providence Christian School, 408 N.W.2d 146, 152 (Mich. 1987) (concluding that any such right was overridden by the government's compelling interest in eradicating discrimination.). *Dayton Christian Schools* has been roundly criticized. *See, e.g.,* Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. Davis L. Rev. 785, 799 (1999) ("Surely a state antibias agency could today show a compelling interest in the continuing employability of highly competent pregnant teachers, however strongly the school might believe a mother's place was in the home. . . . Only a failure to assess properly the powerful government interests would lead a court to reject the claims of a latter day Linda Hoskinson."). In fact, Ms. Hoskinson intentionally chose to work in a conservative Christian environment, rather than in a public school or secular private school. Having gained the benefits of working in this environment, she chose to litigate when the religious rules of the school worked to her disadvantage. Why this presents such an obviously compelling case for the government to override the rights of the school and its parents is never explained by Professor O'Neil.

Thus, until recently, the landscape looked bleak for organizations such as St. Helen's seeking to assert First Amendment defenses to discrimination lawsuits. Fortunately for Sister Hernandez, precedent has recently swung dramatically.[16] Most important, on the last day of its October 1999 term the Supreme Court ruled in *Boy Scouts of America v. Dale*[17] that the Boy Scouts of America ("BSA") had a First Amendment right to defy a New Jersey public accommodations law and refuse to hire a openly gay man as an assistant scout leader. The majority held that forcing the BSA to hire *Dale* would violate the BSA's First Amendment right to expressive association because Dale's presence in the BSA would impinge on the BSA's ability to convey its belief that homosexual activity is immoral.

The media has treated *Dale* mainly as a battle in the ongoing *Kulturkampf* between gay rights activists and their conservative opponents.[18] However, the underlying moral rectitude of the BSA's exclusion of homosexuals was not legally relevant in *Dale*. Rather, *Dale* was about the

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[16] A key turning point came in 1995, when the Supreme Court unanimously held in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), that Massachusetts could not lawfully force the organizers of a St. Patrick's Day parade to allow a gay rights group to march under its banner. The question that remained was whether *Hurley* was an anomalous opinion restricted to its facts, or whether it represented a new determination on the part of the Court to protect the First Amendment, even at the expense of the enforcement of antidiscrimination laws. *See* Darren Lenard Hutchinson, *Accommodating Outness*: Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 90 (1998) (noting that language in *Hurley* "raise[d] the question whether *Hurley* indicates that the Court might disturb the *Roberts* doctrine if presented with the opportunity"); Kristine M. Zaleskas, *Pride, Prejudice or Political Correctness? An Analysis of* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 29 COLUM. J.L. & SOC. PROBS. 507, 547 (1996) ("In *Hurley*, the Court leaves as an open question the status of the *Roberts v. United States Jaycees* line of cases.").

[17] 120 S. Ct. 2246 (2000).

[18] *E.g.*, Editorial, *A Triumph for Homophobia*, ST. LOUIS POST-DISPATCH, June 29, 2000, at B6 ("The United States Supreme Court has endorsed a policy of discrimination and hypocrisy"); *Scouts Can Bar Gays, Court Rules*, SAN FRANCISCO EXAMINER, June 29, 2000, at A1 ("A deeply divided Supreme Court dealt a setback to the gay rights movement yesterday"); *Setback for Gay Movement as Court Rules Against Sacked Scoutmaster*, THE INDEPENDENT, June 29, 2000 ("The gay movement in the United States suffered a setback yesterday"). For a welcome, albeit somewhat misleading, exception, see Kate Zernicke, *Scouts' Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1 ("the ruling did not address the merits of the ban on gays, only whether the Boy Scouts is a private group, and so has the right to set its own membership rules").

right of non-profit, private expressive organizations of all ideological stripes—including church schools such as St. Helen's—to set their membership and employment rules free from government interference.[19]

More broadly, *Dale* has significantly reduced the threat antidiscrimination laws once posed to constitutionally-protected civil liberties. Although *Dale* was a 5-4 decision, with the conservative Justices in the majority, all nine Justices seemed to agree that First Amendment rights must be enforced even when the implementation of antidiscrimination laws is at stake. The majority and dissent disagreed over whether the BSA truly expressed an anti-homosexual activity message, and over whether forcing the BSA to hire a gay assistant scoutmaster would interfere with any anti-homosexual activity message the BSA was propounding. However, both sides agreed that the relevant issue was whether the New Jersey's public accommodations law, which required the BSA to hire an openly-gay scoutmaster, infringed on the BSA's First Amendment rights. If the law did so, the BSA would emerge victorious.

Despite lip service paid to precedents applying the compelling interest test to overcome First Amendment restrictions on antidiscrimination laws, neither side discussed whether the government has a compelling interest in eradicating discrimination against homosexuals. As noted above, in the 1980s the Court applied a special, languid compelling interest test to

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[19] Antidiscrimination activists sometimes seem to lose sight of the fact that civil liberties protections that at times harm one group often benefit that group at another time. For example, at the same time gay rights organizations were fighting to force the organizers of Boston's St. Patrick's Day Parade to allow a gay organization to march under its own banner, see *Hurley v. Irish-American Gay, Lesbian and Bisexual Group,* 515 U.S. 557 (1995)., a California judge denied a petition by an anti-gay organization calling itself "Normal People" to march in San Diego's annual gay pride parade. K. L. Billingsley, *Judge Bars Opposition from Gay Parade*, WASH. TIMES, July 16, 1994.

In *Dale* itself, an organization called Gays and Lesbians for Individual Liberty, informally assisted by the author of this article, filed a brief detailing how homosexuals had suffered from lack of robust protection of the right of association, and how they benefited when the right of association was protected more vigorously.

antidiscrimination laws when First Amendment defenses were raised.[20] *Dale*, by contrast, suggests the Court has reached a consensus that defendants charged with violating antidiscrimination laws are generally entitled to the same full First Amendment protection as defendants charged with violating other important laws.[21] Antidiscrimination laws, then, have been constitutionally normalized.

Part I of this Article discusses the development of Supreme Court doctrine regarding First Amendment challenges to the enforcement of antidiscrimination laws. The Court was initially reluctant to acknowledge that actions that violate antidiscrimination laws sometimes implicate First Amendment rights. When the Court confronted cases that squarely presented valid First Amendment defenses to antidiscrimination laws, it applied a flimsy compelling interest test that shielded antidiscrimination laws from normal First Amendment scrutiny. This neglect of core civil liberties resulted from confused free exercise doctrine, misinterpretation of prior precedents, and a willful decision by Justice William Brennan to privilege antidiscrimination laws over civil liberties.

Part II of this Article discusses attempted justifications by courts and academics for applying the toothless compelling interest test in conflicts between the First Amendment and antidiscrimination laws. Rationales have ranged from Congress' purported intent to eradicate

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[20] The Court held without coherent explanation that enforcement of state laws banning discrimination is a sufficiently compelling interest to trump constitutional defenses to enforcement of that law, even when the discrimination at issue is not banned by federal law, and even when the effect on the protected class would be negligible. *See infra*.

[21] However, the four dissenters would still apparently give antidiscrimination laws a bit of what looks like special treatment. Justice Stevens, writing for the four, argued that in expressive association cases, courts should not take defendants' purported beliefs at face value, but should investigate whether these beliefs are merely a cover for status-based discrimination. The only rationale they gave for this distinction was the potential negative effect on antidiscrimination laws of adopting the contrary position. *See infra*.

discrimination by passing Title VII of the 1964 Civil Rights Act to the anti-caste attributes of the Reconstruction Amendments. As discussed in Part II, all of these arguments fail.

Part II also examines the threat reliance on the compelling interest test posed to the rights of speech, expressive association, and free exercise of religion. Lower courts reasonably interpreted Supreme Court precedents as holding that unless First Amendment freedoms were targeted directly and specifically, antidiscrimination laws—promulgated at any level of government, and protecting any group—are exempt from normal constitutional limitations.

*Dale*, discussed in detail in Part III, reversed this trend. The Court affirmed what should be obvious under our constitutional system: that free speech and associated rights protected by the First Amendment trump statutory antidiscrimination provisions. As Part IV of this Article explains, *Dale's* holding signals a new willingness by the Court to take the First Amendment seriously when antidiscrimionation laws are at stake. However, *Dale* applies directly only to non-profit, primarily expressive associations. Religious associations will especially benefit from *Dale. Dale* will ensure that their ability to convey their values will not be undermined by people who fail to abide by relevant religious teachings, but try to force themselves on the religious associations via antidiscrimination laws. *Dale* should also end the worrisome spectacle of courts and agencies neglecting freedom of speech on behalf of antidiscrimination laws.

## I. THE SUPREME COURT, ANTIDISCRIMINATION LAWS, AND THE FIRST AMENDMENT THROUGH THE 1980S

Cases involving conflicts between antidiscrimination laws and the First Amendment did not arise until many years after passage of the landmark 1964 Civil Rights Act.[22] Few defendants

[22] Had a case pitting the First Amendment rights of a private, non-commercial association against an antidiscrimination law arisen during the Warren Court era, the result would have been unpredictable. In the 1960s, even the most liberal jurists agreed that members of private clubs had a constitutional right to choose their

in antidiscrimination cases brought in the 1960s and 1970s claimed that their First Amendment rights were violated, and the Supreme Court made it clear that discrimination, as such, was entitled to no constitutional protection.[23]

Beginning in the late 1970s, however, courts increasingly began to confront constitutional defenses to antidiscrimination laws. The courts' (including the Supreme Court's) initial instinct was to evade the relevant issues and uphold the laws by finding that the First Amendment's protection of freedom of expression did not conflict with antidiscrimination law in any given case.

Such evasion was not necessary when free exercise defenses to antidiscirmination laws were raised, however. Under then-current doctrine courts needed to apply only a watered-down version of the compelling interest test, and could then in good conscience uphold enforcement of the antidiscrimination law at issue. Thus, in 1983 in *Bob Jones University v. United States*[24] the Supreme Court held that free exercise rights could be overcome by the government's interest in eradicating racial discrimination in education.

The courts' willful evasion of freedom of expression issues and the compelling interest precedents from free exercise cases coalesced in 1984 in *Roberts v. United States Jaycees*, perhaps the most anti-First Amendment opinion ever written by Justice William Brennan. Brennan relied on highly-dubious reasoning to find that expressive association rights were not infringed

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members without government interference. Justice Arthur Goldberg, for example, wrote: "Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person . . . solely on the basis of personal prejudice." Bell v. State, 378 U.S. 226, 312-13 (1964) (Goldberg, J., concurring). On the other hand, antidiscrimination advocates lost very few cases before the Warren Court, and when interpreting Title II of the 1964 Civil Rights Act the Court consistently held that seemingly private clubs were public accommodations. Perhaps Justice Goldberg had in mind only "freedom of intimate association."

[23] *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 78 (1984); Norwood v. Harrison, 413 U.S. 455, 470 (1973).

[24] 461 U.S. 574 (1983).

upon in *Roberts*, and also held that even if such infringement occurred it was justified by the government's compelling interests. *Roberts* quickly became the leading precedent in cases where constitutional defenses were asserted to the enforcement of antidiscrimination laws.

A. Runyon v. McCrary: *Sidestepping the Issue*

In *Runyon v. McCrary*,[25] the Supreme Court rejected a freedom of association defense to an antidiscrimination claim against a private school. The Court explained that while invidious private discrimination may be characterized as an exercise of freedom of association, it is not accorded affirmative constitutional protection. Applying an antidiscrimination statute to prohibit private, nonsectarian schools from denying admission to African-American students would not violate right of free association "'where there is no showing that discontinuance of (the) discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.'"[26] In the absence of a valid First Amendment claim, "the Constitution . . . places no value on discrimination," and "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections."[27]

The Court failed to explain how forcing a segregationist school to admit African-American children would not impair the school's ability to teach that segregation was good, but the Court did not have to. The main issue in the case was whether the Civil Rights Act of 1866 applied to private school segregation. Freedom of association was a side issue, and none of the briefs supporting the schools' position argued that the schools' ability to promote segregation would be

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[25] 427 U.S. 160 (1976).

[26] *Runyon*, 427 U.S. at 176, quoting McCrary v. Runyon, 515 F.2d 1087 (4th Cir. 1975).

[27] *Runyon*, 427 U.S. at 176, quoting *Norwood*, 413 U.S. at 469–70.

compromised.[28] There was no evidence on the record, and no argument was made in the briefs, that compelled integration would interfere with any person's right of expressive association.

Thus, the Court was able to find for the African-American plaintiffs while sidestepping the troubling First Amendment issues raised by the case. However, the Court did not clearly state that it found no conflict in this particular case between expressive rights and the law in question. As a result of this omission some readers, including the Court itself in *Roberts v. United States Jaycees*[29] eight years later, interpreted *Runyon* as holding that antidiscrimination laws trump the right to expressive association.[30]

B. *The Free Exercise Cases*

As the scope and enforcement of antidiscrimination laws expanded, the potential for conflict between such laws and First Amendment rights expanded as well. This was especially true in the free exercise context. In *Sherbert v. Verner*,[31] the Court held that generally applicable laws that interfere with the free exercise of religion, even indirectly, must pass the compelling interest test.[32]

The compelling interest test had become well-established during the Warren Court era,[33]

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[28] The author of this article read each of the relevant briefs.

[29] 468 U.S. 609 (1984).

[30] *See infra*.

[31] 374 U.S. 398 (1963).

[32] *Id.* at 406–08.

[33] Many scholars trace the origins of the compelling interest test to *Korematsu v. United States*, 323 U.S. 214, 215 (1944). In the course of upholding the constitutionality of the internment of Japanese-Americans during World War II, the Court wrote that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to *the most rigid scrutiny*." *Id*. at 215. The Court gradually applied this "strict scrutiny" test to all fundamental rights protected by the Constitution; the government could invade these rights

when the Court used it to expand constitutional rights at the expense of the state.[34] Gerald Gunther described the scrutiny laws given to laws under the compelling interest test as "strict in theory but fatal in fact."[35]

However, the Court rarely applied "true" strict scrutiny in free exercise cases involving generally-applicable laws. As Eugene Volokh explains, "[b]oth the strict scrutiny test's literal terms and the case law that has emerged under it in religious freedom cases are so vague that they don't meaningfully constrain a judge's range of options."[36] In fact, the vast majority of "neutral" laws were upheld against free exercise challenges.

*Sherbert* forced courts to confront conflicts between antidiscrimination laws and the First Amendment. But because of the weakness of the compelling interest test in the free exercise context and judicial solicitude for antidiscrimination claims during the Burger years, parties claiming a free exercise exemption from antidiscrimination laws generally were unsuccessful. Courts, including the Supreme Court, consistently held that the state's compelling interest in eradicating discrimination outweighed any claimed free exercise right.

The Fifth Circuit opinion in *EEOC v. Mississippi College*[37] was the first to declare, albeit in dictum, that the government's compelling interest in enforcing an antidiscrimination law

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only if it had a compelling interest in doing so, and used the least restrictive means in achieving its objectives.

[34] *E.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Sweezy v. New Hampshire, 354 U.S. 23, 265 (1957) (Frankfurter, J., concurring).

[35] Gerald Gunther, *The Supreme Court, 1971 Term--Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[36] Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1494 (1999).

[37] 626 F.2d 477 (5th Cir. 1980).

overcomes free exercise protections.[38] The Ninth Circuit followed *Mississippi College's* dictum two years later in *EEOC v. Pacific Press Publishing Association*.[39]

A conflict between free exercise rights and antidiscrimination law reached the Supreme Court in *Bob Jones University v. United States*.[40] The Internal Revenue Service denied Bob Jones University, a private Christian school, tax-exempt status because it defied public policy by banning interracial dating. The university argued that its policy was based on a sincere belief that miscegenation violates Christian doctrine. The IRS decision, the school argued, therefore violated its free exercise rights. The Court found in favor of the IRS, holding that Bob Jones' free exercise rights could be overcome by the government's "fundamental, overriding interest in eradicating racial discrimination in education."[41]

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[38] *Id*. at 489.

[39] 676 F.2d 1272 (9th Cir. 1982). Pacific Press, a church-affiliated publisher, had firing an employee who violated church teachings by complaining to outside authorities about sex discrimination. The court acknowledged that disciplining Pacific Press for this action burdened the Press's free exercise of religion. The court concluded, however, that the government's compelling interest in eradicating discrimination justified the burden. *Id.* at 1279–80; *accord* Pines v. W.R. Tomson, 206 Cal. Rptr. 866 (Cal. Ct. App. 1984) (finding that restricting listings in "Christian Yellow Pages" to Christians was illegal, and, although the law in question violated the right to expressive association, that violation was justified by the government's compelling interest in eradicating discrimination based on religious affiliation).

[40] 461 U.S. 574 (1983).

[41] *Id.* at 604. The Court also noted that denial of tax benefits for forbidding interracial dating was less restrictive than prohibiting Bob Jones from enforcing its policy. The Court wrote that "[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets." *Bob Jones University*, 461 U.S. at 603-04.

For commentary and criticism, see RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 249-51 (1993); BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION 245 (1997); Robert M. Cover, *Foreword: The Supreme Court: Nomos and Narrative*, 97 HARV. L. REV. 4, 62-67 (1983); Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1358, 1365-66 (1983); Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy*: Bob Jones University v. United States, 1983 SUP. CT. REV. 1; Dee-Ana Bardette & Nancy Parker, Bob Jones University v. United States: *Paying the Price of Prejudice - Loss of Tax-Exempt Status*, 35 MERCER L. REV. 937 (1984); Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 275 (1982); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

Freed and Polsby commented, "No one will deny that the governmental interest in eradicating racial

The Supreme Court overruled *Sherbert v. Verner* in 1990, holding that the Free Exercise Clause is not usually implicated by general laws that happen to impinge on religious practice.[42] In the meantime, precedents from free exercise cases applying a feeble compelling interest test spilled over into other First Amendment areas, threatening to weaken freedom of speech and freedom of expressive association. The key case in this regard, *Roberts v. United States Jaycees*,[43] involved expressive association and was decided just a year after *Bob Jones*.

C. Roberts *and the Expressive Association Cases*

In the 1950s, the Supreme Court announced that freedom to associate in an expressive organization was a fundamental right protected by the First Amendment's guarantees of freedom of speech, religion, assembly, and petition.[44] As *Roberts* illustrates, however, the Burger Court was distinctly uninterested in protecting the right of expressive association when it interfered with the enforcement of antidiscrimination laws.

The United States Jaycees is a leadership and networking organization for young business leaders.[45] Until the mid-1980s, the Jaycees accepted only men as members, but admitted women

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discrimination in education, as elsewhere in life, is compelling; but that does not tell us why it take precedence over every other constitutional and social value." Freed & Polsby, *supra*, at 23.

[42] Employment Division v. Smith, 494 U.S. 872 (1990).

[43] 468 U.S. 609 (1984).

[44] The most prominent case in this was NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), a case in which the Court quashed Alabama's attempt to subpoena the state NAACP's membership list. While *NAACP* is often seen as protecting a general right of freedom of association, the Court's focus was on the right to associate for expressive purposes. For example, the Court stated "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." *Id*. at 453. The Court added that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id*. at 460-61.

[45] *Id.* at 612-13.

as associate members.[46] Associate members could participate in Jaycees activities, but could not vote, run for office, or receive awards.[47] Two Minnesota chapters violated national rules and admitted women as full members. The state chapters claimed that the national organization's policy violated Minnesota's public accommodations law.[48]

The national Jaycees successfully defended its membership policy on constitutional grounds before the Eighth Circuit.[49] The court found that Minnesota's public accommodations law violated the Jaycees' members' First Amendment right to associate to achieve expressive ends. The court concluded that the Jaycees raison d'etre, assisting young men, would be altered by the compelled admission of women as voting members.[50] Moreover, national, state, and local chapters of the Jaycees (including the Minnesota chapter) took positions on a wide range of political issues, and by allowing women to vote "some change in the Jaycees' philosophical cast can reasonably be expected."[51]

Minnesota appealed to the Supreme Court, which reversed in *Roberts v. United States Jaycees*.[52] The main opinion, authored by Justice Brennan, was joined by four other Justices.

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[46] *Id*. at 613.

[47] *Id*.

[48] United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981).

[49] United States Jaycees v. McClure, 709 F.2d 1560 (8th Cir. 1983), *rev'd sub nom,* Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[50] *Id*. at 1570. The court stated: "It is natural to expect that an association containing both men and women will not be so single-minded about advancing men's interests as an association of men only." *Id*.

[51] *Id*. at 1571.

[52] 468 U.S. 609 (1984). For commentary on the case, see Neal E. Devins, *The Trouble with* Jaycees, 34 CATH. U. L. REV. 901, 913 (1985); Douglas O. Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82 MICH. L. REV. 1878, 1879 (1984); William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 69 (1986); Patricia E. Willard, Roberts v. United States Jaycees *and the*

Two Justices recused themselves, Justice O'Connor filed a concurring opinion, and Justice Rehnquist concurred without opinion.

Brennan acknowledged that the Court had "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[53] Brennan admitted that the Jaycees' central purpose was "promoting the interests of young men."[54] Brennan also conceded that political advocacy was a "not insubstantial part" of the Jaycees' activities.[55]

Nevertheless, Brennan found no evidence that the compelled acceptance of women as Jaycees would "change the content or impact of the organization's speech."[56] According to Brennan, admitting women required no change in the organization's central purpose—"promoting the interests of young men."[57] The law also did not prevent the Jaycees from denying membership based on ideological or philosophical differences.[58]

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*Affirmation of State Authority to Prohibit Sex Discrimination in Public Accommodations: Distinguishing "Private" Activity, the Exercise of Expressive Association, and the Practice of Discrimination*, 38 RUTGERS L. REV. 341, 345-56 (1986); Ann H. Jameson, Note, Roberts v. United States Jaycees: *Discriminatory Membership Policy of a National Organization Held Not Protected by First Amendment Freedom of Association,* 34 CATH. U. L. REV. 1055 (1985); Pamela Griffin, Note, *Exclusion and Access in Public Accommodations: First Amendment Limitations on State Law*, 16 PAC. L.J. 1047, 1047-48 (1985).

[53] *Roberts*, 468 U.S. at 622.

[54] *Id.* at 627.

[55] *Id.* at 626.

[56] *Roberts*, 468 U.S. at 627–28. In fact, Rotary International's amicus brief pointed to the "gender gap" in political views. Brief of Rotary International as Amicus Curiae, Roberts v. United States Jaycees.

[57] *Roberts*, 468 U.S. at 626.

[58] *Id*. at 627. Assumedly, for example, the Jaycees could deny membership to women who refused to promise that they would devote their energies to promoting the interests of young men.

The claim that admitting women would inherently change the Jaycees' message was not "supported by the record,"[59] according to Brennan, but instead relied "solely on unsupported generalizations about the relative interests and perspectives of men and women" which "may or may not have a statistical basis."[60] Brennan concluded that "[i]n the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content of the organization's speech."[61] Brennan added that "any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact women are not permitted to vote is attenuated at best."[62]

Skeptical commentators have argued that Brennan's assertion that forcing the Jaycees to admit women was unrelated to the suppression of ideas and would not hamper the organization's ability to express its views is "not believable";[63] his justification for this assertion is said to have been "woefully inadequate."[64] Neal Devins and Marc Linder submit that it is highly unlikely that an all-male electorate will have the same views on a variety of issues as a sex-integrated

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[59] *Id*.

[60] *Id*. at 628.

[61] *Id.*

[62] *Id*. at 627.

[63] George Kateb, *The Value of Association*, in AMY GUTMANN, ED., FREEDOM OF ASSOCIATION 75, 79 (1998).

[64] Devins, *supra* note 51, at 913.

Devins suggests that the Court could have avoided some of these problems by holding that the Jaycees had to admit women as members, but could still limit voting on public policy positions to the organization's male membership. Devins, *supra*, at 914.

electorate.[65] George Kateb points out that the Court's implicit claim that young women would use their membership to contribute to the permissible purpose of "promoting the interests of young men" is dubious, at best.[66] Arguably, the very purpose of requiring the Jaycees to admit young women is to persuade young men that their interests are indistinguishable from those of young women.[67]

In fact, Brennan may be technically correct that it is theoretically possible that an all-male organization that is forced to admit women as members will remain as devoted to the interests of young men as it was previously, that the women who join the group will have the same average political and social views as the men, and that women who choose to join the group would not necessarily try to change its mission. On the other hand, it seems likely (though perhaps unprovable) that admitting women would effect the Jaycees' mission and political program.[68] As Linder suggests, it would be absurd to argue that forcing the KKK to admit African-Americans would have no effect on the organization's philosophy.[69] One does not have to engage in stereotyping, Linder continues, to recognize that "[t]he impact on the expressive activities of the Jaycees resulting from the admission of women would be far less dramatic, but no less certain."[70]

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[65] *Id*.; Linder, *supra* note 51, at 1892.

[66] Kateb, *supra* note 62.

[67] *Id*.

[68] *See* NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS 194 (1998). One wonders how Brennan expected the Jaycees to police their new female members to ensure that they would perpetually vote for and act in the interests of young men at the same rate as their male members did.

[69] Linder, *supra* note 51, at 1892.

[70] *Id*. Moreover, Rosenblum points out that the impact of the Jaycees' political activity could depend on whether the organization was all-male or sex-integrated. For example, the impact of support for the Equal Rights Amendment by an all-male organization could very well be different than support from a sex-integrated organization. Rosenblum, *supra* note _, at 196.

Although Brennan's rationale for finding no conflict between the First Amendment and Minnesota's public accommodations laws seems unpersuasive, if the Court had limited its holding to that issue the case would have been limited to its facts and the damage to the First Amendment would have been minor. Instead Brennan emphasized that "even if enforcement of the Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes."[71] To the extent Minnesota's public accommodations law infringed on the Jaycees' right to freedom of association, it did so to advance compelling interests, i.e., *eliminating* gender discrimination and ensuring "equal access to publicly available goods and services."[72] Because compelling government interests were served, the Jaycees' right to expressive association was trumped.[73]

The Court analogized discriminatory practices to "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact."[74] Such activities "are entitled to no constitutional protection."[75] The Court cited *Runyon v. McCrary* for this position. As we have seen,[76] *Runyon* held that the First Amendment does not protect freedom of association in the absence of proof that the infringement on association will

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[71] *Jaycees*, 468 U.S. at 626.

[72] *Id.* at 624.

[73] "As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent." *Id*. at 625.

[74] *Id.* at 628.

[75] *Id.*; *cf.* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994) (rejecting a free exercise defense to a fair housing law and explaining that "[b]ecause Swanner's religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws.").

[76] *See supra*.

affect the relevant group's ability to communicate its message. The *Roberts* Court, however, interpreted *Runyon* as holding that discriminatory conduct is not protected by the First Amendment even when freedom of speech is impinged, so long as the infringement on expression is "incidental" to the law's regulation of discriminatory conduct, because discriminatory conduct is analogous to tortious or criminal misconduct.[77] The Court implicitly determined because of the particularly destructive nature of discriminatory conduct, a balancing test, rather than the traditional strict scrutiny test, should be applied to a First Amendment challenge to an antidiscrimination law that incidentally affects expression.[78]

Justice O'Connor's concurrence in *Roberts* acknowledged that "[p]rotection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[79] O'Connor nevertheless concurred because she found that the Jaycees were primarily a "nonexpressive," "commercial" association.[80] According to O'Connor, the Jaycees were therefore subject to regulation, even though they engaged in a "not insubstantial volume of [constitutionally] protected activities."[81]

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[77] *See* Marshall, *supra* note 51, (explaining that the *Roberts* Court held that when a right to discriminate is recognized, "the limits of that right will depend on the strength of the countervailing state interest").

[78] *See* Devins, *supra* note 51, at 915-17 (noting that had the Court applied a traditional strict scrutiny analysis, it would have discussed whether the Minnesota law was the least restrictive means of achieving the state's objectives). Professor Mari Matsuda, among others, would use the same reasoning to subject even laws that directly regulate speech that could have discriminatory implications to a balancing test. *See* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

[79] *Roberts*, 468 U.S. at 633 (O'Connor, J, concurring).

[80] *Id.* at 638-40.

[81] *Id.*

In *Board of Directors of Rotary International v. Rotary Club of Duarte*[82] the Court applied its *Roberts* analysis to uphold a California appellate court ruling that Rotary International ("RI") could not revoke the membership of a local Rotary club that had accepted two female members in violation of national Rotary policy. After analyzing the purposes and functions of Rotary clubs, the Court concluded that compelling RI to allow its clubs to admit women would not "affect in any significant way the existing members' ability to carry out their various purposes."[83] Indeed, the Court claimed that its ruling would help RI achieve its stated goals of providing humanitarian service and encouraging high ethical standards. The addition of women, the Court added, would also likely promote RI's stated goal of ensuring that Rotary clubs represented a cross-section of their communities.[84]

As in *Jaycees*, the Court found that the law would have been constitutional even if it did "work some slight infringement on Rotary members' right of expressive association." Public accommodations laws "plainly serv[e] compelling state interests of the highest order" and "the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services."[85]

In the final case of what turned out to be a public accommodations versus expressive

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[82] 481 U.S. 537 (1987). For commentary, see e.g., Marie A. Failinger, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma*, 49 U. PITT. L. REV. 143 (1987); Aviam Soifer, *Toward a Generalized Notion of the Right to Form or Join Associations: An Essay for Tom Emerson*, 38 CASE W. RES. L. REV. 641 (1988); Kimberly McGovern, Comment, Board of Directors of Rotary International v. Rotary Club of Duarte: *Prying Open the Doors of the All-Male Club*, 11 HARV. WOMEN'S L.J. 117, 138-39 (1988); Barbara A. Perry, Comment, *Like Father like Daughter: The Admission of Women into Formerly All Male "Private" Clubs: A Case Comment on* Board of Directors of Rotary International v. Rotary Club of Duarte, 23 NEW ENG. L. REV. 817 (1988-89).

[83] *Id*. at 548.

[84] *Id*. at 548-49.

[85] *Id.* at 549.

association trilogy, in 1988 the Supreme Court rejected a facial challenge to a New York City law banning discrimination in clubs that are not "distinctly private."[86] The Court noted, however, that "if a club seeks to exclude individuals who do not share the views that the club's members wish to promote" the law may not require association.[87]

## II. PROBLEMS WITH THE COMPELLING INTEREST TEST

As discussed in Part I, by the late 1980s the Supreme Court had signaled to lower courts that they should try to evade conflicts between antidiscrimination laws and the First Amendment, and, failing that, that they should apply a weak compelling interest test and uphold enforcement of the laws. As discussed in Section A, below, the Court failed to explain why the government has a compelling interest in eradicating discrimination sufficient to trump First Amendment rights. Nor have lower courts or academic commentators provided any persuasive justification for privileging antidiscrimination laws over the First Amendment.

Section B of Part II discusses the threat the compelling interest test posed to civil liberties. Lower courts consistently held that free exercise and expressive association defenses to antidiscrimination laws were trumped by the government's compelling interests. These precedents eventually seeped into cases involving pure expression, with courts holding that even the basic right to freedom of speech could not trump enforcement of antidiscrimination laws. However, the

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[86] State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

[87] *Id.* at 13. For commentary, see William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815 (1989); Marian L. Zobler, *When is a Private Club a Private Club: The Scope of the Rights of Private Clubs After* New York State Club Association v. City of New York, 55 BROOK. L. REV. 327, 344-45 (1989); Paula J. Finlay, Note, *Prying Open the Clubhouse Door: Defining the "Distinctly Private" Club After* New York State Club Association v. City of New York, 68 WASH. U. L.Q. 371, 375-76 (1990); Nancy G. Kornblum, Comment, *Redefining the Private Club:* New York State Club Associations, Inc. v. City of New York, 36 WASH U. J. URB. & CONTEMP. L. 249, 250 (1988); Julie A. Moegenburg, Comment, *Freedom of Association and the Private Club: The Installation of a "Threshold" Test to Legitimize Private Club Status in the Public Eye*, 72 MARQ. L. REV. 403, 404 (1989).

Supreme Court's 1995 decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*[88] suggested that the Court's romance with the compelling interest test was waning.

A. *The Unjustified, and Unjustifiable, Compelling Interest Test*

The fundamental problem with applying any version of the compelling interest test when antidiscrimination laws conflict with the First Amendment—much less the toothless version applied by the Supreme Court—is that the government does not have even a constitutionally *legitimate* interest in eradicating discriminatory attitudes, beliefs, expressions, or in eradicating associations formed for the purpose of propagating discriminatory attitudes, beliefs, expressions or associations.[89] The very purpose of the free speech protections of the First Amendment is to prevent the government from quashing the expression or promotion of certain ideas.[90]

Several courts and commentators have attempted to explain why the government has a compelling interest in eradicating discrimination sufficient to overcome First Amendment rights. This Section considers and rejects these explanations.

1. *The Argument from Congressional Intent*

The first few attempts to justify application of the compelling interest test to antidiscrimination laws occurred in cases involving infringement of the free exercise clause. According to the Fifth Circuit, "Congress manifested that interest in the enactment of Title VII and

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[88] 515 U.S. 557 (1995).

[89] The author thanks Bryan Wildenthal for this point.

[90] *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377, 391-92 (1992) (arguing that the First Amendment protects hate speech, whether aimed at minorities or majorities); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

the other sections of the Civil Rights Act of 1964."[91] Similarly, the Ninth Circuit claimed that "[b]y enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.'"[92]

There are two problems with such reasoning. First, Congress did not manifest an interest in eradicating discrimination by passing the Civil Rights Act of 1964, although it did manifest an attempt to limit discrimination.[93] In contrast with the goal of eliminating discrimination, the goal of limiting discrimination is perfectly consistent with enjoining the enforcement of antidiscrimination laws in the relatively rare instances in which the laws conflict with the First Amendment. Second, and more important, Congress does not have the power to limit the scope of a constitutional right by manifesting an interest in doing so. If the Congress-has-manifested-an-interest rationale was followed in other cases, the Court would never overturn congressional statutes on First Amendment grounds (flag-burning comes to mind!).

2. *The* Bob Jones *Argument*

In *Bob Jones*,[94] the Supreme Court argued that the government's compelling interest in eliminating racial discrimination in education manifested itself in "myriad Acts of Congress and

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[91] EEOC v. Mississippi College, 626 F.2d 477, 489 (5th Cir. 1980).

[92] EEOC v. Pacific Press Publishing Association, 676 F.2d 1272, 1280 (9th Cir. 1982).

[93] Title VII, for example, is a civil (as opposed to criminal) statute; only applies to employers with more than 15 employees, 42 USC § 2000e(b) (1994); contains damage caps and limitations, 42 USC § 1981a(b)(3) (1994); requires EEOC approval before filing suit , 42 USC § 2000e-5; and contains a religious exemption, 42 USC § 2000e-1(a). These features of the statute are consistent with an interest in limiting discrimination, but just as certainly conflict with a purported intent to *eradicate* discrimination at the expense of all other values.

In fairness to the Fifth Circuit, several years earlier the Supreme Court incorrectly asserted that "eradicating discrimination" was a "central statutory purpose" of Title VII. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

[94] Bob Jones University v. United States, 461 U.S. 574 (1983).

Executive Orders, as well as every pronouncement of this Court attesting a firm national policy to prohibit racial discrimination in public education."[95] The Court did not explain why acts of Congress and the Executive branch, along with judicial opinions prohibiting discrimination in *public* education, as the Constitution requires, raised the government's interest in eradicating discrimination at a *private* university to a status sufficient to overcome enumerated constitutional rights.

Nevertheless, *Bob Jones* was not a particularly radical opinion. First, it involved free exercise. As noted previously,[96] courts rarely applied a true strict scrutiny test in free exercise cases, even if they purported to do so under *Sherbert*. Second, the case involved discrimination against African-Americans. The Warren and Burger courts often stretched constitutional doctrines when necessary to counteract the history of discrimination against African-Americans. Third, *Bob Jones* held only that the government had a compelling interest in eliminating discrimination in education, where state and local governments had been pervasively involved in discrimination. And, fourth, because the IRS had to make an affirmative decision on whether granting a discriminatory university a tax exemption was against public policy, the case involved state action in a way that most cases involving discrimination by private actors do not.[97]

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[95] *Bob Jones*, 461 U.S. at 604.

[96] *See supra*.

[97] Moreover, as Freed and Polsby point out, there was reason to question the sincerity of the university's claimed religious rationale for banning interracial dating. Until federal enforcement of antidiscrimination laws, the university had banned African-American students entirely. The ban on interracial dating may well have been a subterfuge to discourage African-Americans from attending while hiding behind a free exercise defense. The only way the Court could have determined the truth would have been to examine in detail the university's religious beliefs, a task courts are loath to do, partly because of establishment clause concerns. The path of least resistance was to do what the Court did and simply find that the claimed free exercise right was not sufficient to overcome the government's interest in eradicating discrimination. Freed & Polsby, *supra* note 40.

3. *The* Roberts *Argument(s)*

*Roberts* eviscerated the apparent limits of *Bob Jones*. *Roberts* involved freedom of expressive association, not free exercise of religion; the parties who faced discrimination in *Roberts* were women, not African-Americans; *Roberts* involved discrimination that was perfectly legal under federal law; and *Roberts* did not in any way, shape, or form involve state action.

Not surprisingly, *Roberts'* justification for stating that the government had a compelling interest in eliminating the discrimination at issue was far weaker than *Bob Jones'* already questionable reasoning. Brennan justified his opinion by noting the Minnesota Supreme Court's finding that Minnesota had a "strong historical commitment to eliminating discrimination."[98] Bizarrely, a federal constitutional right was overridden by a single state's claimed interest in forcing an organization to admit women as members.[99] And, in contrast to *Bob Jones*, where the compelling interest was only in eradicating discrimination in education against African-Americans, suddenly the government had an interest in eliminating all discrimination against, it seems, any group that the government cared to protect.

Another possible justification for the compelling interest analysis in *Roberts* is Brennan's analogy of discriminatory acts to crimes and torts. According to Brennan, the *malum in se* aspects of discrimination means that discriminatory expressive acts are subject to a balancing test, rather than being entitled to the highest level of constitutional protection.

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[98] *Roberts*, 468 U.S. at 624.

[99] For criticism of such reasoning, see Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692, 716 (9th Cir. 1999) ("Nor, would it seem, can a single state's law evince — under any standard — a compelling government interest for federal constitutional purposes."), *rev'd on other grounds en banc*, __ F.3d. __ (9th Cir. 2000). For support of such reasoning, see Gay Rights Coalition v. Georgetown University, 536 A.2d 1, 46 (1987) (Newman, J., concurring) ("an interest need not be national in scope to be compelling").

Beyond the philosophical and historical problems this argument entails,[100] Brennan seemed to suggest that the government automatically has a compelling interest in eradicating all extant categories of discrimination contained in any federal or state law.[101] Moreover, since Brennan did not examine the facts of *Roberts* with any care,[102] arguably this compelling interest

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[100] The American constitutional system, as reflected in the Declaration of Independence, the body of the Constitution, the Bill of Rights (especially the Ninth Amendment), and the Civil War amendments, rests on the idea that the purpose of government is to secure the natural rights of the citizenry—life, liberty, and property. Common law rights, such as the rights to make and enforce contracts, to hold and alienate property, and to seek redress for injury to person and property in the tort system, are consistent with the Framers' vision and were either undisturbed or strengthened by various constitutional provisions. By contrast, welfare rights, including the right to be free from private discrimination, were not part of the original constitutional design and are not to be found anywhere in the Constitution or its amendments. The legislature can grant a "positive" right to be free from private discrimination, but such a right cannot trump the liberties granted by the Constitution absent constitutional amendment. Thus, the proper role of the compelling interest test is to permit the suspension of enforcement of a constitutional right only when necessary to deal with an imminent threat to life, limb, and property. *See generally* Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (noting that the Constitution is "a charter of negative liberties").

Putting constitutional theory and history aside, advocates of the *Roberts* version of the compelling interest test would argue that it is not self-evident that threats to life, limb, and property are more important than threats to livelihood and dignity. However, life, limb, and property are reasonably well defined terms, whereas courts could go pretty much anywhere they want with "dignity" and "individuality" until the compelling interest exception would swallow the First Amendment. Moreover, the alleged rights to dignity and individuality works both ways–the government threatens the dignity and individuality of members of private social groups when it compels them to associate with others. Also, the basic security and prosperity of members of society are dependent on the protection of life, limb, and property. Admittedly, the basic right to pursue a livelihood is important as well, but under the American Constitution that right is protected by the Thirteenth Amendment. The government can grant additional statutory protections, but constitutional boundaries ensure that in doing so the government does not invade other crucial rights, such as those protected by the First Amendment. In any event, no one in the foundational *Bob Jones* or *Jaycees* cases claimed that the livelihoods of the beneficiaries of the laws in question were in danger.

[101] Dale's attorneys made this argument. *See* Brief of Respondents, Dale v. Boy Scouts of America at 36; *see generally* Brief of the Cities of Atlanta, Chicago, Los Angeles, New York, Portland, San Francisco and Tucson as Amici Curiae in Support of Respondent, Dale v. Boy Scouts of America (discussing various groups protected by cities' antidiscrimination laws, and arguing that Court should find that the cities have a compelling interest in eradicating discrimination against all of these groups sufficient to exempt the laws from First Amendment strictures).

[102] Brennan argued that "discrimination based on archaic and overbroad assumptions about the relative needs and capactities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities" and "deprives persons of their individual dignity and denies society the benefits of wide participation in political economic and cultural life." *Roberts*, 468 U.S. at 625. Brennan also suggested that in *Roberts* women were deprived of access to "various commercial programs and benefits offered to members." *Id.* at 627. A close review of the facts of *Roberts*, however, suggests that it is far from clear that Minnesota's interest in forcing the Jaycees to admit women as members was objectively compelling. *See* David E.

would exist in all possible instances.[103]

Yet by contrast to trespass and other torts and crimes that may have expressive aspects but are not entitled to constitutional protection, antidiscrimination law has no clear definitional boundaries. The concept of antidiscrimination is almost infinitely malleable. Almost any economic behavior, and much other behavior, can be defined as discrimination. Because of the rent-seeking[104] advantages of defining oneself as the victim of discrimination the definition of discrimination has been expanding exponentially in the United States to include, for example, the use of a standardized test that leads to unequal results among different groups,[105] and the refusal to subsidize employees who create special additional expenses in the workplace.[106] Allowing the

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Bernstein, *Sex Discrimination Laws Versus Civil Liberties,* 1999 *U. Chi. Leg. Forum* 133, 162-65. Nor does Brennan specifically explain why access to "various commercial programs and benefits" is so important that it trumps First Amendment rights.

[103] *See* Brief of Respondents, Dale v. Boy Scouts of America at 36.

[104] Rent-seeking is the attempt to capture resources through coerced redistribution via government, rather than through voluntary market transfers. Many scholars treat antidiscrimination law as if because it has an underlying moral basis, it is exempt from ordinary political forces. For example, in *Antidiscrimination Law and Social Equality*, Andrew Koppelman suggests that because the law of workplace harassment today infringes severely on workers' First Amendment rights, it should be discarded as soon as it has served its purpose of opening up opportunities for previously excluded minorities and women. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 254 (1996). Koppelman never explains how Congress will reach a consensus that this goal has been achieved, nor does he explain how once Congress reaches such a consensus it will override the lobbying power of the interest groups that will inevitably coalesce to defend the prerogatives their members received from workplace harassment doctrine.

[105] The Department of Education's Office of Civil Rights has drafted a guide that establishes a rebuttable presumption that "the use of any educational test which has a significant disparate impact on members of any particular race, national origin, or sex is discriminatory" and hence illegal. John Leo, *The Feds Strike Back*, US NEWS & WORLD REP., May 31, 1999, at 16.

[106] Title VII of the 1964 Civil Rights Act and the Americans With Disabilities Act ("ADA") require employers to subsidize religious and disabled employees, respectively. Equal Employment Opportunity Act of 1972, § 2(7), Pub L. No 92-261, 86 Stat 103, codified as amended at 42 USC § 2000e(j) (1994) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."); Americans With Disabilities Act, 42 USC § 12112(b)(5)(A) (1994); 34 CFR § 104.12(b)(2). An employer can only avoid liability for not making (and paying for) a "reasonable accommodation" if this accommodation would cause the employer

government to ignore the First Amendment in regulating any behavior the government chooses to define as discrimination would gradually destroy the First Amendment.

Meanwhile, since *Roberts* states and cities have added many new protected categories to public accommodations and other antidiscrimination laws. The District of Columbia Human Rights Act, for example, prohibits discrimination on the basis of an individual's "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation."[107] Michigan prohibits discrimination on the basis of obesity.[108] The University of Nebraska bans discrimination on the basis of hair length.[109] Several cities ban discrimination based on parental status.[110] Minnesota outlaws discrimination in public accommodations against members of motorcycle gangs.[111]

Does "eradicating discrimination" against members of each of these categories, along with

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"undue hardship," a condition defined rather stringently in 42 USC § 12111(10)(B) (1994). The requirement that religious and disabled employees be accommodated if it does not create an "undue hardship" means that enduring some hardship is required. In economic terms, the hardship that is a subsidy to the employees. Refusal to incur the costs involved is considered "discrimination."

A similar expansion of antidiscrimination concepts has been occurring other countries as well. For example, the New Zealand Human Rights Commission has determined that refusing service to a customer whose account will be on credit because she is unemployed, has no credit card, earns less than $10,000 a year, and does not own a home is illegal discrimination on the grounds of employment status. N. v. E., Complaints Division W31/99 (N.Z. Hum. Rts. Comm. Oct. 26, 1999), reported at <http://www.hrc.co.nz/org/legal/teritojuly00.htm> (vistited July 30, 2000).

[107] D.C. Code Ann. § 1-2512(a) (1992 & Supp. 1993)).

[108] Mich. Comp. Laws Sec 37.2102 (1977).

[109] Josh Knaub, U. Nebraska Law Faculty Puts Hair-Length Dilemma to Rest, U-Wire, April 21, 1999.

[110] Boston, Mass., Code § 12-9.7; Chicago, Ill., Munic. Code § 2-160-070.

[111] Minn. Stat. § 604.12, subd. 2(a) (1998) ("A place of public accommodation may not restrict access, admission, or usage to a person solely because the person operates a motorcycle or is wearing clothing that displays the name of an organization or association.").

members of any other categories legislators come up with, constitute under *Roberts* a compelling interest sufficient to overcome the right to expressive association? Such an understanding of *Roberts* would eviscerate almost completely the right of expressive association.[112] Nevertheless, several courts have held that prevention of discrimination against unmarried heterosexual couples—hardly an oppressed group in American society—in the housing market is a compelling interest, even when the government itself discriminates against unmarried couples in other contexts.[113]

4. *The Reconstruction Amendments Argument*

Another argument that could be used to support application of the compelling interest test has been provided by academics. Several scholars have argued that the Reconstruction amendments overrule constitutional limits on the government's power to protect African-Americans and perhaps other groups from private discrimination.[114] These scholars argue that the

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[112] *See* Petitioner's Reply Brief, Dale v. Boy Scouts of America, at 16 ("That would be the end of all freedom of association.").

[113] Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994); Jasniowski v. Rushing, 678 N.E.2d 743 (Ill. App. Ct. 1994) (holding that the government's compelling interest in eradicating discrimination against unmarried couples overcame landlord's free exercise defense), *vacated*, 685 N.E.2d 622 (Ill. 1997); McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998) (holding under Michigan constitution that requiring landlords to rent to unmarried couples does not violate free exercise right because the compelling interest test was satisfied), *rev'd on reconsideration,* 1999 WL 226862 (Mich.); State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (three dissenters arguing that eliminating any type of invidious discrimination is a compelling government interest that overcomes free exercise rights).

For criticism, see Swanner v. Anchorage Equal Right Comm'n, 513 U.S. 979, 982 (1994) (Thomas, J. dissenting from denial of cert.):

> If, despite affirmative discrimination by Alaska on the basis of martial status and a complete absence of an national policy against such discrimination, the State's asserted interest in this case is allowed to qualify as a "compelling" interest--that is, a 'paramount' interest, an interest 'of the highest order'--then I am at a loss to know what asserted governmental interests are not compelling. The decision of the Alaska Supreme Court drains the word *compelling* of any meaning and seriously undermines . . . protection for exercise of religion."

[114] *E.g.*, Akhil Reed Amar, *The Case of The Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV L. REV. 124 (1992) (arguing that the Reconstruction Amendments grant a positive right to be free from private discrimination.). For a persuasive rebuttal of Amar's contentions, see Alex Kozinski & Eugene Volokh, *A*

overarching historic purpose of the Thirteenth, Fourteenth, and Fifteenth amendments was to undo the status of African-Americans as a subordinated caste. Given that the Thirteenth and Fourteenth amendments do not single out racial discrimination as a special category, the argument continues, the Reconstruction Amendments are best understood as creating a governmental obligation to eliminate caste-like patterns of group subordination in American society, whether these patterns arise from governmental or private sources.[115] This obligation in turn can supercede protections provided by the Bill of Rights in appropriate circumstances.

In fact, however, the Fourteenth Amendment contains a clear state action limitation, and, moreover, even advocates of the amendments consistently distinguished between civil rights, which were protected by the 14th Amendment, and social rights, such as the right to be free from private discrimination, which were not.[116] But even if one accepts the broad anti-caste interpretation of the Reconstruction amendments, the amendments might support a compelling interest in limiting discrimination to ensure that no private caste system or caste-like system is established. But preventing the creation or continuation of a caste is a far cry from "eradicating

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*Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993). *See also* Jennifer L. Conn, *Sexual Harrassment: A Thirteenth Amendment Response*, 28 COLUM. J. L. & SOC. PROBS. 519 (1995); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 771 (2000).

[115] Communications with Professor Leslie Goldstein helped the author frame this point. *See generally* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

[116] *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 299-300, 395-97 (1982); Michael W. McConnell, *Originalism and the Desegregation Decisions,* 81 VA. L. REV. 947, 1014-23 (1995). Ironically, modern scholars nevertheless argue that the 14th Amendment should be used to privilege social rights over First Amendment rights.

As Professor Eugene Volokh has explained, some scholars disclaim reliance on the Reconstruction Amendments as such, and instead argue that First Amendment rights should be subordinated to antidiscrimination claims because the "constitutional value" of equality is in tension with First Amendment "values." Professor Volokh persuasively rebuts this argument in Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. ROUNDTABLE 223 (1996).

discrimination," the compelling interest identified in *Roberts*; there can be a fair amount of discrimination against a group in the absence of a caste or quasi-caste system.

In any event, the key *Roberts* opinion did not hold that eliminating discrimination is a compelling interest only when the victims suffer from caste-like restrictions. If the Court had done so, one could argue about the propriety of its decision, and how one should decide which groups get special victim status as recompense for "group subordination." For example, the Court might have held that the government can only have a compelling interest in protecting a group from private discrimination if that group has been deemed a suspect class for equal protection purposes, a category that currently excludes women.

The Court would also have had to delineate exactly which constitutional rights are trumped by the Reconstruction Amendments. Contrary to current constitutional doctrine[117] the Reconstruction Amendments argument detailed above would potentially allow the government to completely suppress hate speech, or, for that matter, any speech that arguably contributed to a caste-like system.[118]

5. *The Public Accommodations Argument*

A final possible defense of the compelling interest test is limited to cases involving public accommodations laws. The claim is that even if the government does not have a compelling interest that rises to constitutional status in eliminating all discrimination, but it does have such an interest in eliminating discrimination in public accommodations. The right to use a public accommodation, after all, has a long-standing common law pedigree. Failure to open a public

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[117] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that laws targeting hate speech are unconstitutional).

[118] Moreover, constitutional rights ranging from the prohibition on ex post facto rules to the criminal procedure rules of the 4th, 5th and 6th Amendments would be vulnerable as well.

accommodation to the public at large can be analogized to a traditional common law tort such as theft that is not generally entitled to First Amendment protection. This line of argument has the practical advantage of limiting the *Roberts* line of cases to public accommodations laws.

The specific facts of *Roberts* create problems for this line of reasoning, however. First, the common law right was rather restricted, and had its origins in preventing the abuse of monopoly power, not antidiscrimination concerns.[119] Second, even under an expansive view of the common law rule, no one denied women the right to use the Jaycees' accommodations in any literal sense—women were allowed to participate in Jaycees activities, but could not become full members of the organization and vote.[120] If Minnesota's constitutional argument in *Roberts* had been based on traditional common law prerogatives, the Court would properly have held that membership and voting rights in an organization is not part of the use of a public accommodation in a traditional common law sense, and the Jaycees were therefore entitled to First Amendment protection if their right to expressive association was infringed upon.

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[119] At common law, innkeepers and others who "made profession of a public employment" were prohibited from refusing, without good reason, to serve a customer. *See* Lane v. Cotton, 12 Mod. 472, 484-485, 88 Eng. Rep. 1458, 1464-1465 (K.B. 1701) (Holt, C. J.). As one of the 19th century English judges put it, the rule was that "[t]he innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received;
and for this purpose innkeepers are a sort of public servants." Rex v. Ivens, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P. 1835). However, the rule seems to have its origins not in a modern antidiscrimination principle, but in the monopoly that innkeepers often had when travel was by horse and buggy and only one inn might present itself during a day's journal. If that inn refused a customer, the customer would have nowhere to eat and sleep that evening.

[120] Indeed, over the last few decades states and localities have expanded the definition of public accommodations in their antidiscrimination statutes far beyond any reasonable interpretation of the common law. For example, in a case alleging that eating clubs used by Princeton University students violated New Jersey's public accommodations law, the state supreme court admitted that the accommodations at issue were formally private. Nevertheless, the court found that the "Gestalt" of the clubs' relationship to Princeton made them public and therefore subject to the state's public accommodations law. Frank v. Ivy Club, 576 A.2d 241, 256-57 (N.J. 1990).

B. *Roberts* and the Threat to the Civil Liberties

As discussed below, courts consistently applied the compelling interest test as delineated in *Roberts* in subsequent litigation when conflicts arose between laws banning discrimination and the First Amendment. The compelling interest test threatened to render free exercise and expressive association rights ineffectual when they conflicted with the enforcement of antidiscrimination laws, and also began to threaten the foundational right of freedom of speech. Fortunately, the 1995 case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*[121] suggested that the Supreme Court had reconsidered its reliance on an impotent compelling interest test when antidiscrimination laws threatened the First Amendment. Instead of following *Roberts* and *Duarte* and applying that test to a conflict between a public accommodations laws and the right of expressive association, the Court applied traditional robust First Amendment scrutiny, and unanimously declared the law to be unconstitutional insofar as it infringed on First Amendment rights.

1. *The Compelling Interest Test Overwhelms the First Amendment*

After *Bob Jones* and *Roberts* lower courts consistently found that the government had a compelling interest in eradicating discrimination sufficient to overcome any infringement of antidiscrimination laws on the right of free exercise of religion.[122] Since free exercise defenses to

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[121] 515 U.S. 557 (1995).

[122] In addition to the cases discussed below, see Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (D.C. 1987) (ruling that Catholic university could be compelled to give the same benefits to gay student organizations that it offered to other student groups because of government's compelling interest in eradicating discrimination against gays); McLeod v. Providence Christian School, 408 N.W.2d 146, 152 (Mich. 1987) (concluding that the government's interest in eradicating employment discrimination is sufficiently compelling to allow government to force school to retain teacher who sought, in violation of church teachings, to work while raising young children); *but see* Dayton Christian Schools v. Ohio Civil Rights Commission, 766 F.2d 932 (6th Cir. 1985) (government's interest in eradicating discrimination in private Christian schools not sufficiently compelling to allow state to compel school to retain teacher who

generally-applicable laws were rarely looked on favorably even before *Employment Division v. Smith*, this result was not especially remarkable.

More disquieting was that after *Roberts* most courts became dismissive of expressive association defenses to antidiscrimination laws.[123] The California Supreme Court, for example, held that the First Amendment posed no barrier to forcing a Boys' Club to accept girls[124] because the public accommodations law in question intruded "no further, and for no less compelling purpose, than was the case in *Roberts*."[125] The Connecticut Supreme Court stated in dicta that the Boy Scouts of America's argument that it had a constitutional right to exclude women from serving as scoutmasters had "little merit" in light of *Jaycees* and *Duarte*.[126] Not all of these cases clearly implicated expressive association, as opposed to a more general freedom of association claim. However, the courts cavalierly suggested that even valid expressive association defenses must always yield to the government's compelling interest in eliminating discrimination.[127]

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complained of sex discrimination after her contract was not renewed because of her pregnancy), *vacated*, 477 U.S. 619 (1986).

For further discussion of the status of free exercise vis a vis antidiscrimination laws, see *infra*.

[123] *But see* Invisible Empire of the Knights of the KKK v. Mayor of Thurmont, 700 F. Supp. 281 (D. Md. 1988) (holding that the KKK had a constitutional right to exclude African-Americans from their parade; distinguishing *Roberts* primarily by relying on Justice O'Connor's concurring opinion).

[124] Isbister v. Boys' Club of Santa Cruz, 707 P.2d 212 (Cal. 1985).

[125] *Id*. at 221. The court then proceeded to deny the club's claims under the California Constitution, even though the state constitution "affords greater privacy, expressive, and associational rights in some cases than its federal counterpart." *Id.*; *cf.* Warfield v. Peninsula Golf & Country Club, 10 Cal. 4th 594, 628-29 (1995) (holding that California's public accommodations law did not interfere with a country club's right of expressive association, and therefore there was no reason to apply the compelling interest test).

[126] Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities, 528 A.2d 352, 356 n.5 (Conn. 1987).

[127] *E.g., id*.; *see also* Welsh v. Boy Scouts of America, 993 F.2d 1267, 1280 (7th Cir. 1993) (Cummings, J., dissenting) (dissenting from a holding that a state public accommodations law does not apply to the Boy Scouts as a matter of statutory interpretation, and arguing that the compelling interest test justifies applying the law to the Scouts). Of course, as discussed previously, see *supra*, *Roberts* itself suggested as much.

It was only a matter of time before the expressive association precedents began filtering into "pure expression" cases. Several courts stated that the government has a compelling interest in eradicating discrimination sufficient to override the First Amendment and permit the direct regulation of speech.[128]

Conflict between antidiscrimination and freedom of speech arose in the context of "hostile environment" litigation.[129] Not only did courts punish speech that was protected in other contexts,[130] but several courts also granted broad injunctions against potentially discriminatory workplace speech without apparent concern that these injunctions constituted prior restraints, the most disfavored form of speech restrictions.[131]

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[128] One court stated that the applicable standard when an antidiscrimination law infringes on free speech is the even weaker "substantial interest" test. Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492, 517 (D.N.J. 1995), *aff'd on other grounds*, Presbytery of New Jersey of the Orthodox Presbyterian Church v. Whitman, 99 F.3d 101 (3d Cir. 1996).

[129] For academic commentary on the relationship between hostile environment law and the First Amendment, see, e.g., J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481, 539 (1991); Cynthia Estlund, *Freedom of Speech in the Workplace and the Problem of Discriminatory Harassment,* 75 TEX. L. REV. 687 (1997); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1; Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding The First Amendment--Avoiding a Collision*, 37 VILL. L. REV. 757 (1992); Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMPL. & LAB. L. 305 (1996); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1814-1815 (1992).

[130] *E.g.*, Bowman v. Heller, 1993 WL 761159, *8 (Mass. Super. Ct.) (finding liability based on an obnoxious satire involving the pasting a picture of a political opponent's head to a picture of a nude woman's body) , *rev'd on other grounds*, 651 N.E.2d 369 (Mass. 1995); *cf.* J. EDWARD PAWLICK, FREEDOM WILL CONQUER RACISM AND SEXISM 221-223 (1988) (describing a case in which Boston University was held liable for sex discrimination against a professor after the trial court admitted as evidence of discriminatory attitudes a speech by the president of the university to an outside audience suggesting that young children are better off when their mothers do not work outside the home); Pakizegi v. First Nat'l Bank, 831 F. Supp. 901, 908 (D. Mass. 1993) (concluding that hanging a picture of the Ayatollah Khomeini and a burning American flag in one's cubicle creates a hostile environment based on national origin) (dictum).

[131] *E.g.*, Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991); Turner v. Barr, 806 F. Supp. 1025, 1029 (D.D.C. 1992) (ordering an employer and its employees to "refrain from any racial,

The Supreme Court has yet to rule on the constitutionality of punishing workplace speech, but several courts have held that workplace speech is not protected if it contributes to a "hostile environment." The key lower court case so far is *Robinson v. Jacksonville Shipyards, Inc*.,[132] in which a female shipyard worker successfully prosecuted a hostile environment claim against her employer. Because the claim was based in part on offensive speech, including speech not directed at the plaintiff but offensive to her, the defendant claimed that the court's decision violated its right to freedom of speech. Moreover, the defendant objected to the court's extremely broad injunction that banned speech that seemed clearly to be protected by the First Amendment.[133]

In the course of rejecting the company's First Amendment defense, the court relied on several specious arguments in denying that hostile environment law ever implicates the First

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religious, ethnic, or other remarks or slurs contrary to their fellow employees' religious beliefs"); Harris v. International Paper Co., 765 F. Supp. 1509, 1527 (D. Me. 1991) (requiring employer and employees to "cease and desist from . . . racial harassment in the workplace including, but not limited to, any and all offensive conduct and speech implicating considerations of race."); Snell v. Suffolk County, 611 F. Supp. 521, 531-32 (E.D.N.Y. 1985) ("derogatory bulletins, cartoons, and other written material" and "any racial, ethnic, or religious slurs whether in the form of 'jokes,' 'jests,' or otherwise"); Aguilar v. Avis Rent A Car System, Inc., 87 Cal. Rptr. 132 (1999) ("racial epithets").

[132] 760 F. Supp. 1486 (M.D. Fla. 1991).

[133] The court specifically banned the following types of speech at the company:

> (1) displaying pictures, posters, calendars, graffiti, objects, promotional materials, reading materials, or other materials that are sexually suggestive, sexually demeaning, or pornographic, or bringing into the [] work environment or possessing any such material to read, display or view at work.
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> A picture will be presumed to be sexually suggestive if it depicts a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body.
>
> (2) reading or otherwise publicizing in the work environment materials that are in any way sexually revealing, sexually suggestive, sexually demeaning or pornographic.

*Robinson,* 760 F. Supp. at 1542.

This injunction would, for example, bar the reading of a Danielle Steele novel on lunch break. *See generally* Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 722 (1995) (criticizing the court's injunction as overbroad).

Amendment.[134] Apart from those arguments, the court claimed that even if the First Amendment protects workplace speech in such contexts, the government's compelling interest in eradicating discrimination exempts hostile environment law from this protection.[135] The court wrote:

> If the speech at issue is treated as fully protected, and the Court must balance the governmental interest in cleansing the workplace of impediments to the equality of women, the latter is a compelling interest that permits the regulation of the former and the regulation is narrowly drawn to serve this interest. Other first amendment rights, such as the freedom of association and the free exercise of religion, have bowed to narrowly tailored remedies designed to advance the compelling governmental interest in eradicating employment discrimination.[136]

*Robinson* has been extremely influential. Several courts have cited its First Amendment holding favorably,[137] and no case has yet held directly that the First Amendment prohibits

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[134] Briefly, the court found that: (1) the company was not expressing itself through the "sexually oriented pictures or the verbal harassment by its employees"; (2) the pictures and verbal harassment were not protected speech but "discriminatory conduct in the form of a hostile work environment"; (3) the regulation of verbal harassment was merely a time, place, and manner regulation of speech; and (4) female workers subject to the hostile work environment. *Robinson*, 760 F. Supp. at 1535–36. For an explanation of why these arguments are incorrect, see Volokh, *supra* note 37.

[135] *Id*. at 1536.

[136] *Id*. at 1535, citing Rotary Int'l, 481 U.S. at 548-49; EEOC v. Pacific Press, 676 F.2d 1272, 1280-81 (9th Cir. 1982); EEOC v. Mississippi College, 626 F.2d 477, 488-89 (5th Cir. 1980). The court previously cited *Roberts* for the proposition that eliminating discrimination against women is a "compelling interest." Id.

[137] For cases following *Robinson*, see Bowman v. Heller, 1993 WL 761159, *8 (Mass. Super. Ct.), *rev'd on other grounds*, 651 N.E.2d 369 (Mass. 1995); Jenson v. Eveleth Taconite Company, 824 F. Supp. 847 (D. Minn. 1993); Berman v. Washington Times Corp, 1994 WL 750274, *5 n.4 (D.D.C.) ("Although the Defendant has claimed that the First Amendment shields such behavior from liability, this Court finds itself in accord with those authorities that have found that the Constitution does not bar government regulations of such gender-based harassment in the workplace."); Baty v. Willamette Industries, Inc, 985 F. Supp. 987 (D. Kan. 1997) (citing *Robinson* for support of the proposition that the First Amendment does not preclude a finding of liability for hostile work environment sexual harassment); *see also* Aguilar v. Avis Rent A Car, 87 Cal. Rptr. 2d 132, 141 (1999) (utilizing *Roberts'* analogy of discrimination to violence); *id*. at 167 (Werdergar, J., concurring)

workplace speech from being the basis of Title VII liability if that speech would be protected in other contexts.[138]

2. Hurley *to the Rescue*

Just when it seemed that American law was on the verge of irrevocably privileging antidiscrimination claims over First Amendment rights, the Supreme Court decided *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*.[139] For the first time, when presented with a general antidiscrimination law that conflicted with the First Amendment the Court held the law was unconstitutional as applied. The Court also implicitly disclaimed reliance on the compelling interest test in cases involving such conflicts.

In *Hurley*, a gay rights organization ("GLIB") claimed that the organizers of Boston's St. Patrick's Day Parade were obligated under a Massachusetts public accommodations law to permit GLIB's members to march under GLIB's banner.[140] The parade organizers responded that they had a First Amendment right to exclude a group that sought to convey a message (in this case, they

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(upholding restrictions on speech in the workplace despite constitutional constraints because of California's compelling interest in eliminating racial discrimination in the workplace). For recent commentary, see Note, *Constitutional Law–Free Speech Clause–California Supreme Court Upholds Injunction Against Harassing Speech in the Workplace*–Aguilar v. Avis Rent a Car System, 113 HARV. L. REV. 2116 (2000).

[138] However, four Supreme Court Justices have suggested that hostile environment law may violate the First Amendment. Davis v. Montrose County Board of Education, 119 S. Ct. 1661, 1682, 1690 (1999) (Kennedy, J. dissenting, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.). Moreover, the Fifth Circuit has noted in dictum that hostile environment law may conflict with the First Amendment. In *DeAngelis v. El Paso Municipal Police Officers Ass'n*, the court cited *Robinson* critics Volokh and Browne, and suggested that "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment." 51 F.3d 591, 596–97 (5th Cir 1995); *see also Aguilar*, 87 Cal. Rptr. 2d at 173 (Kennard, J., dissenting) (arguing that an injunction barring offensive workplace speech violated the First Amendment); *id*. at 189 (Brown, J., dissenting) (arguing that like other offensive speech, offensive workplace speech must be tolerated under the First Amendment). For a comprehensive review of cases that have mentioned the First Amendment defense to hostile environment law, see http://www.law.ucla.edu/faculty/volokh/harass/COURTS.HTM#T6.

[139] 515 U.S. 557 (1995).

[140] For background, see Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791 (1993).

claimed, a "sexual message") they did not wish to convey.

The trial court held that the parade was a public accommodation under Massachusetts law, and that the organizers were required to permit GLIB to march in it. The court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment. . . . The Parade is not an exercise of their constitutionally protected right of expressive association."[141] The court also found that any infringement on the organizers' right to expressive association was only "incidental," and that any such infringement was justified by the government's interest in eradicating discrimination against homosexuals.[142] Under *Roberts*, the organizers' First Amendment argument failed.

On appeal, the state supreme court also found no infringement of the organizers' First Amendment rights.[143] The court wrote:

> For the purposes of this case . . . we need not decide whether the free speech rights or the expressive association right, or both, might be implicated by the factual situation asserted by the defendants. This is so because, as the [trial] judge found, it is "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment."[144]

Meanwhile, a federal district court issued a declaratory judgment holding that the

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[141] Irish-American Gay, Lesbian and Bisexual Group v. City of Boston, 1993 WL 818674, *13 (Mass. Super. 1993), *aff'd*, 636 N.E.2d 1293 (Mass. 1994), *rev'd*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995).

[142] *Id*. at *14.

[143] Irish-American Gay, Lesbian and Bisexual Group v. City of Boston, 636 N.E.2d 1293 (Mass. 1994), *rev'd*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995).

[144] *Id*. at 1299.

organizers of Boston's St. Patrick's Day Parade had a constitutional right to exclude GLIB from the 1995 parade.[145] The court concluded that unlike the scenarios in *Roberts* and *Duarte*, the public accommodations statute in question significantly burdened the organizers' right to associate for expressive purposes.[146] The court then held that even if under the *Roberts* test the state had a compelling interest in eradicating discrimination against gays, it could not rule in GLIB's favor because to do so "would risk seriously undermining the protection provided by the First Amendment."[147] The court was apparently so uncomfortable with *Roberts* that it defied Supreme Court precedent.

Before the declaratory judgment case was appealed, the original state litigation reached the United States Supreme Court. The Court reversed the Massachusetts Supreme Court in a unanimous opinion written by Justice David Souter.[148] Souter acknowledged that public accommodations laws have a venerable history, and "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."[149] Souter also noted that the Massachusetts law was typical of public accommodations statutes, in that it did not

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[145] South Boston Allied War Veterans Council v. Boston, 875 F. Supp. 891 (D. Mass. 1995); *cf.* New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 364-68 (S.D.N.Y. 1993) (holding that parade organizers had a free speech right to ban a homosexual group from marching under its own banner, and, while declining to reach the organizers' expressive association claim, noting that "[t]here may well be substance to this argument").

[146] *South Boston Allied War Veterans Council*, 875 F. Supp. at 915.

[147] *Id*. at 916.

[148] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995).

[149] *Id*. at 572.

"target speech or discriminate on the basis of content."[150]

However, the Court explained that the parade organizers did not exclude gays from the parade, but rather excluded a group that had been formed for the express purpose of marching under its own banner in the parade "in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants."[151] "[O]nce the expressive character of both the parade and the marching GLIB contingent is understood," Souter wrote, "it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation."[152] The choice of the organizers not to propound a particular point of view "is presumed to lie beyond the government's power to control. . . . "[t]he fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." [153]

Souter concluded by distinguishing *Roberts* and *Duarte* on the grounds that those cases did not involve a "trespass on the organization's message itself."[154] *Roberts* and *Duarte* did not disturb the right of private organizations to "exclude an applicant whose manifest views were at odds with a position taken by the [organization's] existing members."[155] Souter did not proceed to apply the compelling interest test as *Roberts* seemed to require, even though the trial court had

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150 *Id*.

151 *Id*. at 570.

152 *Id*. at 572.

153 *Id*. at 574.

154 *Id*. at 580.

155 *Id*. at 581.

relied upon that test, as had GLIB's brief.[156]

The broader significance of *Hurley* was not immediately clear because the Court did not state whether its holding relied on free speech rights or expressive association rights. One possible interpretation of this lack of clarity was that the Court declined to find a constitutionally-meaningful distinction between those rights. If so, *Hurley* had significantly narrowed the scope of *Roberts*, which had treated expressive association as a poor First Amendment stepsister by subjecting it to the anemic compelling interest test. Another possible interpretation was that *Hurley* was purely a free speech case, not an expressive association case, and therefore left the *Roberts* line of expressive association cases undisturbed.

The first relevant case decided after *Hurley* took the latter position. The Utah Supreme Court wrote that *Hurley* "addressed only the right to control the content of a parade's 'message' under the First Amendment's guarantee of free speech; it specifically did not address the issue of participation of protected groups in the parade.[157] The court instead applied the *Roberts* compelling interest test, and found that an Elk's Lodge could be required to admit women.[158] By contrast, Justice Joyce Kennard of the California Supreme Court opined that "[t]he breadth of the *Hurley* decision raises grave doubts" about whether the BSA could be required to admit those who disagreed with its views regarding homosexual conduct, including avowed homosexuals.[159]

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[156] Brief for Respondent, Hurley v. Irish-American Gay, Lesbian and Bisexual Group, at 22.

[157] Elk's Lodge No. 719 and No. 2021 v. Department of Alcoholic Beverage Control, 905 P.2d 1189, 1195 (Utah 1995).

[158] *Id.*

[159] Curran v. Mount Diablo Council of the Boy Scouts of America, 72 Cal. Rptr. 2d 410, 458 (1998) (Kennard, J., concurring).

Kennard's instincts were soon vindicated in *Boy Scouts of America v. Dale*.[160]

## III. THE END OF THE COMPELLING INTEREST TEST!?

As discussed below, in *Dale* the Supreme Court majority paid lip service to *Roberts*, but applied *Hurley's* far more stringent standard. As in *Hurley*, the compelling interest test played no role in *Dale's* majority opinion. The dissenters also declined to rely on the compelling interest test.

### A. *The State Court Decisions*

James Dale became a Cub Scout at the age of eight and remained in scouting until he turned eighteen, achieving the rank of Eagle Scout in 1988.[161] In 1989, Dale applied for adult membership in the Boy Scouts of America ("BSA") and became an assistant scoutmaster. Meanwhile, Dale acknowledged his homosexuality and became active in his university's gay and lesbian advocacy organization. In 1990, a newspaper printed an interview with Dale about his advocacy on behalf of gay youth. Dale soon received a letter from the local scouting council revoking his adult membership because the BSA "specifically forbid[s] membership to homosexuals."

In 1992, Dale filed a complaint in state court against the BSA alleging violation of New Jersey's public accommodations statute. The trial court found for the BSA, holding that forcing the BSA to employ Dale would violate the BSA's First Amendment rights.

The New Jersey Court of Appeals reversed.[162] The court concluded that the free speech

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[160] 120 S. Ct. 2446 (2000).

[161] The background facts are found in Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000).

[162] Dale v. Boy Scouts of America, 706 A.2d 270 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000).

rights of the BSA were not infringed.[163] The court pointed to BSA rules and bylaws which state that the only requirements are age, gender, and willingness to adhere to the Scout Law and Scout Oath. The BSA had contended that the requirements in those documents that Scouts be "morally straight" and "clean" are preclusive of implicit or explicit endorsement of homosexual activity.[164] The court responded that because the BSA did not have an official position on homosexuality until 1978, and because the position was very poorly publicized, the BSA did not really try to convey a message about homosexuality.[165] Moreover, the BSA did not expel individuals or organizations that publicly opposed the BSA's policy on homosexuality, suggesting that it was homosexual status, not advocacy, that led to Dale's expulsion.[166]

The court distinguished *Hurley* on the grounds that "both the parade and GLIB's participation [in Hurley] were pure forms of speech."[167] By contrast, the BSA was claiming a right to expressive association, and, as in *Roberts*, any infringement on the BSA's right to expressive association was justified by the state's compelling interest in "eradicating discrimination."[168]

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[163] *Id.* at 287.

[164] *Id.* at 288.

[165] *Id.* at 288-89.

[166] *Id.* at 289.

[167] *Id.* at 291.

[168] *Id.* at 292. A dissenting judge argued that *Hurley* should have controlled the outcome of the case. *Hurley*, the judge wrote, stood for the principle that leaders of an organization have the right to control the message articulated by the organization. "This principle," he continued, "is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs." *Id.* at 294 (Landau, J., dissenting). The judge added that *Roberts* does not dictate a contrary result because "nothing in *Roberts* prevents an organization from advocating its view that a gay lifestyle is immoral and undesirable without requiring it to provide a platform for competing advocacy, express or implicit." *Id.* at 295.

The New Jersey Supreme Court unanimously affirmed the appellate court's decision.[169] Like the lower court, the Supreme Court found that forcing the BSA to employ Dale did not constitute "forced speech."[170] *Hurley* was not controlling because "Boy Scout leadership is not a form of 'pure speech' akin to a parade."[171]

The court rejected the view that "Dale's presence in the organization is symbolic of BSA's endorsement of homosexuality."[172] Moreover, New Jersey's public accommodation would not "hamper [the BSA's] ability to carry out these activities or express its views"[173] or prevent the BSA "from invok[ing] its rights as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[174] The court determined that the BSA's ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster.[175]

The court concluded that "even if Dale's membership 'works some slight infringement on . . . [the BSA's] members' right of expressive association,' the 'infringement is justified because it serves . . . [New Jersey's] compelling interest in eliminating discrimination' based on sexual orientation."[176]

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169 Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999), *rev'd*, Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000).

170 *Id*. at 1229.

171 *Id*.

172 *Id*.

173 *Id*.

174 *Id*.

175 *Id.* at 1223.

176 *Id.*, at 1228, quoting Rotary Club International v. Duarte, 481 U.S. 537, 549 (1987).

B. *The Supreme Court Majority Opinion*

The BSA appealed to the United States Supreme Court. In a 5-4 opinion authored by Chief Justice William Rehnquist and joined by Justices Kennedy, O'Connor, Scalia, and Thomas, the Court held that New Jersey's forcing the BSA to admit Dale violated the BSA's right to freedom of expressive association.[177] Rehnquist began the opinion by noting that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[178]

Rehnquist then turned to the substance of the case. He first discussed whether Dale's presence in the BSA would affect the organization's ability to express its viewpoints. The New Jersey Supreme Court had found that "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership . . . [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth'" and that exclusion of homosexuals "appears antithetical to the organization's goals and philosophy."[179] Rehnquist, however, found that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[180]

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[177] 120 S. Ct. 2446 (2000).

[178] *Id*. at 2451, citing New York State Club Assn. 487 U.S. 1, 13 (1988). Rehnquist also cited *Roberts* and its compelling interest test.

[179] *Dale*, 734 A.2d at 1226.

[180] 120 S. Ct. at 2453, citing Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 124 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"), and Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection").

In so holding, Rehnquist ignored the Court's opinion in *Duarte* upholding a law forcing Rotary International to admit women. As we have seen, the Court, in language reminiscent of the New Jersey Supreme

Rehnquist concluded that to force the BSA to grant Dale a leadership position violated the organization's right of expressive association. The BSA, Rehnquist noted, asserts that it "teaches that homosexual conduct is not morally straight."[181] Rehnquist declined to inquire into the sincerity of the organization's belief, except to note that the record contained written evidence of this belief.[182]

Rehnquist added that what Dale openly professes and exemplifies "clearly flies in the face" of the BSA's message that homosexual activity is immoral. If New Jersey required the BSA to permit Dale to serve as a volunteer leader, the BSA would also be forced "to endorse his symbolic, if not openly articulated, message."[183] The Court concluded that application of the New Jersey law to the BSA "would significantly burden the [BSA's] right to oppose or disfavor homosexual conduct."[184] "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[185] Just as the coerced presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster "surely interferes with the Boy Scout's choice not to propound a point of view contrary to its

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Court's in *Dale*, claimed that its ruling would help RI achieve its stated goals of providing humanitarian service and encouraging high ethical standards and help ensure that Rotary Clubs represented a cross-section of their communities. *See supra* note _, and accompanying text.

181 *Id*. at 2452.

182 *Id.* at 2453.

183 *Id.*

184 *Id.*

185 *Id*. at 2554.

beliefs."[186]

Rehnquist rejected the New Jersey Supreme Court's argument that the BSA's right of expressive association was not infringed because "'Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.'"[187] Rehnquist responded that associations "do not have to associate for the 'purpose' of disseminating a certain message" to receive First Amendment protection, they merely have to "engage in expressive activity."[188] In *Hurley*, for example, the purpose of the St. Patrick's Day parade "was not to espouse any views about sexual orientation."[189] Second, if the BSA wants leaders to "teach only by example," this is protected by the First Amendment. Finally, "the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'" Rehnquist added that "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."[190]

Having found that the New Jersey law violated the BSA's First Amendment rights, Rehnquist went on to distinguish *Roberts* and *Duarte*. Rehnquist noted that these cases suggested that states have a compelling interest in eradicating discrimination against any group protected by a

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186 *Id*. at 2543.

187 *Id.* at 2454, quoting *Dale*, 734 A.2d at 1223.

188 *Id*. at 2454.

189 *Id.*

190 *Id*.

public accommodations statute. "But in each of these cases," Rehnquist explained, the Court "went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express."[191] Therefore, "the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws,"[192] and the Court's application of the compelling interest test in *Roberts* and *Duarte* was mere dicta.[193]

This conclusion is rather remarkable—albeit welcome—given the centrality of the compelling interest test to the *Roberts* opinion as written,[194] and the test's widespread adoption and diffusion through the lower courts. As Dale's attorneys pointed out, the compelling interest test as applied in *Roberts* more closely resembled the liberal balancing test the Court enunciated

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[191] *Id*. at 2455.

[192] *Id*.

[193] Rehnquist did not use the word dicta, but the fact that he failed to apply the compelling interest test means that in effect he treated the compelling interest aspects of *Roberts* and *Duarte* as dicta.

Rehnquist added some confusing dicta of his own to the effect that in *Roberts* and *Duarte* the Court did not stop when it found a compelling state interest, but went on to determine whether the statute at issue imposed any "serious burden" on the organization's right of expressive association. Rehnquist then wrote:

> In *Roberts*, we said '[i]ndeed, the Jaycees has failed to demonstrate . . . any serious burden on the male members' freedom of expressive association.' In *Duarte*, we said: "[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."

*Id.* at 2456 (citations omitted). This dicta is both unnecessary and unclear, as it seems to conflate the *Roberts* test with the much stricter First Amendment test applied by the Court in *Dale*. Perhaps Rehnquist is suggesting that *Roberts* and *Duarte* held that only minor, inconsequential infringements on the First Amendment are subject to the compelling interest test, whereas "serious burdens" on First Amendment rights are subject to full First Amendment scrutiny. If that is Rehnquist's point, one hopes he is not implicitly endorsing such reasoning, but simply trying to avoid explicitly overruling *Roberts* by showing that applying its test would not change the result of *Dale*. Leaving it up to the courts to decide which burdens are serious and which are not puts far too much discretion in the hands of judges, who will be tempted to allow their social policy preferences to overcome the appropriate result under the Constitution.

[194] Arguably, the compelling interest portion of *Roberts* was its main holding, with the Court adding as a secondary point its conclusion that the expressive association rights of the Jaycees were not infringed.

in *United States v. O'Brien*[195] to evaluate laws incidentally burdening free speech than it resembled the strict scrutiny standard generally associated with the compelling interest test. Rehnquist, however, specifically disavowed the applicability of *O'Brien* to cases such as *Dale* where the right of expressive association is at issue.[196]

*Dale* thus implicitly overrules the most significant aspects of Justice Brennan's opinion in *Roberts*. *Dale* would be a much less confusing opinion if the majority had bitten the bullet and explicitly overruled *Roberts*. Since none of the Justices in the *Dale* majority had joined the main *Roberts* opinion—Rehnquist and O'Connor concurred, while, Kennedy, Thomas, and Scalia were not yet on the Court—it is not clear why the Court failed to do so. Perhaps Rehnquist felt bound by his ill-conceived vote with the pro-compelling interest test majority in *Duarte*.[197]

In any event, Rehnquist also noted that unlike in *Roberts* and *Duarte*, where the Court found no infringement on First Amendment rights, in *Hurley* the Court found that the parade organizers' right to express their message was infringed upon.[198] *Hurley*, not *Roberts*, was therefore controlling, and as in *Hurley* the antidiscrimination law at issue had to yield to the First Amendment.

C. *The* Dale *Dissents*

Justice John Paul Stevens, joined by three other Justices, wrote the main dissent. Stevens

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[195] 391 U.S. 367 (1968). *O'Brien* required a showing of a "substantial" rather than a "compelling" state interest to allow First Amendment rights to be infringed in certain circumstances. In practice, this was a distinction without a difference.

[196] *Dale*, 120 S. Ct. at 2458.

[197] Justice O'Connor did not take part in *Duarte*, Justice Scalia concurred without opinion, and Justices Kennedy and Thomas were not yet on the Court.

[198] *Id.* at 2455.

argued that forcing the BSA to employ Dale would not impose any serious burdens on the BSA's ability to achieve its shared goals.[199] Stevens contended that the BSA at most "simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality."[200] There is no basis, therefore, for concluding that admitting homosexuals will impair the BSA's ability to engage in protected activities or disseminate its views.

According to the dissent, "'[t]o prevail in asserting a right of expressive association as a defense to a charge of violating an antidiscrimination law, the organization must at least show that it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude."[201] Otherwise, Stevens wrote, civil rights legislation would become a nullity, as defendants engaged in post-hoc rationalizations for discriminatory conduct.[202]

Stevens distinguished *Hurley* because Dale's participation in the BSA "sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message."[203] The mere act of joining the BSA is not symbolic speech subject to the First Amendment. Moreover, the notion that the BSA implicitly endorses the views expressed in a non-Scouting context on a variety of issues of the hundreds of thousands of adult volunteers it employs is "simply mind boggling."[204]

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199 *Id.* at 2462-63 (Stevens, J., dissenting).

200 *Id.* at 2463.

201 *Id*. at 2471.

202 *Id*.

203 *Id*.

204 *Id*. at 2476.

Justice Souter wrote a separate dissent, joined by Justices Breyer and Ginsburg, to emphasize that unlike Justice Stevens, who strongly expressed his distaste for the BSA's policy on gays, he did not believe that the merits of the BSA's policy was legally relevant.[205] Souter also emphasized that like Stevens, he believes that "no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way."[206] "To require less," Souter wrote, "and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expressive association into an easy trump of any antidiscrimination law."[207] In expressive association cases, unlike standard free speech cases, the Court does not have to accept an individual or group's declaration of its beliefs at face value.[208] Souter did not justify this distinction, beyond his expressed concern about the negative effect a broader rule would have on antidiscrimination laws.

The dissenters thus unfortunately resurrected the old Supreme Court tactic of evading conflict between antidiscrimination laws and the First Amendment by construing the facts of the case and the underlying constitutional right narrowly to bypass the conflict. Nevertheless, even the dissents represent significant progress from the days of *Roberts* and *Duarte*. Justice Stevens's primary dissent did *not* argue that even if the BSA's First Amendment rights suffered some incidental infringement, that infringement was justified by the government's compelling interest in

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205 *Id.*. at 2478 (Souter, J., dissenting).

206 *Id*. at 2478.

207 *Id*.

208 *Id*. n.*.

eradicating discrimination against homosexuals.[209] Nor did Justice Souter use his separate opinion to defend the compelling interest test.

Remarkably, none of the nine Justices currently on the Supreme Court appears to support applying the compelling interest test in conflicts between antidiscrimination laws and civil liberties. While the dissenters' opinions construe the right of expressive association narrowly, to the extent such a right is infringed the right will be enforced by the dissenters.[210] *A fortiori,* the dissenters would also vote to uphold speech rights in the pure expression cases where some lower courts have applied the compelling interest test.[211]

## IV. THE PROMISE OF *DALE*

*Dale* will undoubtedly be used to protect First Amendment rights when they are infringed upon by antidiscrimination laws. As discussed below, after *Dale* (1) associations that are primarily expressive in nature will be exempt from antidiscrimination laws when those laws infringe on the associations' ability to project their messages. Indeed, religious associations will utilize *Dale* to obtain exemptions from antidiscrimination laws they were not able to obtain under

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[209] It is possible that Stevens did not do so because he felt no need; once he established that the BSA's First Amendment rights were not infringed, the compelling interest argument was irrelevant. However, Stevens did not go out of his way to be terse in his opinion. As noted above, he included an aside condemning prejudice against homosexuals, a point irrelevant, as the other three dissenters pointed out, to the legal issue in the case.

[210] Under *Roberts*, by contrast, it was not at all clear that the Ku Klux Klan had the right to exclude African Americans, or that a Black separatist group had a right to exclude whites. *See* Invisible Empire of the Knights of the KKK v. Mayor of Thurmont, 700 F. Supp. 281 (D. Md. 1988) (reaching the conclusion that the KKK had a constitutional right to exclude African-Americans only by ignoring the majority opinion in *Roberts* and relying instead on Justice O'Connor's concurrence); Southgate v.United African Movement, 1997 WL 1051933 (N.Y.C. Com. Hum. Rts. June 30) (holding that a Black separatist organization had no right to exclude whites from its meetings).

[211] *See supra*.

the free exercise clause; and (2) antidiscrimination laws should no longer be a threat to freedom of speech in such contexts as hostile environment litigation and litigation under the Fair Housing Act.

A. Dale *and Freedom of Association*

*Dale* did not clearly specify which organizations will receive constitutional protection on freedom of association grounds from antidiscrimination laws. However, the scope of *Dale*'s holding is restricted by two factors. First, *Dale* is grounded squarely in the First Amendment, not a vague right of association floating somewhere in the penumbral ether of the Constitution. Only expressive associations can come under *Dale's* protective umbrella, and only when their discriminatory membership criteria relate to a distinct message they seek to convey or not convey.

Second, in *Roberts* Justice O'Connor expressed her view that only associations that are *primarily* expressive as opposed to commercial are eligible for First Amendment exemptions from antidiscrimination laws.[212] Even organizations that engage in a "not insubstantial" amount of expressive activity are ineligible for First Amendment protection if they are not primarily expressive. Because Justice O'Connor's vote was necessary to *Dale's* 5-4 holding, and because there is no reason to believe that she has changed her views on the issue, *Dale's* scope is presumably limited to organizations that are primarily expressive.

Assumedly, to come within the scope of O'Connor's interpretation of the expressive association aspect of the First Amendment an organization must at the very least be a non-profit.[213]

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[212] *Roberts*, 476 U.S. at 638-40 (O'Connor, J., concurring).

[213] It would be difficult to argue that for-profit organization is primarily expressive and non-commercial, which is the test an organization must meet to satisfy O'Connor's dissent in *Roberts*. *Cf.* Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784 (Minn. Ct. App. 1985), *aff'd*, 389 N.W.2d 205 (Minn. 1986) (holding that a for-profit health club could not assert a free exercise right to exclude gay patron). Of course, if a pure speech claim, rather than an expressive association claim is at issue, for-profit organizations do come within the ambit of First Amendment protections.

Thus, contrary to the concerns of some post-*Dale* commentators, discriminatory businesses such as the infamous Ollie's Barbeque[214] will not be able to rely on *Dale* to evade antidiscrimination laws.

Religious organizations will most likely be the primary beneficiaries of *Dale*. Ironically, while the "compelling interest" language of the *Bob Jones* free exercise case once bled into the freedom of association cases, threatening the right of expressive association, *Dale's* protection of freedom of association will benefit many organizations attempting to preserve their free exercise rights.

For a time in the 1980s, when *Sherbert v. Verner* was still good law, and *Jaycees* suggested that an expressive association claim would rarely if ever trump enforcement of an antidiscrimination law, religious organizations naturally couched their constitutional defenses against antidiscrimination laws that conflicted with their beliefs in terms of free exercise. In most instances, the religious organizations nevertheless lost.[215] The compelling interest test was applied too loosely in the free exercise context to be very helpful, and, in any event, courts consistently held based on *Bob Jones* and *Roberts* that the government has a compelling interest in eradicating discrimination. Once the Supreme Court ruled in *Smith* that religious individuals and organizations have no right to be exempted from generally-applicable laws that interfere with their religious beliefs, religious organizations seemed at the mercy of legislative whim.[216]

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[214] *See* Katzenbach v. McClung, 379 U.S. 294 (1964) (unanimously upholding against a challenge by Ollie's Barbeque congressional authority to regulate public accommodations).

[215] *See supra*. However, it should be kept in mind that the employment decisions of religious organizations regarding clergy were shielded from antidiscrimination laws by a discrete First Amendment test. *See supra*.

[216] *Smith* did not, however, affect the absolute privilege religious organizations have to select their "ministers" free from government interference or second-guessing. *See* EEOC v. Catholic Univ. of Am., 83 F.3d

*Dale*, however, gives religious organizations newfound autonomy from certain antidiscrimination laws, autonomy in many instances far broader than anything such organizations won under *Sherbert*. Recall that under *Dale* if an antidiscrimination law "materially interferes" with the ideas that the organization seeks to express, the law is unconstitutional as applied to an organization as an infringement on free speech.[217] With that in mind, consider Frederick Gedicks' explanation of the issues facing religious groups confronted with legal mandates that violate the groups' tenets:

> The group that refuses to change a core concern to comply with valid regulation may be liquidated and cease physically and legally to exist. The group that chooses to abandon a core concern in order to comply with regulation alters its definitional boundaries, thereby transforming itself into a different group. In either event, the group has ceased to be, having been extinguished by the government's regulatory intervention.[218]

In other words, forcing a religious organization to comply with antidiscrimination legislation that violates its beliefs destroys the rights of the organization and its members to expressive association, the very right at issue in *Dale*.[219]

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455, 461-63 (D.C. Cir. 1996) .

[217] *Dale*, 120 U.S. at 2445.

[218] Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WISC. L. REV. 99, 112.

[219] Professor Ira Lupu anticipated that many free exercise cases would ultimately be construed as expressive association cases. *See* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 395-404 (1987).

*Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*[220] illustrates the effect *Dale* is likely to have on the rights of religious groups. Georgetown University refused to extend "University Recognition"[221] to two gay student groups.[222] Although the university permitted the groups to meet on university property and to invite guest speakers, it repeatedly denied University Recognition as inconsistent with Catholic beliefs about sexual ethics.[223]

The two groups sued the university alleging violations of Washington, D.C.'s Human Rights Act. The D.C. Court of Appeals agreed that a religious organization such as Georgetown could not be compelled to endorse a student group that encouraged or accepted homosexuality.[224] However, the court found that the Act did not require that Georgtown endorse or accept the goals of the gay student groups, but that the university extend the same benefits to them that it offered to other student groups.[225] According to the court, although the scheme of University Recognition

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[220] 536 A.2d 1 (D.C. 1987).

[221] University Recognition was the second highest level in a three tier system of official recognition of student organizations at Georgetown. "Student Body Endorsement" was given by the Student Activities Committee ("SAC") to any organization which met certain size and composition requirements with objectives "within the scope of the student body interest and concern, serving an educational, social, or cultural purpose." "University Recognition" required the approval of the University administration and was available only to organizations which had achieved Student Body Endorsement and which satisfied two additional criteria: The organization must "be successful in aiding the University's educational mission in the tradition established by its founders" and must provide a broad service to the University community as a whole. The third tier, "University Funding", was available only to groups which had already achieved University Recognition. Groups with Student Body Endorsement may meet onuniversity property, apply for lecture funding, use campus advertising, receive financial counseling from the SAC, and petition the student government for assistance. The additional tangible benefits of University Recognition include use of a mailbox in the SAC office and other mailing services, the right to use a computer labeling service, and the right to apply for University Funding. *Id.* at 9-10.

[222] *Id*. at 5.

[223] *Id*. at 10-13.

[224] *Id*. at 18-19.

[225] *Id*. at 21.

offered by Georgetown did include an element of endorsement of recognized organizations, that endorsement could be severed from the tangible benefits that came with Recognition.[226]

The court assumed *arguendo* that these requirements burden on Georgetown's free exercise of religion.[227] After a lengthy discussion of the legislative history of the Act and psychological, sociological, research into homosexuality and anti-gay discrimination, the court determined that the District had a compelling interest in eradicating discrimination based on sexual orientation.[228] The court next found that the Act imposed a relatively minor burden on Georgetown's exercise of religion; the university already provided limited benefits to the gay groups and the additional tangible benefits were "relatively insignificant" according to the university's own brief.[229] Finally, the court concluded that enforcing the Act's requirements of equal access to "facilities and services" without requiring endorsement was the least restrictive way of advancing the District's compelling interest in eradicating discrimination based on sexual orientation.[230]

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[226] *Id*. at 20.

[227] *Id*. at 31.

[228] *Id*. at 38.

[229] *Id*. Perversely, the fact that Georgetown was tolerant of its gay students apparently meant that it received less constitutional protection than would be granted to a virulently anti-gay school.

[230] *Id*. at 39; *cf.* Dignity Twin Cities v. Newman Center & Chapel, 472 N.W.2d. 355 (Minn. Ct. App. 1991) (overturning administrative ruling and holding that a Catholic organization could not be required by antidiscrimination law to rent space to homosexual organization that refused to attest that it accepted church teachings on homosexuality; holding based on "excessive entanglement" of government in religious affairs).

For scholarly commentary on the Georgetown case, see Fernand N. Dutile, *God and Gays at Georgetown: Observations on* Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 15 J.C. & U.L. 1 (1988); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2431-38 (1997); Linda J. Lacey, Gay Rights Coalition v. Georgetown University: *Constitutional Values on a Collision Course*, 64 OR. L. REV. 409 (1986); Paul E. O'Connell, Comment, Gay Rights Coalition v. Georgetown University: *Failure to Recognize a Catholic University's Religious Liberty*, 32 CATH. LAW. 170 (1988).

Contrast this decision with the necessary result of the same fact scenario under *Dale*. *Dale* held that the BSA has the right to completely exclude Dale from scouting because of his open homosexual orientation even though there was no evidence that Dale would use his position to advocate, or even talk about, gay rights, or homosexuality more generally. Surely Georgetown and similarly situated religious universities that otherwise do not discriminate against gay students have the right to deny funding and office space to student organizations explicitly organized to promote views on sexual issues that conflict with the universities' religious values. Forcing Georgetown to subsidize such groups would impair the university's ability to convey its Catholic message regarding sexuality.

Similarly, under *Dale* religious schools have a right to refuse to employ individuals whose actions conflict with the schools' religious tenets, at least if those individuals will be in a position to be perceived as role models. Thus, for example, contrary to the holdings of three federal courts,[231] church schools have a constitutional right to fire employees who give birth out of wedlock if sex outside of marriage is frowned upon by the sponsoring church.[232] Churches that teach that mothers should stay at home with young children may similarly refuse to employ women with young children.[233] Religious schools will be entitled to exemptions in appropriate

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[231] Ganzy v. Allen Christian School, 995 F. Supp. 340, 348 (E.D.N.Y. 1998); Vigars v. Valley Christian Center, 805 F. Supp. 802 (N. D. Cal. 1992); Dolter v. Wahlert High School, 21 Fair Empl. Prac. Cas. (BNA) 1413 (N.D. Iowa 1980).

[232] *See generally* Robert John Araujo, "*The Harvest is Plentiful But the Laborers are Few": Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713, 733 (1996) ("I suggest that a religiously affiliated schol can refuse to hire a candidate or discharge an employee whose personal conduct counters the religious tenets of the school."); Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 160 (1986) ("If the state can compel a religious institution to rehire a person to a teaching position despite that person's departure from religious doctrine, then the church loses the ability to control its voice.").

[233] *See* Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission, 766 F.2d 932 (6th Cir) (holding, pre-*Smith*, that such a right existed under the free exercise clause),

circumstances from California's Leonard Law, which prohibits private schools from punishing speech that could not be constitutionally punished in a public school.[234]

On the other hand, free exercise claims that do not involve expressive association by non-profit entities will not be affected by *Dale*. Thus, *Dale* says nothing, for example, about whether

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*vacated on ripeness grounds*, 477 U.S. 619 (1986); McLeod v. Providence Christian School, 408 N.W.2d 146, 152 (Mich. 1987) (concluding that any such right was overridden by the government's compelling interest in eradicating discrimination.).

These claims may also be subject to a pre-Employment Div. of Human Resources v. Smith, 494 U.S. 872 (1990). compelling interest test. Under *Smith* the compelling interest test still applies to so-called hybrid claims, where a party asserting a free exercise in combination with other constitutional protections. The Court specifically included a situation in which free exercise of religion was asserted in conjunction with the right of parents to guide the education of their children. *Smith*, 494 U.S. at 881, citing Wisconsin v. Yoder, 406 U.S. 205 (1972), a situation that arises in cases where religious schools discipline female teachers for failing to obey church rules. However, church schools are more likely to succeed under *Dale*'s absolutist First Amendment test than under the weak free exercise compelling interest test.

[234] Calif. Educ. Code §48950.

religious individuals can be required to rent to unmarried couples,[235] at least not directly.[236] Nor is *Dale* likely to affect cases in which religious employers prohibit the employment of those whose lifestyles conflict with the owner's beliefs.[237] Whether religious organizations will be allowed to bind employees to contracts that comport with the organizations' beliefs but violate antidiscrimination laws remains to be seen.[238] Most likely, courts will hold that wage payments

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[235] *See*, *e.g.,* Smith v. Fair Employment and Housing Commission, 913 P.2d 909 (Cal. 1996) (holding that a statute barring discrimination on basis of marital status does not implicate landlords' free exercise of religion); Jasniowski v. Rushing, 678 N.E.2d 743 (Ill. App. Ct. 1994) (holding that the government's compelling interest overcame landlord's free exercise defense), *vacated*, 685 N.E.2d 622 (Ill. 1997); State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (holding that the statute at issue does not cover marital status discrimination; three out of the four judges in the majority argue that the statute would be unconstitutional as a violation of free exercise rights if it required religious landlords to rent to unmarried couples).

Religious landlords may have a right not to rent to unmarried couples under the hybrid claims aspect of *Smith*, subject to the compelling interest test. *See* Thomas v. Anchorage Equal Rights Commission, 165 F.3d 392 (9th Cir. 1999) (holding that religious landlords had a constitutional right to refuse to rent to unmarried couples, finding a hybrid free exercise/property rights claim), *dismissed on ripeness grounds on rehearing en banc,* ___ F.3d ___ (2000). Moreover, landlords may also have such a right in states that continue to apply a compelling interest test to free exercise claims despite *Smith. See* McCready v. Hoffius, 1999 WL 226862 (Mich.) (reversing previous holding that compelling interest test under state constitution is satisfied by the government's interest in eliminating housing discrimination against unmarried couples); *but cf.* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994) (holding that a state law requiring landlords to rent to unmarried couples is subject to a compelling interest test under the Alaska constitution, but that the law must be upheld because Alaska has a compelling interest in eradicating discrimination against unmarried couples).

One commentator suggests that if the compelling interest test is applied in such cases, the state should at a minimum, have to produce evidence showing (1) historical and pervasive discrimination against unmarried couples; (2) the number of cohabiting couples and religiously motivated landlord; (3) the number of rental units not available because oft he religious convictions of these landlords; (4) the length of times it take to find appropriate housing; and (5) the types of housing available to married cohabitants as an alternative. Michael V. Hernandez, *The Right of Religious Landlords to Exclude Unmarried Cohabitants: Debunking the Myth of the Tenant's "New Clothes"*, 77 NEB. L. REV. 494, 560 (1998).

[236] To the extent that *Dale* sends a signal to lower courts to take civil liberties claims more seriously when antidiscrimination laws at issue, *Dale* may cause courts in jurisdictions that apply the compelling interest test in cases involving general laws that happen to infringe on free exercise to apply the test more stringently.

[237] *See* State v. Sports & Health Club, 370 N.W.2d 844 (Minn. 1985) (involving an employer who refused to hire single women working without their fathers' consent).

[238] For example, several cases have arisen in which Christian organizations paid married men higher wages than women based on their "head of household" status. *E.g*., Dole v. Shenandoah Bapt. Church, 899 F.2d 1389 (4th Cir. 1990); EEOC v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986).

are not "expression" or "speech" for purposes of the First Amendment.[239]

B. Dale *and Freedom of Speech*

As noted previously,[240] hostile environment law is increasingly infringing on First Amendment rights. Several courts have held that such infringement is justified by the government's compelling interest in eradicating discrimination in employment.[241]

The Supreme Court will inevitably hear a case in which hostile environment law and First Amendment perogatives conflict. Already, in *Davis v. Monroe County Board of Education*,[242] a case holding that peer harassment in schools violates federal law, four dissenting Justices repeatedly observed that sexual harassment law often conflicts with the First Amendment.[243]

No First Amendment claim was at issue in *Davis*. The fact that the dissenters raised the issue several times suggests that they are troubled by the growing conflict between hostile environment law and freedom of speech. Of course, one cannot definitively predict what the Court will hold in whatever case eventually comes before it. But after *Hurley* and *Dale*, one can be

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[239] *See generally* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 348 (1999) ("employment and housing are almost certain to be characterized as commerical and public, two factors deemed important to the existence or scope of associational interests.").

[240] *See supra*

[241] *See supra*.

[242] 526 U.S. 629 (1999).

[243] First, the Justices noted that "[a] university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer sexual and racial harassment." *Id*. at 667 (Kennedy, J., dissenting). Later, the dissenters added that "[a]t the college level, the majority's holding is sure to add fuel to the debate over campus speech codes that, in the name of preventing a hostile educational environment, may infringe students' First Amendment rights." *Id*. at 681. Finally, the dissenters pointed out that a student's claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment." *Id.* at 683; *see also* DeAngelis v. El Paso Municipal Police Officers Assn, 51 F.3d 591, 596–97 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment.").

reasonably certain that the Court, unlike several lower courts,[244] will not conclude that a party's First Amendment rights can be infringed upon because of the government's compelling interest in eradicating discrimination. Rather, if a hostile environment claim survives Supreme Court scrutiny despite a First Amendment challenge it will be because the defendant was unable to persuade the Court that First Amendment rights were infringed.

Hostile environment law is not the only place where freedom of speech has conflicted with antidiscrimination laws. The controversy over campus speech codes, enacted in part to respond to federal civil rights laws,[245] is well-known, and will be discussed no further here.[246] Much less well-known is that during the early years of the Clinton Administration, the Department of Housing and Urban Development ("HUD") equated organized citizen opposition to proposed group homes that would house members of protected groups with illegal housing discrimination under the Fair Housing Act.[247]

HUD's interpretation of the Fair Housing Act led to some of the most brazen government assaults on free speech rights in recent American history. HUD's actions cannot be directly attributed to judicial precedent. However, they provide both troubling evidence of sentiment at the highest levels of government to sacrifice freedom of speech to antidiscrimination concerns, and indicate that at least some HUD and Justice Department officials thought that post-*Roberts* courts

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[244] *See supra*.

[245] Hostile educational environments are unlawful under Title IX of the 1972 Education Amendments to the 1964 Civil Rights Act. The Department of Education's guidelines for Title IX require universities to ensure that minorities and women do not face "hostile environments" on campus, or the universities face the loss of federal funds. *See, e.g.*, 62 FED.. REG. 12,034, 12,038 (1997).

[246] For further discussion, see Bernstein, *supra* note _.

[247] Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1999). The FHA prohibits discrimination based on race, color, religion, sex, familial status, handicap, or national origin.

would stand by while the executive branch eviscerated the First Amendment.

One example of HUD's antics should suffice. Three residents of a Berkeley, California neighborhood opposed a plan to renovate a rundown hotel for use as a homeless center.[248] In newsletters and petitions, they claimed the location of the proposed center, near two liquor stores and a nightclub, was inappropriate because of the prevalence of alcoholism among the homeless population.[249] The three objected to the lack of mental health and substance abuse treatment in the proposed program.[250] They also unsuccessfully sued the zoning board alleging a conflict of interest.[251] Despite their efforts and the opposition of others in the neighborhood, the city approved the facility.[252]

Marianne Lawless, director of Housing Rights, Inc., a federally-funded housing advocacy group, filed a complaint with HUD claiming the three had opposed the project because the residents might be mentally disabled or former substance abusers.[253] Both groups are considered to have disabilities and therefore are protected under the Fair Housing Act. In the course of investigating the complaint HUD issued subpoenas for anything the three Berkeley residents had written on the matter, minutes of public meetings, lists of members of their coalition, and any other

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[248] Heather MacDonald, *Free Housing Yes, Free Speech No*, WALL ST. J., Aug 8, 1994, at A12.

[249] *Id*.

[250] *Id*.

[251] *Id*.

[252] Janet Wells, *Housing Discrimination Probe Upsets Berkeley Officials*, S.F. CHRON., Aug. 2, 1994, at A18.

[253] *Id*.

relevant documents.[254] The Berkeley three were warned that failure to comply with the document requests could result in fines of up to $100,000 each and a jail sentence of up to one year.[255] If the investigation turned up evidence of discrimination, they would be subject to fines of up to $50,000 each and might be liable for compensatory and punitive damages.[256]

HUD's preliminary investigation concluded that the three had broken the law.[257] HUD spokesperson John Phillips demonstrated HUD's contempt for freedom of speech by explaining in response to free speech concerns that "[t]o ask questions is one thing, to write brochures and articles and go out and actively organize people to say, 'we don't want those people in those structures,' is another."[258]

Incidents similar to those involving the Berkeley three occurred across the country.[259] One victim of HUD harrassment summed up the effects of HUD's investigation as follows:

> It financially ruined the neighborhood association and terrified residents.

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[254] MacDonald, *supra* note 244. Asking for a list of members seemed to be a clear contravention of NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (holding that an expressive association could not be compelled to reveal its membership to the government).

[255] *Id.*

[256] *Id*.

[257] Susan Ferriss, *Free Speech Advocates Find a Fight In Berkeley: HUD Investigating 3 Residents For Bias Against Mentally Ill in Remarks, Letters Protesting Projects*, S.F. EXAMINER, July 22, 1994, at A6.

[258] *Id*.

[259] *See* Sigfredo A. Cabrera, *HUD Continues Its Assault on Free Speech*, WALL ST. J., June 7, 1995, at A15; Lou Chapman, *Free Speech An Issue in Suit Against Ridgmar Group*, FT. WORTH STAR-TELEGRAM, Nov. 19, 1994, at 27; Editorial, *Intimidating Political Protest*, WASH. POST, Aug. 22, 1994, at A16; Edmund Mahony, *Judge Dismisses Suit Against Neighborhood*, HARTFORD COURANT, February 12, 1995, at B1; Joyce Price, *HUD Sues Texans in Home-Sale Battle Citizens Fought to Stop Deal In 1991*, WASH. TIMES, Nov. 1994, at A4; Joyce Price, *Federal Government Sues Five for Fighting Group Home: Act of Getting a Restraining Order Called Discriminatory*, WASH. TIMES, May 31, 1995, at A3; Brian J. Taylor, *No Retreat in Feds' War on Free Speech*, SACRAMENTO BEE, Nov. 19, 1994, at F1.

> HUD investigators pressured neighbors to turn informer. Residents were afraid to join the association or to speak out at public meetings. The government even tried to deprive us of legal representation by threatening to call our attorney as a witness.
>
> We couldn't take minutes at meetings of our board because these could be seized and used as evidence against us. We tried to settle the case, but the terms of the consent decree drafted by the government were intolerable. They would have required residents to undergo an enforced course of political re-education and proposed unconstitutional restraints on our right to speak, write and association.[260]

After a media outcry over HUD's refusal to respect First Amendment rights,[261] HUD announced new guidelines for its field offices. The Department would no longer investigate "any complaint . . . that involves public activities that are directed toward achieving action by a governmental entity or official; and do not involve force, physical harm, or a clear threat of force or physical harm to one or more individuals."[262] The department also announced it was dropping the investigation of the Berkeley incident because, it concluded, the citizens were acting within their free-speech rights.[263]

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[260] Mahony, *supra* note 255.

[261] *See*, *e.g.*, Editorial, *Free the Berkeley Three: HUD vs. Free Speech*, VIRGINIAN-PILOT, Aug. 18, 1994, at A20; Editorial, *No More Speech Police*, BOSTON HERALD, Sept. 3, 1994, at 12; Editorial, WASH. POST, *supra* note 126, at A16; MacDonald, *supra* note 244; Justin Raimondo, *The Hidden Agenda of Radical Egalitarians*, S.F. EXAMINER, Aug. 17, 1994 , A17.

[262] Memo from Roberta Achtenberg, Asst. Sec. for Fair Housing and Equal Opportunity, U.S. Dep't of Housing and Urban Development (September 2, 1994) (on file with author).

[263] Roberta Achtenberg, *Sometimes on a Tightrope at HUD*, WASH. POST, Aug. 22, 1994, at A17.

The Berkeley three then successfully sued HUD and some of its employees for constitutional violations. *See* White v. Julian, No. C-95-1757 MHP (N.D. Cal. 1998) (available at <http://www.cir-usa.org/white.html>) (visited July 21, 2000), *aff'd*, __ F.3d ___ (9th Cir. 2000). The court denied qualified immunity to individual HUD employees, concluding that their conduct was clearly unconstitutional. *Id*.

The few other cases that have squarely addressed the First Amendment issue have been decided in favor of

Assistant Attorney General Deval Patrick, however, was unapologetic. He had previously written a letter to a judge arguing that "Congress intended the [Fair Housing Act] to proscribe any speech if it leads to discrimination prohibited by the FHA."[264] In a letter to the *Washington Post*, Mr. Patrick responded to criticism of the Justice Department's action in a Fair Housing case in Fort Worth:

> The problem wasn't the repugnant views expressed in leaflets and court filings; they were mere instrumentalities in a concerted effort to coerce and intimidate the seller in violation of the Fair Housing Act and Texas law.
>
> Baseball bats are perfectly legal too. But if you wield one to keep people out of the neighborhood, we are going to use the bat as evidence of your intent to violate the civil rights laws.[265]

Patrick correctly asserted that the Fair Housing Act outlaws conduct protected by the First Amendment. Under the Act, it is illegal "[t]o make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or

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the protestors and against HUD and private organizations seeking to suppress speech. Salisbury House, Inc. v. McDermott, 1998 WL 195693, *10 (E.D. Pa. 1998) ("Although [the neighbors'] views reflect an ill-advised, distasteful form of 'not in my backyard'-ism, the Defendants have the night under the First Amendment to express themselves without fear of prosecution."); Michigan Protection and Advocacy Service, Inc. v. Babin,. 799 F. Supp. 695 (E.D. Mich. 1994) (holding that neighbors' opposition to group home for mentally disabled adults was protected by the First Amendment); United States v. Wagner, 1995 WL 841924, at *5 (N.D.Tex.) ("the Court cannot, without contravening the protections of the First Amendment, permit the Paragraph 14 claims against Defendants on the grounds that they engaged in protest activities–leafleting, petitioning, and soliciting–against the placement of a group home in their subdivision"). However, the *Roberts* compelling interest argument does not seem to have been made in any of these cases. Pre-*Dale*, such an argument may have been successful.

[264] Achtenburg, *supra* note 259.

[265] Deval L. Patrick, Letter to the Editor, WASH. POST, February 19, 1996, at A24.

national origin, or an intention to make any such preference, limitation, or discrimination."[266] Lobbying against a halfway house or drug rehabilitation center arguably constitutes making a statement expressing a preference that groups considered "handicapped" be denied housing. Of course, Patrick should have recognized that HUD and the Justice Department are obligated to respect constitutional rights, even in the face of a conflicting antidiscrimination statute.

Fortunately, the public—or at least the media and a few influential congressmen—was sufficiently troubled by the consequences for the First Amendment of enforcing this aspect of the Act that HUD and the Justice Department had to back off, though HUD is still occasionally accused of attempting to intimidate neighborhood opponents of group housing.[267] However, there is no guarantee that the results of the political process will be the same in the future. As the scope of antidiscrimination laws have grown, the political constituency supporting such laws at the expense of constitutional rights has grown apace.[268]

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[266] 42 U.S.C. § 3604(c). Under 42 U.S.C. § 3604(f)(1), it is illegal "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (A) that buyer or renter (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter." Two courts have held that neighbors who filed lawsuits against the transfer of property could be held liable under this section of the Act. *See* United States v. Scott, 788 F. Supp. 1555, 1559-62 (D. Kan. 1992) (holding that the opposition of neighbors to the sale of a residential property because of the disabilities of the prospective occupants violated the FHA); Casa Marie, Inc. v. Superior Court of Puerto Rico, 752 F. Supp. 1152 (D.P.R. 1990), *vacated on other grounds*, 988 F.2d 252 (1st Cir. 1993) (holding that the filing of a non-frivolous state court suit violated the FHA because it was done with discriminatory intent). The application of the FHA to neighbors was criticized in Michigan Protection and Advocacy Service, Inc. v. Babin, 799 F. Supp. 695, 714 n.39 (E.D. Mich. 1992), *aff'd*,18 F.3d 337 (6th Cir. 1994). The First Amendment issue was not raised in these cases.

[267] *See, e.g.*, Township of West Orange v. Whitman, 8 F. Supp. 2d 408 (1998) (local citizens accuse HUD of attempting to intimidate them into relinquishing their First Amendment rights, and request injunction protecting their rights).

[268] Even the American Civil Liberties Union is increasingly abandoning its civil libertarian principles when antidiscrimination laws are at issue. *See* David E. Bernstein, *The ACLU Has Lost its Way*, CINCINNATI ENQUIRER, May 16, 2000, at 8. To take just one example, the ACLU filed an amicus brief on behalf of Dale, rejecting the Boy Scouts' claimed right to expressive association. By contrast, as late as 1972 the ACLU promulgated a policy on "private

The potential failures of the political process made it imperative that the Supreme Court establish a strong precedent that would protect First Amendment liberties from antidiscrimination laws in the future. *Dale* appears to be just such a precedent.

## CONCLUSION

For decades, legal scholarship has been full of denunciations of "judicial activism."[269] The volume of literature on judicial activism has obscured instances where the Court has erred in the opposite direction, abdicating its responsibility to limit government power to its constitutional boundaries. There are few more extreme examples of such judicial abdication than *Roberts v. United States Jaycees*.

The *Roberts* Court implicitly gave lower courts permission to tendentiously evade clear conflicts between the First Amendment and antidiscrimination laws in order to ensure that enforcement of antidiscrimination laws was not disturbed by constitutional niceties.[270] The Court compounded this transgression by holding that to the extent the antidiscrimination law at issue in *Roberts* did infringe First Amendment rights, it was subject only to a feeble compelling interest test.

The Court did not explain why antidiscrimination laws are entitled to special constitutional

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organizations" stating that "private associations and organizations, as such, lie beyond the legitimate concern of the state and are constitutionally protected against governmental interference." Quoted in WILLIAM A. DONOHUE, THE TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU 131 (1993).

[269] For many years, such criticism of the judiciary was largely a conservative province. More recently, with a conservative Supreme Court aggressively invalidating Congressional legislation, liberals have joined the chorus denouncing judges who allegedly exceed their proper authority.

[270] The Court had done the same thing, albeit less egregiously, in *Runyon v. McCrary*.

treatment, why the facts of *Roberts* established a "compelling" case for government involvement, or, most bizarrely, why a single state's claimed interest in eliminating discrimination not banned by federal law trumped federal constitutional rights. Instead, the Court abdicated its role as protector of the Constitution in favor of what it considered to be sound social policy, again implicitly inviting lower courts to do the same.

The result was that First Amendment liberties came under increasing assault as lower court judges applied and extended *Roberts.* Such abdication of judicial duty to enforce the First Amendment should be at least as offensive and scary to legal commentators as judicial activism. Not only do judges have a constitutional duty to the enforce the First Amendment, but, for reasons this author has elaborated upon elsewhere,[271] protection of the rights to free speech, free exercise, and free association is extremely important, including and especially for members of minority groups.

These First Amendment liberties are most in need of judicial protection when set against an extremely popular cause, such as antidiscrimination laws. Yet the *Roberts* Court not only seemed content to leave to their fate those who by exercising their First Amendment rights threatened to limit the enforcement of such laws, but also suggested that the First Amendment must be suspended until the utopian goal of *eliminating* discrimination is achieved; in other words, the First Amendment must be suspended forever.

*Dale* suggests that the *Roberts* era is thankfully over, and that the nine Justices of the Supreme Court, though retaining a level of disagreement on the scope of the right of expressive association, unanimously believe that antidiscrimination laws must be subject to the same

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[271] *See* Bernstein, *supra* note 101.

constitutional scrutiny as other important laws with broad popular support. Those of us who agree with the fundamental premise of the First Amendment—that government cannot be trusted to trusted to establish and fairly police the boundaries of acceptable speech, association, and religious expression—can now rest a little easier.