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FREEDOM OF DISCRIMINATION?: THE CONFLICT BETWEEN PUBLIC ACCOMMODATIONS' FREEDOM OF ASSOCIATION AND STATE ANTI-DISCRIMINATION LAWS

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"Discrimination threatens not only the rights and proper privileges of the inhabitants of [New Jersey,] but menaces the institutions and foundation of a free democratic State."[1] This declaration by the New Jersey state legislature sets forth the strong policy underlying the state's Law Against Discrimination, which prohibits discrimination against homosexuals and other minorities in public accommodations.[2] State legislatures throughout the country have taken similar steps in this direction by enacting comparable anti-discrimination statutes needed to end discrimination in these organizations. As states have expanded their civil rights laws in this fashion, conflicts have arisen between individuals in a protected class and members of organizations asserting their constitutionally protected freedom of association. With the formation of new organizations each day expressing opinions on a variety of issues, such conflicts are likely to increase over the next several years. The importance of these competing rights and policy interests demands that the United States Supreme Court and legal scholars re-evaluate the proper scope of the freedom of association, and develop a legal test that reflects the boundaries of this constitutional right.

The 2000 case, *Boy Scouts of America v. Dale*,[3] provided the Supreme Court with an ideal opportunity to re-examine the interaction between the free association rights of public accommodations and state anti-discrimination laws. Unfortunately, the Court failed to revise its analysis to carefully delineate the scope of this constitutional freedom. Instead, the

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1. N.J. STAT. ANN. § 10:5-3 (West 2000).
2. *Id.* §§ 10:5-1 to 5-49.
3. 530 U.S. 640 (2000).

Court adopted a myopic approach that protected the Boy Scouts' right to remove a homosexual man from its organization without adequate consideration of why it dismissed him and whether his inclusion "significantly burdened" the group's ability to express its message.[4]

This article will discuss how the Supreme Court's analysis of an organization's freedom of expressive association unnecessarily impedes a state's right to legislate against discrimination. The difficulty with the Court's overly broad interpretation of the freedom of association becomes evident upon analyzing its decision in *Dale*. This Article will propose modifying this analysis to place greater emphasis on the organization's reasons for excluding an individual. Such an inquiry will address whether the individual's exclusion was based on his speech or his status as a homosexual, and whether that speech or status expressed a viewpoint for purposes of freedom of speech under the First Amendment. By requiring the individual's dismissal to be based on his professed views, the Court would help ensure that an organization's freedom of association remains within its intended constitutional scope. In addition, this doctrinal change would give greater effect to state anti-discrimination statutes, which represent the will of a state's citizens.

Section I of this Article will analyze how the freedom of expressive association developed from an abstract principle within the First Amendment to an enforceable legal right, and how this right has been applied to challenge state anti-discrimination laws. Early cases first recognized this freedom as necessary to protect intimate associations between relatively few numbers of people. More recent United States Supreme Court decisions recognize the right of an organization to exclude individuals who express views that conflict with the organization's message. These cases arise when organizations claim that the freedom to associate shields their membership decisions from the application of state legislation prohibiting discrimination. This section will examine several of these cases to illustrate how the Supreme Court has defined this freedom and when, under that approach, a statute violates an organization's Constitutional rights.

Section II will discuss the facts and legal issues presented in *Dale*[5]. In order to fully understand these legal issues and the need for modification of the Supreme Court's constitutional doctrine, it is helpful to examine how the New Jersey appellate courts and the United States Supreme Court applied the freedom of association in this case. The Supreme Court held that the Boy Scouts maintained a position against homosexuality, and that keeping

4. *Id.* at 659.
5. 530 U.S. 640.

Dale as a member would significantly infringe on its freedom to express this view.[6] The Court's analysis of this issue did not adequately consider whether the Boy Scouts dismissed Dale for his viewpoint speech or his status. Justice Handler of the New Jersey Supreme Court first discussed the importance of this distinction in his concurring opinion,[7] but as Professor Nan Hunter correctly points out, he characterizes one's status too narrowly.[8] This distinction is essential in conducting a thorough inquiry into the question of whether compelling the Boy Scouts to reinstate Dale would "significantly infringe" the organization's ability to express its views. The failure to consider this issue contributed to the Court's unnecessary broadening of the scope of the freedom of association.

Section III will propose a speech-status framework which would require the Court to thoroughly analyze the reasons an individual is excluded or removed from a public accommodation and whether including that individual would constitute a severe intrusion on the organization's freedom of expressive association. This analytical framework recognizes that there are two general situations where compelling an organization to include an individual will "significantly burden" its ability to freely express its views. The first situation centers around statements the individual made that allegedly contradict the group's message. The second focuses on the individual's identity or status which was itself alleged to burden the organization's views. Subsection A will analyze speech and status-based exclusions and will set forth five specific categories into which an individual's speech or status may fall depending on whether it expresses a viewpoint, identity, or both. Examining these categories in the context of reviewing the decision to exclude an individual will allow the Court to more deftly determine whether the individual's statements or status would significantly infringe upon the organization's freedom to express its views.

As a result, this speech-status dichotomy will also bring the application of the freedom of association in line with its intended scope. Subsection B will discuss the proper protection that the freedom of association was intended to offer and explain why the Court must avoid extending this freedom beyond the interests it was designed to protect. The freedom of association was not intended to apply as a right in itself, but as a necessary means of protecting other important interests, especially those embodied in

6. *Id.* at 659.

7. Dale v. Boy Scouts of America, 734 A.2d 1196, 1235-36 (N.J. 1999).

8. *See* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L.L. 1, 28 (2000) (arguing that Justice Handler's view of self-identifying speech as nothing more than a label does not consider that such speech also inherently conveys a sense of self-worth).

the First Amendment. Clarifying the inquiry into whether an individual's speech or status significantly burdens an organization's freedom of expressive association will ensure the likelihood that the Court protects organizations only to this extent and does not unnecessarily usurp States' power to prohibit discrimination.

Section IV will return to *Dale*[9] and apply this speech-status framework to the alleged conflict between the Boy Scouts' freedom of association and New Jersey's interest in preventing discrimination in its public accommodations. This reexamination will show that Dale did not likely express a view on homosexuality, and as a result, compelling the Boy Scouts to reinstate him would not implicate the group's free speech rights. Therefore, application of the New Jersey law would not "significantly burden" the Scouts' ability to express its views. The Boy Scouts' exclusion of Dale centered primarily on his identity, and such status-based discrimination does not come within the scope of the freedom of association and should not receive constitutional protection from state regulation.

The courageous step forward many states have taken by passing anti-discrimination laws demands that the United States Supreme Court reexamine its current analysis of the conflict between this legislation and the freedom of expressive association of organizations. Unfortunately, the Supreme Court failed to do so when it was last presented with the opportunity in the spring of 2000, and few commentators have addressed this specific problem. This Article sets forth a speech-status framework that would help the Court analyze whether a state's anti-discrimination statute "significantly infringes" upon an organization's freedom of association. This proposal would help district and appellate courts properly define the scope of the freedom of association and harmonize the associational rights of organizations with States' efforts to end discrimination.

I. THE DEVELOPMENT OF THE FREEDOM OF ASSOCIATION AND THE SUPREME COURT'S ANALYSIS

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[10]

In interpreting the extent to which the First Amendment protects freedom of association, the United States Supreme Court

9. 530 U.S. 640.
10. U.S. CONST., amend. I.

has recognized that this interest underlies highly personal relationships as well as various political, social, economic, religious, and educational endeavors.[11] It is necessary to understand how the Court's approach has evolved through various cases in order to appreciate the need to modify this analysis.

Courts have long recognized that the First Amendment protects the individual's right to enter into and maintain highly personal relationships without unwarranted governmental interference.[12] The earliest evidence of this associational right emerged when the Supreme Court recognized parents' strong liberty interest in directing the upbringing and education of their children.[13] In *Pierce v. Society of Sisters*,[14] a group of parents who wanted to send their children to private school challenged an Oregon statute requiring all parents to send their children, age eight to sixteen, to public school.[15] The State contended that it was the sole teaching power within the state and that it only tolerated the existence of private institutions.[16] The Court adopted a compromise view of education by holding that the State has a right to require children to attend school, but that parents have a liberty interest in choosing the direction of their children's education.[17] The association interest that parents have in raising their children is personal and should be free from unjustified State influence.[18]

Beyond the general right to associate in highly personal relationships, the First Amendment implies a right of expressive association for political, social, economic, and religious reasons.[19] Freedom to associate for these purposes is necessary to protect the freedoms of speech, religion, and the right to question the government's decisions that lie at the heart of the First Amendment.[20] In other words, to deny individuals the right to associate with other like-minded people would effectively infringe upon their right to express themselves freely.

As is the case with many constitutional rights, States may

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11. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (ruling that while students may be forced to attend school, the freedom of association prohibits states from requiring students to attend public schools); Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984) (recognizing that the freedom of association protects individuals' personal freedom).

12. *Roberts*, 468 U.S. at 617-18.

13. *Pierce*, 268 U.S. at 534-35.

14. 268 U.S. 510.

15. *Id.* at 529-30.

16. *Id.* at 533.

17. *Id.* at 534-35.

18. *Id.*

19. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244-46 (1982) (holding that denominational neutrality which is mandated by the First Amendment assures that each religion enjoys the free exercise of religion).

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

limit this right to associate for "expressive purposes" through statutes or regulations that further a compelling state interest and are not aimed at squelching speech.[21] The most significant promulgation of these state regulations has been in the form of anti-discrimination laws prohibiting organizations that qualify as public accommodations from discriminating against a variety of different status groups.[22] Application of these state anti-discrimination laws has increasingly clashed with organizations' freedom of association under the First Amendment.[23]

A. Roberts v. United States Jaycees

The United States Supreme Court first addressed the conflict between the freedom of association and a state anti-discrimination statute in *Roberts v. United States Jaycees*,[24] where the Court was called upon to decide the constitutionality of a Minnesota statute prohibiting sex-based discrimination in public accommodations.[25] In *Roberts*, several Minnesota chapters of the United States Jaycees began accepting women into the organization as full members contrary to the organization's national bylaws.[26] The Jaycees is a national non-profit organization whose stated purpose is to promote the "development of young men's civic organizations" and to enhance the personal development and community participation of young men.[27] Based on this objective, the national organization prevented local chapters from recognizing some as full members and sanctioned those chapters that disobeyed.[28]

The local chapters sued the national organization in state court under the Minnesota Human Rights Act for gender discrimination, and the Jaycees responded by seeking injunctive

21. *Id.* at 623; *See also* Buckley v. Valeo, 424 U.S. 1, 25 (1976) (stating that governmental actions which impede the freedom of association must be closely scrutinized).

22. *See, e.g.*, N.J. STAT. ANN. § 10:5-4 (West Supp. 2000) (requiring access to employment, in all places of public accommodation without discriminations).

23. *See, e.g.*, *Roberts*, 468 U.S. at 612 (involving a dispute over whether the Minnesota Human Rights Act, which required the Jaycees to admit women as regular members, impinged on the male members' freedom of association); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 541-42 (1987) (addressing whether California's Unruh Act, which required the Rotary Club to admit women, interfered with the male members' freedom of association); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 561-62 (1995) (involving a dispute over whether the refusal to allow members of a gay rights group to march in a parade violated the Massachusetts public accommodations law).

24. 468 U.S. 609.

25. *Id.* at 624-25.

26. *Id.* at 614.

27. *Id.* at 612-13.

28. *Id.* at 614.

relief in federal district court claiming that the forced admission of women violated their freedom of association.[29] In regards to the state law issue, the Minnesota Supreme Court held that the Jaycees were a public accommodation within the meaning of the statute and that the organization violated the statute by discriminating against women.[30] The federal district court subsequently ruled that to apply this statute to the Jaycees would violate the group's freedom of association under the First Amendment.[31]

The Eighth Circuit reversed, and on appeal, the United States Supreme Court held that the application of the Minnesota anti-discrimination statute would not violate the Jaycees' freedom of association.[32] The Court began its analysis of the statute's effect on the Jaycees by addressing the group's viewpoint or expressive agenda and the extent to which it involved gender.[33] Speaking for the Court, Justice Brennan stated that the Jaycees' focus on "promot[ing] the views of young men" does not suggest that the organization set forth a clear message on any particular issue.[34]

In light of this conclusion, the Court had no difficulty holding that providing women complete membership rights in the group would have little or no impact on its ability to promote its desired views.[35] In particular, Brennan asserted that there is no reason to believe that allowing women to vote would change the Jaycees' message. Furthermore, the Court ruled that it would not "indulge in [such] sexual stereotyping."[36] To the minor extent that the organization's freedom of speech is infringed upon, the Court ruled that the infringement was no more than necessary to accomplish the compelling interest of preventing discrimination in public accommodations.[37]

Two years later in *Board of Directors of Rotary International v. Rotary Club*,[38] the Supreme Court re-affirmed its holding in *Roberts* by upholding the application of a California anti-discrimination statute to Rotary International's membership decisions.[39] *Rotary Club* involved essentially the same facts as *Roberts*. Rotary International revoked the charter of the Rotary Club of Duarte after the club admitted several women as active

29. *Id.* at 614-16.
30. *Id.* at 616-17.
31. *Roberts*, 468 U.S. at 616.
32. *Id.* at 625.
33. *Id.* at 627.
34. *Id.*
35. *Id.* at 627-28.
36. *Id.* at 628.
37. *Id.* at 628-29.
38. 481 U.S. 537 (1987).
39. *Id.* at 549.

members.[40] In defending the Duarte club's suit under California's Unruh Civil Rights Act, Rotary International claimed that applying this statute to its decisions would infringe on the organization's freedom of association under the First Amendment.[41]

Again, the United States Supreme Court began by explaining that Rotary International and Rotary Clubs engage in a variety of service activities, but do not advocate positions on issues regarding women or any other topic.[42] Therefore, the mandate of the California law cannot impair the group's ability to carry on its activities.[43] The Court further reasoned that even if the Rotary did have some minimal expressive association, the admission of women would not affect its ability to convey its message.[44] The Court also held that California's compelling interest in eliminating discrimination against women was so significant that it trumped any "slight infringement" Rotary members may suffer.[45]

In these two cases, the Court correctly recognized that the aspiring female members did not communicate a message that contradicted the viewpoints of their respective groups. The Court's method of analysis allowed it to determine that these organizations possessed no First Amendment free speech interest in discriminating against these women. These cases, however, represented clear examples of status-based discrimination. When an organization's exclusion of an individual is not so obviously motivated by his status, this analysis results in an unnecessary expansion of this freedom.

B. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston

Hurley v. Irish-American, Gay, Lesbian and Bisexual Group of Boston[46] presented the Supreme Court with a much different situation than occurred eleven years earlier in *Roberts*. In this case, a public accommodation rejected individuals as a result of their actual message rather than some imputed message.[47] The Court's decision and reasoning together with *Roberts* and its progeny draw an important distinction between the protections afforded organizations that wish to exclude individuals because of who they are and those who strive to keep certain people out

40. *Id.* at 541.
41. *Id.* at 543.
42. *Id.* at 548.
43. *Id.*
44. *Id.*
45. *Id.* at 549.
46. 515 U.S. 557 (1995).
47. *See id.* at 561.

because of their message.[48]

In *Hurley*, members of GLIB, a group of gay, lesbian, and bisexual men and women of Irish ancestry, applied to participate in Boston's annual St. Patrick's Day Parade as an expression of their pride in being openly gay and Irish.[49] Since 1947, a veteran's council, an unincorporated association of private citizens from Boston had organized the parade and obtained a permit from the city.[50] Although the organizers denied GLIB's request in 1992, GLIB obtained a court order permitting the group's members to take part in the parade as individuals without a banner indentifying the group.[51] When GLIB's application to march was again denied in 1993, the group sued the Council for violating Massachusetts' public accommodations law, Massachusetts General Laws Section 272:98, which banned discrimination in public accommodations based, *inter alia*, on sexual orientation.[52]

Both the trial court and the Supreme Judicial Court of Massachusetts agreed that the Council did in fact violate the statute by discriminating against GLIB, and that there was no merit to the Council's claim that allowing the group to march would infringe upon its right to expressive association under the First Amendment.[53] The Massachusetts high court reasoned that nothing about the parade indicated that it conveyed a particular message or had an expressive purpose.[54]

After reviewing the circumstances and legal issues involved in the case, the Supreme Court reversed, holding that the parade organizers possessed a right of expressive association in the parade and that the State's mandate admitting GLIB infringed on this right.[55] The Court began by stating that a parade is not merely organized for the purpose of walking through the town, but carries with it the collective message of those who actively take part in it.[56] This message is embodied not only in the signs, banners, and chants, but also in the symbolic expression of the parade's participants.[57] Although the Court did not expressly refer to the parade as an expressive association, it afforded it similar treatment.[58]

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48. *See id.* at 572-73; *see Roberts*, 468 U.S. at 670 (ruling that preventing Jaycees from excluding women will not change the content of the organization's speech).

49. *Hurley*, 515 U.S. at 561.

50. *Id.* at 560.

51. *Id.* at 561.

52. *Id.*

53. *Id.* at 563-64.

54. *Id.* at 564.

55. *Hurley*, 515 U.S. at 573.

56. *Id.* at 568.

57. *Id.* at 569.

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

In a unanimous opinion, Justice Souter suggested that the anti-discrimination statute would effectively prevent the organizers from excluding homosexuals from participating in the parade generally.[59] The Council did not prevent the members of GLIB from marching in the parade as individual openly gay Irish-Americans, but rather refused to allow the group to carry its own banner.[60] The Court reasoned that GLIB's desire to march in the parade was motivated by the opportunity to express its message that gay Irish-Americans should be celebrated as an important part of the Irish community.[61] Massachusetts could not compel the organizers of the parade to include this message in its parade, because to do so would deprive them of their freedom of expressive association under the First Amendment.[62]

The Court's reasoning in *Hurley* is unique because the organization was the parade organizers whose message was more "public" than the average public accommodation.[63] In this regard, the Court was careful to allow the organizers to closely control any message conveyed by the parade.[64] Had this case involved a non-parade public accommodation, excluded GLIB members should have received greater attention in determining whether they significantly infringed on the organizers' message. The Supreme Court clearly downplayed *Hurley's* uniqueness when it decided *Dale* in the 2000 term. Examining the Court's opinion in *Dale* illustrates its misplaced reliance on *Hurley*, and the inadequacy of the Court's doctrinal approach.

II. BOY SCOUTS OF AMERICA V. DALE

The nature of the claim presented in *Dale* did not differ greatly from the freedom of association challenges to state anti-discrimination statutes made in the aforementioned cases. However, the nature of the Boy Scouts; and James Dale's position as a homosexual leader of young children sparked a great deal more public interest and debate among liberal and conservative groups alike. This politically charged climate only intensified by the time the case reached the United States Supreme Court.

A. Facts

James Dale entered the Boy Scouts of America in 1978 by joining Monmouth Council, New Jersey's local Cub Scout pack. He remained an active member of the organization until 1990.[65]

59. *Hurley*, 515 U.S. at 572.
60. *Id.*
61. *Id.* at 570.
62. *Id.* at 575.
63. *Id.* at 560-61.
64. *Id.* at 580-81.
65. *Dale*, 530 U.S. at 644.

During this time he excelled earning the highly acclaimed Eagle Scout Badge, speaking at various Scout functions, and in 1989 becoming an adult leader.[66] In 1989, Dale enrolled at Rutgers University, and after realizing that he was gay, he admitted his homosexuality to his family and friends.[67] He became the co-president of Rutgers University Lesbian/Gay Alliance, and in July 1990, he was interviewed about the group by the Star Ledger, a Newark newspaper.[68] The article included a photograph of Dale, which identified him as a homosexual, and his comments about his experience in looking for a positive role model in the gay community when he was a young man.[69]

After the article was published, Dale's local chapter expelled him from the Boy Scouts on the grounds that the organization does not grant membership to homosexuals.[70] He subsequently sought information about the Boy Scouts' policy regarding membership and leadership standards to understand and eventually challenged this decision.[71]

The Boy Scouts of America is a federally chartered corporation that has had eighty-seven million members since its inception in 1910.[72] Its mission is:

> to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues. . .[73]

The oath of the Boy Scouts further states that each Scout will do his best "[t]o keep [him]self physically strong, mentally awake, and morally straight."[74] However, in terms of morality the organization advises its members that what is right and wrong should be determined by what is in their hearts and heads.[75]

The organization did not make a public statement or take a public position on homosexuality before revoking Dale's membership.[76] In 1978, the Boy Scouts did draft a position statement maintaining that an openly gay individual may not be a member or a volunteer leader within the organization.[77] This statement was not released to the public or group members. In

66. *Id.*
67. *Id.* at 644-45.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 697.
73. *Dale*, 530 U.S. at 666.
74. *Id.*
75. *Id.* at 1203.
76. *Id.* at 673-74 (Stevens, J., dissenting).
77. *Id.* at 651-52.

fact, no such statement relating to homosexuality was ever released before Dale filed his lawsuit. Only after Dale's membership was revoked did the group distribute two position statements which declared that homosexuality was inconsistent with a "morally straight" life.[78]

Dale pursued review of this action through the group's review board and the Regional Director, but was unsuccessful.[79] He then sued the Boy Scouts alleging that dismissing him from the organization because of his sexual orientation violated the New Jersey Law Against Discrimination (LAD).[80] The Boy Scouts contended that applying LAD to force the group to include homosexual members would violate its freedom of expressive association.[81]

B. New Jersey State Court Proceedings

The state court case contained both the claim of discrimination under LAD and the Boy Scouts' assertion that even if it violated LAD, the statute could not be applied without violating the defendant's First Amendment rights.[82] The New Jersey Supreme Court had the final word on the question of state law; the Constitutional issue could be appealed to the United States Supreme Court.[83]

1. New Jersey Superior Court

The trial court held that the Boy Scouts were not a "public accommodation" under the New Jersey anti-discrimination statute, and therefore Dale had no cause of action against the organization.[84] On appeal, the New Jersey Superior Court reversed.[85] The appellate court reasoned that the Boy Scouts' local chapters were public accommodations, since they sought membership from the general public and maintained relationships with other established public accommodations.[86] Therefore, the organization violated LAD when it removed Dale.[87] The Court also rejected the Boy Scouts' freedom of expressive association claim, because there was an insufficient link between the group's expressive activities and its exclusion of homosexuals.[88] Both

78. *Id.* at 674 (Stevens, J., dissenting).
79. *Dale*, 734 A.2d at 1205.
80. *Id.*
81. Dale v. Boy Scouts of America, 706 A.2d 270, 284-85 (N.J. Super. Ct. App. Div. 1998).
82. *Id.*
83. *Dale*, 734 A.2d at 1219.
84. *Id.* at 1205-06
85. *Id.* at 1206.
86. *Id.*
87. *Id.*
88. *Id.* at 1207. The N.J. Supreme Court described the court's ruling as

parties petitioned the New Jersey Supreme Court for review.[89]

2. New Jersey Supreme Court

After granting the parties' petitions for review, the State Supreme Court resolved the state law discrimination claim by affirming the Superior Court's ruling that the Boy Scouts is a place of public accommodation under LAD and that the organization discriminated against James Dale.[90] By holding that the Scouts violated the New Jersey statute, the Court was required to reach the group's claim that application of the statute infringes on its First Amendment rights.[91]

The Court recognized the two interests embodied in the Freedom of Association: the freedom to enter into intimate associations and the freedom to engage in expressive association.[92] As to the freedom of intimate association, the Court held that the Boy Scouts was not the type of small organization in which members maintain highly personal relationships afforded Constitutional protection.[93] In reaching this decision, the Court focused not only on the size of the organization, but on its very open selection process and inclusive policy.[94]

Turning to the more relevant freedom of expressive association, the Court focused on the framework the United States Supreme Court set forth in *Roberts* and *Hurley*. In the majority opinion, Justice Poritz acknowledged that while this freedom preserves an organization's right to associate with other people in "pursuit of . . . political, social, economic, educational, religious, and cultural ends," such protection only allows the exclusion of an individual who "significant[ly]" affects the group's message.[95] The Court further pointed to the permissibility of infringement upon this right when the United States Supreme Court has found a compelling state interest.[96]

The Court then analyzed whether the Boy Scouts was a group that maintained a public position on an issue or expressed a particular message.[97] After concluding that the group advocated

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follows: "Although the court accepted the argument that the First Amendment protects Boy Scouts goals and activities, it determined that the relationship between Boy Scouts' stated goals and Boy Scouts' exclusionary practice was not significant enough to overcome the compelling stated interest in eradicating invidious discrimination." *Id.*

89. *Id.* at 1200.
90. *Dale*, 734 A.2d at 1218.
91. *Id.* at 1219.
92. *Id.* at 1220, 1222-23.
93. *Id.* at 1221.
94. *Id.*
95. *Id.* at 1222.
96. *Id.* at 1223.
97. *Dale*, 734 A.2d at 1226.

that its members be "morally straight" and "clean," the Court held that the application of New Jersey's LAD did not significantly affect its ability to express this view.[98] Since the organization's message did not openly favor the exclusion of homosexuals or the discouragement of homosexual behavior, the Court did not believe that admitting Dale would have much impact on the Scout's message of moral integrity.[99]

The New Jersey Supreme Court distinguished this case from *Hurley*.[100] The Court reasoned that unlike the *Hurley* marchers, Dale was not seeking to convey any message about homosexuality to the other Scout members.[101] While inclusion of the GLIB banner in *Hurley* would have significantly burdened the parade organizers' message, Dale's continued membership would not have similarly affected the Boy Scouts ability to express its views.[102] This is highlighted by the distinction between a parade, in which speech is the sole purpose for organizing, and a group such as the Boy Scouts, whose message has developed throughout its existence.

C. United States Supreme Court

After the New Jersey Supreme Court disposed of the issue under New Jersey's anti-discrimination law, the United States Supreme Court granted certiorari to decide if applying the state law to the Boy Scouts' action would infringe on the organization's First Amendment right of expressive association.[103]

The Court began by addressing the issue of whether the Boy Scouts engaged in "expressive association" so as to be able to claim such a right.[104] After briefly examining the organization's mission statement and the Scout Oath, the majority concluded that by communicating its views regarding the morality and values of its members, the Scouts did engage in expressive association.[105] The Court further reasoned that if the Boy Scouts assert that it believes homosexuality is immoral, it must accept this position.[106] The Court, as a result, accepted the organization's declaration in its brief that it "teaches that homosexual conduct is not morally straight" and pointed to the unreleased 1978 position statement as evidence of this assertion.[107]

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98. *Id.* at 1223-24.
99. *Id.* at 1225.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Dale*, 530 U.S. at 644.
104. *Id.* at 648.
105. *Id.* at 648-51.
106. *Id.* at 651.
107. *Id.* at 651-52.

In the majority opinion, Chief Justice Rehnquist next considered the more difficult question of whether forcing the Boy Scouts to readmit Dale would "significantly affect" its ability to communicate its viewpoints inside and outside the organization.[108] Instead of making its own reasoned determination of whether Dale's views would impair the organization's expression, the Court again deferred to the Boy Scouts' assertions.[109]

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, sharply attacked the Court's peripheral inquiry into whether the Boy Scouts actually maintain a position against gays and homosexual behavior as wholly inadequate.[110] It is not enough for a group to publicly assert its position on an issue for the first time during litigation as the Scouts do here.[111] This would allow the freedom of expressive association to serve as a procedural method for an organization to justify its discriminatory exclusion of certain individuals.[112] Justice Stevens argued that in no other context has the Court felt beholden to accept a party's assertions on a legal issue such as this.[113]

The majority further asserted that Dale's status as an openly gay member of the community was inapposite to the Scouts' averred teachings.[114] Forcing the group to readmit Dale would have required it to communicate to "the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[115] The Court concluded that Dale's membership would "significantly burden" the Scouts' ability to express its views on homosexuality and therefore would intrude on the group's freedom of expressive association.[116]

In reaching this conclusion, Chief Justice Rehnquist analogizes this case with *Hurley* claiming that Dale would interfere with the Boy Scouts' decision not to support homosexual behavior to the same extent that GLIB would have interfered with the message of the parade organizers in *Hurley*.[117] The Court emphasized that all of a group's views are protected, and thus it was inconsequential that anti-homosexuality was not the Scouts' core purpose.[118] The Court further held that New Jersey's interest in preventing discrimination in places of public accommodation does not overcome the violation of the Scouts' First Amendment

108. *Id.* at 654.
109. *Id.* at 655-56.
110. *Dale*, 530 U.S. at 686 (Stevens, J., dissenting).
111. *Id.*
112. *Id.*
113. *Id.* at 685-86.
114. *Id.* at 651-55.
115. *Id.* at 653.
116. *Id.* at 659.
117. *Dale,* 530 U.S. at 659.
118. *Id.* at 661.

rights, because unlike the circumstances in *Roberts*, this infringement was substantial.[119]

Justice Stevens, in his dissent, argued that even if one accepts the Court's assumption that Dale's homosexual status contradicts the Scouts' teachings, it is quite a stretch to claim that merely including him would force the group to convey a different message.[120] Neither the First Amendment nor the Boy Scouts' policy requires all members within the organization to agree on all of the policies.[121] The dissent contended that allowing Dale as a member would send no more of a message than the different viewpoints of the group's heterosexual members.[122]

III. A NEW ANALYTICAL FRAMEWORK: RECOGNIZING A DISTINCTION BETWEEN AN INDIVIDUAL'S SPEECH AND STATUS AND CLARIFYING THE QUESTION OF WHEN AN INDIVIDUAL SUBSTANTIALLY INFRINGES UPON AN ORGANIZATION'S FREEDOM OF EXPRESSIVE ASSOCIATION.

In analyzing whether application of a state anti-discrimination law infringes upon an organization's First Amendment freedom of expressive association, the Supreme Court focuses most of its attention on whether that organization is expressing a viewpoint, and if so what that viewpoint is.[123] While this inquiry is essential in determining the scope of protection that should be afforded the organization, it is equally if not more important whether the views and, in rare cases, the status of the excluded individual will actually "significantly burden" the organization's ability to express its message.[124]

In deciding the later issue, it is necessary to go beyond the deferential approach by which the Court allows the organization itself to determine whether its message will be impaired. The standard endorsed by the Court in *Dale*[125] allows an organization to justify almost every exclusion it makes, including discriminatory ones, by alleging post-hoc that the individual weakened its message in some way.[126] Justice Stevens, in his dissent, takes particular exception with the majority's view that the Court "cannot doubt" an organization's assertion that an

119. *Id.* at 657-58; *Roberts*, 468 U.S. at 626.
120. *Dale*, 530 U.S. at 691.
121. *Id.* at 689-91.
122. *Id.* at 692.
123. *Id.* at 648-59.
124. *See* Hunter, *supra* note 8, at 27 (criticizing the New Jersey Supreme Court's analysis of the Boy Scouts' freedom of association claim for failing to address whether Dale's statement identifying himself as a homosexual conveyed a message). According to Hunter, this inquiry is one of three essential elements of what she refers to as an expressive identity claim. *Id.*
125. *Dale*, 530 U.S. at 650-53.
126. *Id.* at 686-87 (Stevens, J., dissenting).

individual impairs its message.[127] He maintains that the parameters of a constitutional right, especially the First Amendment, has never been and may not now be left in the hands of the organization itself.[128] In *Roberts*, the Court itself seems to have mandated that an "unsupported generalization" about the relative interests and perspectives" of different groups of people may not be uncritically accepted.[129]

Instead, the Court must undertake a thorough review of the facts and circumstances of each case to determine whether the forced inclusion of a certain individual will actually hamper the organization's ability to communicate its message. This inquiry must focus on the individual and whether his speech or status will "significantly burden" the organization's viewpoint. It is extremely important to distinguish between situations where an individual's speech is claimed to threaten an organization's freedom of expressive association and those where an individual's status is at issue. Professor Hunter emphasizes the importance of focusing on the viewpoint attributed to the individual both in analyzing an organization's right to associate and in ensuring that the individual's equality rights are protected.[130] The remainder of this Article will build upon the former proposition and attempt to offer a more refined analysis of when the freedom of association should shield an organization from the operation of state anti-discrimination laws.

There are two general situations where forcing organizations to admit individuals may "significantly infringe" the groups' ability to express their views. The first of these occurs when an individual makes statements that convey a viewpoint inapposite to the organization's established message. The individual's comments on a particular issue can be compared with this message to determine if he or she will impose such a burden on the organization. Where such a burden exists, the organization's First Amendment rights are clearly implicated, because the organization's ability to express its message would be greatly weakened if it were forced to accept individuals who have spoken out against this message.[131] In effect, the organization would be

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127. *Id.*

128. *See id.* (refusing to ". . . defer to whatever position an organization is prepared to assert in its briefs. . . as an improper way to mark . . .the proper boundary between genuine exercises of the right to associate, [. . .], and sham claims that are simply attempts to insulate nonexpressive private discrimination").

129. *See Roberts*, 468 U.S. at 628 (condemning legal decision making that relies uncritically on such generalizations).

130. Hunter, *supra* note 8, at 20.

131. *See, e.g., Hurley*, 515 U.S. 576 (maintaining that "when the dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to

required to endorse speech with which it does not agree.[132]

The second situation occurs when an organization excludes an individual, not because of statements he made, but because his status alone compels the organization to adopt or accept a message that runs contrary to its fundamental views or purpose. It will be much more difficult for a court to conclude that an individual's status conveys a message that would conflict with the group's views to such an extent that including him would constitute a "significant burden." The Court should scrutinize such cases where an organization dismisses an individual for his status, because they do not touch nearly as closely upon the interests underlying the First Amendment. To the contrary, excluding individuals based on their identity or status involves the dangerous underhanded discriminatory motives that have long pervaded social and political organizations. The First Amendment should not be used as a shield to permit such discrimination unless the group's freedom of speech, religion, or assembly demands such protection. Therefore, for one's identity to meet this standard, the organization's views against a particular status group should not only be clearly expressed, but should also be the central purpose of the organization.[133]

In order to fully understand the speech-status distinction and when each general category will "significantly burden" an organization's ability to express its message, it is necessary to discuss the different circumstances in which speech and status cases may arise. Situations where an organization might claim that an individual's speech or status is at odds with its message may be broken down into five categories: (1) the individual expresses views contrary to those of the organization;[134] (2) the individual's status conveys a message with which the group does not agree;[135] (3) the individual's status in itself is alleged to contradict the organization's message;[136] (4) the individual's statements are actually an extension of his identity;[137] and (5)

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autonomy over the message is compromised").

132. *Id.*

133. *See, e.g.*, Invisible Empire of the Knight of the Klu Klux Klan v. Town of Thurmont, 700 F. Supp. 281, 289 (D. Md. 1988); *See also Dale*, 734 A.2d at 1225 (holding that the Boy Scouts' First Amendment right of association was not at all burdened because the organization had no views on homosexuality that would qualify as a "unifying associative goal"); *Dale*, 530 U.S. at 683 (Stevens, J., dissenting) (stating that "[t]he relevant question is whether the mere inclusion of the person at issue would 'impose any serious burden'. . . [on] the organization's 'shared goals,' 'basic goals,' or 'collective effort to foster beliefs'").

134. *Hurley*, 515 U.S. at 557.

135. *See generally* Hunter, *supra* note 8, at 28 (maintaining that self-identification is more than a label).

136. *See generally Roberts*, 468 U.S. at 609; *Dale*, 530 U.S. at 648.

137. Hunter, *supra* note 8, at 20.

hybrid cases where an individual's statements and status are at issue.[138] Each of these categories will be explained and analyzed in subsection A in order to help refine the inquiry into whether an individual will "significantly burden" a public accommodation's freedom of association.

The need for this speech-status distinction becomes clearer after examining the purpose of the First Amendment and the interests underlying the freedom of expressive association. These interests, which will be discussed in subsection B, will show that while the First Amendment supports an organization's right to exclude individuals who express views that hinder its ability to communicate its message, it generally does not support exclusion based on status.

A. Boundaries of the Speech-Status Distinction

Before applying this speech-status dichotomy as part of a thorough analysis of whether an individual's forced inclusion will "significantly burden" an organization's message, it is necessary to examine the scope of this distinction. As mentioned above, not every case involves a clear distinction between an individual's speech and his status. Instead, there are five different categories of either speech or status that may describe an organization's exclusion of an individual for infringing on its ability to communicate its message. Understanding these categories helps to provide a framework for deciding whether an individual is being excluded because of his speech or his status, and whether the reason for this exclusion significantly burdens the organization's message.

1. Speech That Conveys a Viewpoint

The first type of case occurs when the individual makes a statement that expresses a viewpoint potentially in conflict with the message of the organization in which he seeks to be admitted. Under these circumstances, the individual's statement equals viewpoint "speech" from the standpoint that it goes beyond being mere words to expressing a message for freedom of speech purposes. The classic illustration of this situation arises where an individual who seeks admission into an anti-abortion organization states either publicly or privately that a woman's right to choose whether or not to have an abortion should be protected. The individual's statement clearly expresses a message, and therefore constitutes viewpoint "speech" rather than mere words without a message. The Court could then decide whether the individual's speech actually significantly infringed upon the group's ability to

138. The author contends that *Dale* falls into this category. This will be discussed in Section IV.

express its anti-abortion views.

Although not as unmistakable as the previous example, *Hurley* provides another example of this category.[139] In *Hurley*, GLIB maintained a clear position that Irish homosexuals should be accepted as just as important a part of the Irish community as Irish heterosexuals.[140] The Supreme Court correctly determined that forcing the parade organizers to permit GLIB to march with its banner would be an expressive act that imposed the organization's message upon them.[141] Although *Hurley* involved an expressive act rather than a particular statement, it similarly involved the expression of a view contrary to that of the parade organizers.

2. Statements Equal Status

Every time an individual makes a statement, however, he does not express a viewpoint or engage in viewpoint "speech." In certain situations, an individual's statement or conduct may not convey a message at all, but instead may be what Professor Hunter deems "expressive identity" or an expression of one's status or identity.[142] Examples in which this may arise include when an individual affirms his or her ethnic identity, when a homosexual comes out of the closet, or when a person with AIDS discloses his or her illness. In all of these hypothetical situations the individuals have made a statement, but none of the statements express a particular viewpoint. Instead, these statements merely identify them as members of their respective status groups.

Although not squarely within this paradigm, a similar situation arose in *Roberts*, where the Jaycees tried to exclude women from holding full membership because it believed that their identity as women would lead them to express views that contradicted the group's message.[143] Although the Jaycees claimed that it excluded women because they maintained different views, the underlying reason was based upon their identity as women.[144] The Supreme Court ruled that discriminating against women in this context was not protected by the organization's freedom of expressive association, because nothing suggests that women will express a particular viewpoint as a result of their identity.[145] In other words, an organization may not assume that a woman will

139. *Cf. Hurley*, 515 U.S. at 574 (concluding that GLIB was conveying a message when it sought to participate in the parade).
140. *Id.*
141. *Id.* at 575.
142. Hunter, *supra* note 8, at 20-21.
143. *Roberts*, 468 U.S. at 615-16.
144. *Id.* at 627.
145. *Id.* at 626-27.

express certain views merely because she is a woman.[146] This reasoning applies not only to women, but also to members of any status group, such as African-Americans or homosexuals.[147]

Despite agreeing with the Court's protection of women's right of expressive identity, Professor Hunter argues that the Court failed to distinguish between viewpoint and "point of viewing."[148] She asserts that for both First Amendment jurisprudence and Equal Protection analysis, the Court must distinguish between members who are "mouthpiece[s]" of their respective groups, and members of certain "socially constituted" groups who declare that they have a unique and worthwhile point of view that should be entitled to the same liberties as other groups.[149] Hunter argues that to effectuate equality, the latter "point of viewing" statements should not be deemed viewpoint speech in analyzing organizations' freedom of association rights.[150]

In extending her analysis of the freedom of expressive association into the realm of equality jurisprudence, Hunter encounters the danger of extending this protection of expressive identity too far. On several occasions, the Court has refused to impute a particular viewpoint from one's point of view because the harm to individuals with those points of view has far outweighed the clarity such a distinction might achieve.[151] While recognizing a distinction in this context would not harm the individual, it would threaten the organization's freedom of expressive association.

It is one thing for an individual to acknowledge that he is a member of an organization and that he is personally proud of his association, but it is quite another for that individual to say that members of his status group have a valuable point of view. For example, an individual who says he is gay and proud of it does not go beyond expressing his identity. Stating that as a gay person he has a unique point of view that society should not denigrate, however, is much closer to coming within the first category of viewpoint speech rather than "status." Therefore, exempting Hunter's interpretation of "point of viewing" from viewpoint speech would limit the scope of freedom of expressive association to which organizations are entitled. Organizations would be forced, in effect, to adopt the individual's point of view.

3. Status Equals Status

In more egregious cases, an organization will deny admission

146. *Id.* at 628.
147. Hunter, *supra* note 8, at 20.
148. *Id.* at 21.
149. *Id.* at 21-22
150. *Id.* at 22.
151. *See generally* Shaw v. Reno, 509 U.S. 630 (1993); *Roberts*, 468 U.S. at 613.

to an individual of a particular identity or status, not because he has made a statement that is arguably related to his identity, but simply because he is a member of that status group. In the vast majority of these situations, the individual's status will not convey a message or viewpoint that may be understood to substantially burden the organization's fundamental views or purpose. Instead, this category involves discrimination in its purest form, and as will be discussed in the following section, does not implicate any First Amendment interests.

Although *Roberts* involved potential elements of "speech," the case is especially relevant here. The national office of the Jaycees did attempt to exclude women from obtaining full membership in the organization because they were women.[152] The Supreme Court dismissed any idea that due to their identity as women, female members would automatically express views that contradicted the organization's primary message or goal of cultivating the lives of young men.[153] While there may have been at least a theoretical conflict between women's status and the group's message, the Jaycees' action helps to illuminate this type of pure status case.

A more obvious example would be found where an organization such as the United States Jaycees or Rotary International excluded African-Americans or Hispanics without any individual expression of views contrary to their position. In these situations, including individuals from these status groups would not impose an unwanted message on the organization because the central purpose or message of these organizations does not address minorities or minority issues. When there is no such conflict between the individual's status and the organization's fundamental views, the freedom of expressive association should not operate to limit the application of states' anti-discrimination statutes.

4. Status Equals Viewpoint Speech

Not all cases where an organization excludes an individual for his status should be analyzed as pure "status" cases under the previous category. In a limited number of situations, where the central focus of an organization's message is opposition toward a particular status group, including a member of that identity would compel the organization to endorse the message that it tolerated these individuals. This compulsion would "significantly infringe" on the group's ability to express its fundamental message and purpose for organizing. While allowing such morally reprehensible groups to discriminate further in accordance with their views seems counterintuitive, doing so in these cases is

152. *Roberts*, 468 U.S. at 613.
153. *Id.* at 627.

necessary to protect the groups' constitutionally recognized freedom of speech. The First Amendment does not limit free speech rights to socially acceptable points of view.[154] Most status-based exclusions, however, simply involve covert discrimination that is neither connected to nor consistent with the organization's core beliefs.

The most obvious and hotly debated example of this category involves the Ku Klux Klan.[155] The Klan is an organization whose sole purpose is to promote its racist view that African-Americans and other ethnic and religious groups are inferior to whites. There is little doubt that if a black man or woman wanted to join the group, he or she would be denied membership. This situation is clearly distinguishable from a case where an organization such as the Jaycees discriminates against a member of a particular status group. Unlike the Jaycees, the Klan's entire existence rests on its belief that minorities are inferior. To require the group to include an African-American would force the organization to endorse the view that it tolerated African-Americans, which is entirely inapposite to its purpose. Therefore, the organization would be excluding African-Americans because their status conveys a message in this context.

Where an organization's purpose is not centered on racist or xenophobic views, it may not claim that including members of certain racial or ethnic identities would compel it to accept a message that contradicts its views. No one would perceive the acceptance of an African-American member as communicating any message where the group does not promote a fundamentally racist position.

5. Hybrid Cases Involving Status and Speech

The final category of speech-status situations arises when it is unclear whether an individual has been denied admission to a public accommodation because of his status or his speech. This situation is especially relevant when the individual is a homosexual, because in the course of making a statement, he may both disclose his status and convey his views on homosexuality. With members of other status groups, such as racial minorities, this is less likely to be relevant, both because their status is likely self-evident and thus no speech is necessary, and because a statement that, "I am African-American" does not usually connote a viewpoint. Because it will often be difficult in hybrid cases to determine what the actual reason for the exclusion is, the court must undertake a thorough analysis to determine whether either the individual's status or speech qualifies as viewpoint speech

154. *Dale*, 530 U.S. at 660.
155. Hunter, *supra* note 8, at 28.

under the previous categories.

6. Viewpoint Speech May "Substantially Infringe" Upon An Organization's Freedom of Association.

After determining which category applies to a particular public membership decision, federal courts will be in a much better position to decide whether inclusion of the individual will "significantly infringe" the organization's ability to express its message. When an individual's statement, status, or statement-status hybrid constitutes viewpoint speech, the Court must compare the individual's message with that of the public accommodation. If the individual's expressed views severely intrude on the group's freedom of expressive association, the freedom of association protects the exclusion of that individual.

When the organization's action falls into the status equals status or statements equal status categories, the freedom of association should afford the group no protection from state regulation. As will be discussed in subsection B, the interests underlying the First Amendment do not extend to such status-based discrimination, and therefore neither should the protection of the freedom of association.

B. The Interests Underlying the First Amendment Support an Organization's Freedom to Associate or Disassociate with Individuals When its Freedom of Speech is Implicated.

This doctrinal shift emphasizing an initial inquiry into the organization's reason for excluding a particular individual will not only clarify and refine the Court's analysis of whether the organization's freedom of association rights are violated, but will limit the Court's application of this freedom to protect only those rights the First Amendment was initially intended to safeguard. As discussed previously, the freedom of association protects various intimate associations, such as freedom to marry, freedom to choose whether one's children go to public or private school, and freedom from other government interference.[156]

An examination of the purposes underlying the First Amendment will help to show that beyond these highly personal interests, the freedom of association should generally operate to protect an organization's free speech rights, but should not serve as an end in itself. When an organization excludes an individual based on his status, there is generally no discernable right of speech at stake, and the Constitution should not protect such discriminatory behavior.[157] Distinguishing between expressive

156. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (upholding parents' right to send their children to public or private school).

157. *See Roberts*, 468 U.S. at 627 (stating the Constitution should not protect

speech and status cases helps to give effect to these policies and to ensure that the court properly applies the freedom of association.

The First Amendment, which contains direct evidence of the framers' intent, provides the ideal starting point to ascertain the proper scope of the freedom of association. It must first be reiterated that nowhere in the language of the Amendment or any constitutional precursor do the founding fathers set forth or even mention a right of association.[158] Within the Amendment, however, this right is implicated both in its protection of individuals' right to peaceably assemble and in its assurance of the right to "petition the Government for a redress of grievances."[159] The origins of association and its importance in American society are also firmly rooted in American scholarship and literature. In 1839, Alexis de Tocqueville heralded the American right of political association as an essential check against the "tyranny of the majority" from silencing the voice of the minority.[160] This principle motivated the founding fathers revolution against the tyrannical rule England exercised over them.

While scholars such as Tocqueville wrote of individuals' freedom to associate in the abstract, it has been the courts that have given legal effect to this right as attendant to the constitutional right of free speech.[161] From early cases in this area to more recent decisions, the Supreme Court has been extremely hesitant to regulate associations where to do so would limit an organization's freedom to exercise its clearly delineated First Amendment rights.[162] The Court has recognized an individual's right to associate for "a wide variety of political, social, economic, educational, religious, and cultural ends."[163]

This does not suggest, however, that this freedom is absolute. The Court has recognized an absolute right to free association only in the most limited circumstances involving a "narrow range of activities."[164] Generally, this right only exists when it helps protect other established rights.[165] The freedom of association does not

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such behavior).

158. DAVID FELLMAN, *Constitutional Rights of Association*, in FREE SPEECH AND ASSOCIATION: THE SUPREME COURT AND THE FIRST AMENDMENT, at 23-84 (Philip B. Kurland ed., University of Chicago Press 1975) (1961).

159. *See* AMY GUTMANN, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION, at 3-31 (Amy Gutmann ed., Princeton University Press 1998) (1998) (quoting U.S. CONST., amend. I.).

160. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 194-95 (Phillips Bradley ed., Vol. 1 1972) (1945).

161. *See, e.g.*, Louisiana *ex. rel.* Gremillion, 366 U.S. 293, 297 (1961) (describing case law limiting disclosoure of associational ties). *Hurley*, 515 U.S. at 575.

162. *Louisiana ex. rel. Gremillion*, 366 U.S. at 297.

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

164. *Id.*

165. GEORGE KATEB, *The Value of Association*, in FREEDOM OF ASSOCIATION,

exist and "cannot function in a social and political vacuum," but instead must yield to government regulation when it would infringe on other rights.[166] Therefore, every action taken by a group associating for expressive purposes is not immune from scrutiny. The Court has been quite willing to regulate the activities of associations, including their membership policies, where they serve no First Amendment rights or violate "compelling state interests."[167]

Most cases in this area focus on the later form of regulation, limiting the freedom of association as opposed to regulating activities that do not implicate this right. The theory underlying this article's proposed reformulation of this constitutional doctrine, however, rests upon the view that only in the rarest circumstances will status-based discrimination constitute an exercise of a group's constitutional rights of association. Therefore, most often a state will not even need "compelling interests" for regulating these decisions. Membership decisions are typically thought of as an extension of an organization's expressive purpose, because members with publicly divergent views may dilute or alter the group message.[168] Some scholars maintain that this logic applies to all membership decisions regardless of the group's justification for exclusion.[169] This theory offers far too broad a view of the freedom of association as it recognizes it as a right existing independent of any First Amendment interests underlying these decisions. One commentator more deftly delineated the scope of this protection by positing that when an organization's main purpose is to convey a particular viewpoint, "its freedom to select members consistently with its expressive purposes is essential to its members' exercise of free speech through the association."[170] Although arguing for a more expansive view of the freedom of association, Gutmann's position is not entirely inconsistent with the view that an organization's freedom of association should only serve its free speech interests. Decisions to exclude certain individuals, not because they possess divergent views, but because they are members of a different status group, generally implicate no such expressive speech and should not receive constitutional protection. Although the *Roberts'* Court ruled that the regulation at issue was narrowly tailored to achieve its purpose, Justice

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at 35-63 (Amy Gutmann ed., 1998); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1014-10 (Foundation Press 1988) (1978).

166. FELLMAN, *supra* note 158, at 50.

167. *See, e.g.*, *Roberts* 468 U.S. at 623 (stating freedom to associate is not an absolute right); Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 91-92 (1982).

168. GUTMANN, *supra* note 159.

169. *See, e.g.*, KATEB, *supra* note 165.

170. GUTMANN, *supra* note 159, at 11.

Brennan emphasized that "expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."[171]

Even if the Court were to determine that status-based discrimination does, in some way, implicate free speech or other First Amendment interests, states' regulation of this invidious discrimination should in most cases qualify as a "compelling state interest" that only incidentally infringes on an organization's right of expressive association. *Roberts* provides the clearest example of this situation. In that case, the Supreme Court held that Minnesota's regulation of the United States Jaycees' admission policy did not violate the freedom of association because the state's interest in eradicating discrimination based on sex was compelling and imposed no serious burden on the male members' freedom of expressive association.[172] The Court further reasoned that this interest was not related to suppressing ideas and could not be "achieved through means significantly less restrictive of associational freedoms."[173]

The Massachusetts statute at issue in *Hurley*, however, while certainly furthering a compelling interest, was not narrowly tailored to its goal of eliminating discrimination against homosexuals. Therefore, it was not the least restrictive means of achieving the goal.[174] The parade organizers did not prevent homosexuals from marching in the parade,[175] but instead only excluded GLIB members who intended to march with their organization's banner.[176] These individuals were not excluded solely due to their status. To the contrary, they were excluded because their participation in the parade would have compelled the organizers to recognize gays and lesbians as a valuable part of the Irish community in Boston.[177] Therefore, requiring the organizers to allow GLIB members to march would have resulted in more than an incidental infringement on their ability to express their views.[178] *Hurley* represents a unique and difficult case, because a parade is a much more visible and concentrated expression of ideas than other public accommodations.[179] Its holding should be viewed in this limited context and should not be broadly applied to dissimilar situations.

A clearer example of a case where the application of an anti-

171. *Roberts*, 468 U.S. at 628.
172. *Id.* at 628.
173. *Id.* at 623.
174. *Hurley*, 515 U.S. at 572-75.
175. *Id.* at 572.
176. *Id.*
177. *Id.*
178. *Id.* at 569-70.
179. *Id.*

discrimination statute severely restricts an organization's ability to express its viewpoint would occur where a state applies such legislation to the Ku Klux Klan's exclusion of an African-American. Again, the state's interest in eradicating discrimination is no doubt compelling. However, the statute's application to an organization that exists for the main purpose of hatred toward racial, ethnic, religious, and cultural minorities severely infringes on the group's free speech rights. As the Supreme Court suggested in *United States v. O'Brien*, an individual or organization must first have an opportunity to express its views regarding the application of such regulation for that regulation to qualify as the least restrictive means of achieving its purpose.[180] While an organization with a neutral viewpoint on racial and ethnic minorities would have no difficulty in continuing the expression of its message, the KKK would be forced to contradict its entire purpose for existence and therefore have no opportunity to legitimately maintain its bigoted message against African-Americans.

At first, it may appear antithetical to afford such constitutional protection to these groups and not to a more socially conscious organization such as the Jaycees. As the United States Supreme Court has repeatedly held, however, an organization's freedom of speech rights must not be limited by the repugnancy of its views. Therefore, as long as free speech protection extends to the KKK's expression of its radical beliefs, the freedom of association, as an attendant right, should protect its membership decisions consistent with its well-established views.

This discussion helps to illustrate that the freedom of association should not protect the status-based discrimination found in *Roberts* and *Dale* from state regulation, because no First Amendment rights are implicated. Discrimination by a public accommodation based on status, such as race, sex, or sexual orientation should generally be deemed outside the scope of the freedom of association or should be overcome by the state's compelling interest in ending discrimination in such organizations. The only limitation on this principle is where the individual's status so contradicts the organization's fundamental views or purpose that including the individual would in itself be expressive. This position furthers the view that the scope of the freedom of association is an attendant right to the First Amendment that operates to protect free speech and assembly rights.

Most organizations with discriminatory membership policies do not develop such policies to further the expressive purposes for which their members associate. Instead, they are motivated by the type of behind the scenes invidious discrimination that has for

180. United States v. O'Brien, 391 U.S. 367, 377 (1968).

so many years permeated these organizations and allowed their members to hide their prejudices from the public. Surely, this unspoken prejudice is not an interest underlying the First Amendment that warrants constitutional protection. If these organizations want First Amendment protection, they should be required to declare their prejudices publicly and face the scrutiny and likely criticism that would follow.

Courts must carefully distinguish between those instances in which an organization excludes an individual for expressive purposes and those where the individual's status is the controlling factor. Analysis of the categories discussed in subsection A, helps to clarify the proper scope of an organization's freedom of association so that the Court may more accurately determine whether an individual's inclusion into the group will significantly affect this freedom.

IV. HOW THE COURT SHOULD HAVE DECIDED *BOY SCOUTS OF AMERICA V. DALE*: APPLICATION OF THE SPEECH-STATUS DICHOTOMY.

The remainder of this article will apply the proposed analytical framework to the facts before the Supreme Court in *Dale*. Comparing the result under this analysis with the result reached by the majority will help to show that the Court broadened the freedom of association beyond the interests set forth in the First Amendment. New Jersey's Law Against Discrimination was unnecessarily trumped as a result.

The question the Court should have asked first in *Dale* was whether the Boy Scouts dismissed or excluded James Dale as a result of his speech or because of his status. Examining the actual reason for the exclusion and determining into which of the five categories this conduct falls would have enabled the Court to determine whether the individual's inclusion actually would have infringed on the group's ability to convey its message. This, in turn, will help the Court decide whether the freedom of association should protect the activity from regulation.

The Boy Scouts' dismissal of Dale as an active member and assistant scout leader can most accurately be categorized as a hybrid case involving elements of both speech and status. In his interview with the Star-Ledger, Dale made a public statement identifying himself as a homosexual and the president of Rutgers University Lesbian/Gay Alliance.[181] The Boy Scouts maintained that this brief statement formed the sole basis of its dismissal of Dale.[182] It appears, however, that the Monmouth Council was influenced to a greater extent by his status as a homosexual

181. *Dale*, 530 U.S. at 645.
182. *Id.* at 689.

man.[183] Therefore, it is necessary to examine these two factors separately to determine whether the Boy Scouts' freedom of association was implicated in its decision to dismiss Dale.

The first issue concerning Dale's comments in the interview focuses on whether the comments were speech or status, and if they were speech, whether they infringed on the Boy Scouts' purported message on homosexuality. After attending a seminar on gay issues, Dale gave the interview to an out of town newspaper in which he identified himself as the homosexual co-president of Rutgers gay/lesbian organization.[184] He told the reporter that while growing up, he was searching for a gay role model, and that today's gay teenagers need more gay role models to look up to.[185] Just because Dale made these statements does not necessarily qualify them as viewpoint speech for the purposes of this analysis. It is important to decide whether these comments actually expressed a message or viewpoint.

Justice Stevens forcefully argues in his dissent that none of Dale's words printed in the Star-Ledger article communicate a message or express a particular view on homosexuality.[186] Most of what Dale said merely identified him as a homosexual man and that cannot be considered expressive speech.[187] These particular comments should therefore fall into the speech equals status category and should not receive constitutional protection because the Boy Scouts have not declared anti-homosexuality as one of its fundamental beliefs. Excluding Dale based on his status as a homosexual is not the type of membership decision protected by the freedom of association.[188]

The Boy Scouts, however, argued that Dale's statement expressing a need for more gay role models went beyond identifying his status and expressed a viewpoint on homosexuality.[189] It can be argued that even these comments, which affirm the self-worth of homosexuals, should be considered an extension of self-identification.[190] While this argument has merit, it is difficult to see its limit. Certainly every comment regarding homosexuality or other identity groups that positively affirms its members may not be deemed non-speech. If any clear distinction may be drawn, it is perhaps best drawn between statements regarding one's *individual* identity as a member of a status group and statements regarding the status group as a

183. *Id.* at 695 n.21 (Stevens, J., dissenting).
184. *Id.* at 697.
185. *Id.* at 690.
186. *Id.*
187. *Id.*
188. *See generally Dale*, 530 U.S. at 663 (summarizing dissenting view).
189. *Dale*, 734 A.2d at 1207.
190. Hunter, *supra* note 8, at 28.

whole. While the former serves as a means of self-identification, the latter goes beyond the individual and expresses a message about the status group's intrinsic value. As a result, these later statements are expressive and must be treated as viewpoint speech that *may* "significantly infringe" the organization's ability to express its view.[191]

The statement at issue in *Dale* arguably comes within the gray area between these two types of statements. Dale's statements advocating more gay role models arose from his comment that he did not personally have any such role models growing up.[192] To this extent, his words may be seen as an extension of his individual identity and therefore as non-viewpoint speech. Admittedly, one can argue that the statement went beyond Dale's own life and identity, and therefore should fall into the later expressive type.

Treating these statements as viewpoint speech, however, does not mean that Dale's membership substantially infringed on the Boy Scouts' freedom of expressive association. Until this litigation arose, the Scouts had no clear position on homosexuality, and any position the organization did take was not released to either its members or to the public.[193] Even if one accepts the Boy Scouts' argument that its position was clear, Dale's statement did not advocate a homosexual lifestyle for others. Instead, he merely advocated the need for more role models in the gay community.[194] This distinction is important, because while a statement urging the need for more role models expresses a viewpoint, it does not directly express a viewpoint on homosexuality. Therefore, these statements cannot significantly infringe on the Scouts' ability to express its view.

The statements Dale made in the newspaper article primarily made the Boy Scouts aware of Dale's homosexuality, which provided them the real impetus for removing him from the Scouts.[195] It is a weak argument for the organization to contend that it feared its members and their parents would read the article and associate Dale and his comments with the Boy Scouts' views on homosexuality. The Boy Scouts' real fear was that Dale's homosexuality itself conveyed a message or that by being a homosexual Dale would promote that lifestyle to the members.[196] Dale was a Boy Scout member for twelve years, during which time he earned the coveted Eagle Scout rank for his exemplary conduct

191. *Dale*, 530 U.S. at 659.
192. *Id.* at 645.
193. *Id.* at 675-76 (Stevens, J., dissenting).
194. *Id.* at 645.
195. *Id.* at 675-76.
196. *Dale*, 734 A.2d at 1229.

and was entrusted as an assistant scoutmaster.[197] At no time during this period did he express any views whatsoever on homosexuality to any scout. The proper application of the freedom of association is to protect the Scouts' right to dismiss him if and when he actually advocates such views among the group or in the immediate community. In fact, the organization's official position is that scout leaders should avoid any discussion of sex.[198] There is no reason to believe that homosexual members would violate this policy any more than heterosexual members would.

Nor can Dale's status as a homosexual be considered an example of the status equals viewpoint speech category set forth in section III. That category should be narrowly construed so as only to apply to situations where a member of an identity group seeks admission into an organization whose fundamental purpose is the opposition of or hatred toward that group. In these cases, such as those involving an African-American trying to join the Klan, the very presence of the individual expresses a message that infringes upon the organization's fundamental expressive purpose. Clearly, the presence of homosexuals in the Boy Scouts communicates no such message.

The Boy Scouts' vague message that its members should be of good moral character never addressed homosexuality or sexuality in any way.[199] The organization waited until it discovered Dale's sexuality to either publicly or privately espouse any views on the issue. Since the Scouts developed this viewpoint after it discovered that Dale was gay, the viewpoint cannot be considered vital to the organization's fundamental purpose. It is extremely dangerous to allow a group to express a very broad message and then clarify that message through its individual membership decisions.

Furthermore, as the Court has ruled in various contexts, the organization could not ascribe certain viewpoints to Dale as a result of his status.[200] This was the very principle the Court adhered to in *Roberts* when it prevented the Jaycees from excluding women from becoming voting members because the group believed women would support different views than male members.[201]

Therefore, the Boy Scouts' reason for revoking Dale's membership rested largely with his status as a homosexual, and not with his expression of a viewpoint contrary to its teachings. As previously discussed, this type of status-based discrimination

197. *Dale*, 530 U.S. at 640, 665.
198. *Id.* at 669 (Stevens, J., dissenting).
199. *Id.* at 640.
200. *See, e.g.*, *Roberts*, 468 U.S. at 627-28.
201. *Id.* (holding that unsupported generalizations about a group of people are assumptions on which the court can not base legal decision making).

does not implicate the important speech interests of the First Amendment, and therefore, it should not receive the constitutional protection under the freedom of association.

V. CONCLUSION

With greater awareness and social consciousness of the ills presented by discrimination has come conflict between organizations' freedom to choose their members and individuals' rights to seek admission into these organizations without consideration of their status. The issue presented in *Boy Scouts of America v. Dale* illustrates this legal and social struggle and its effects on both parties involved. The Supreme Court's decision in this case failed to effectuate the proper scope of the freedom of association or New Jersey's interest in limiting discrimination in its public accommodations.

This article has offered a framework in which to analyze the reasons a public accommodation excludes or removes a member and whether those reasons "significantly infringe" on the organization's freedom of association. By first determining whether the decision falls into a speech or status category, the Court will be better able to answer this question and to determine if the exclusion warrants constitutional protection. Placing greater emphasis on this inquiry also helps to ensure that the proper scope of this freedom is applied, and that organizations will not be allowed to invidiously discriminate against individuals under the shield of the Constitution.