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Entrance, Voice and Exit: The Constitutional Bounds of the Right of Association

Evelyn Brody
IIT Chicago-Kent College of Law, ebrody@kentlaw.iit.edu

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Evelyn Brody[*]

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[*] Professor of Law, Chicago-Kent College of Law, and Visiting Professor of Law, Duke University School of Law (Fall 2001) and New York University School of Law (Spring 2002). This Article was prepared for Seminar 9: "Advocacy and Democracy: Rights, Theories and Practices Seminar," in the seminar series on "Nonprofit Advocacy and the Policy Process" sponsored by The Urban Institute's Center on Nonprofits and Philanthropy (held in Washington, D.C., on October 19, 2001). I co-hosted this series in my capacity as an Associate Scholar of The Urban Institute. For information about these seminars, as well as papers presented and summaries of discussions, *see* http://www.urban.org/advocacy research. This Article was also supported by the Marshall D. Ewing Research Fund at the Chicago-Kent College of Law. I appreciate the helpful suggestions from attendees at the Urban Institute seminar, particularly Elizabeth Boris, Miriam Galston, Frances Hill, Betsy Reid, and Mark Tushnet. I am additionally grateful to David A. Brennen, to my Chicago-Kent colleagues who attended my April 1999 faculty roundtable, and to Chicago-Kent Centennial Visitor Stanley N. Katz and those who attended my October 2000 workshop with Dr. Katz.

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.[1]

> As a matter of democratic theory, the right of association is something we cannot live without; but as a matter of social governance, the right, if uncontained, is something we cannot live with.[2]

INTRODUCTION

Despite the central role of organized groups as intermediary bodies in American society, the constitutional right of association is surprisingly recent and limited. As the Supreme Court struggles to define the bounds of "the" freedom of association, we find that important issues remain unaddressed. First, many private organizations engage in various types of selection criteria. But, what subjects the Jaycees to State anti-discrimination laws while insulating the Boy Scouts of America? Second, the typical American nonprofit organization is a corporation that lacks both shareholders and members, so are there any "associates" whose rights are entitled to protection, or is the corporation's freedom of speech all that constitutionally matters? Third, regardless of whether an organization comprises members, not all private entities operate "democratically"; does the law care? Finally, even if voice is democratic, how do we protect dissenters if exit is not voluntary?

This Article proceeds in six parts. Part I sets out the legal framework for analyzing associational rights. Part II considers the question of entrance, and examines the core Supreme Court decisions affecting the membership rights of the NAACP, the Jaycees, and the Boy Scouts. Part III considers voice, and — adding business corporations, labor unions, and political parties to the mix — explains why associational autonomy cannot depend on whether the organization is governed by internal

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[1] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 203 (P. Bradley ed. 1954) (1835), *quoted in* NAACP v. Claiborne Hardware, 458 U.S. 886, 933 n.80 (1982).

[2] David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 203-04. Professor Cole precedes this statement with the observation that "virtually all conduct is at least potentially associational, presenting serious challenges to crafting a coherent jurisprudence." *Id.*

democratic principles. Part IV examines exit, where we see that democracy does not save state-compelled association, and members of such a compelled association enjoy a constitutional right not to pay for unrelated ideological speech that they object to supporting. Part V covers identity groups — essentially associates without organizations — by sketching out the law of group libel and hate speech. Finally, Part VI uses the examples of common-interest communities, university speech codes, and the proposed funding of social services through faith-based organizations to illustrate why the Supreme Court has been unable to adopt a single principle — even Justice O'Connor's superficially appealing distinction between commercial and expressive association — in designing a constitutional jurisprudence of associational rights.

This Article uses the First Amendment as its lodestar.[3] As we examine the structure for regulation of association and the role of the courts, we will appreciate the limits of the law in remedying private discriminatory and anti-democratic behavior. In general, the associational jurisprudence draws from our broader political structure that enshrines individual autonomy as its core norm.[4] This Article does not, however,

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[3] The First Amendment reads: "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." U.S. CONST. amend. I. As described below, the First Amendment, along with the rest of the Bill of Rights, were gradually "incorporated" through the Fourteenth Amendment Due Process Clause to protect against action by the States. Concentrating on freedom of expression and assembly, this Article does not generally deal with the other First Amendment issues of freedom of religion, freedom of the press, or obscenity. Nor, in general, do I address the associational and privacy issues of the family (protected by the Fifth Amendment and a "penumbra" of constitutional rights). Finally, I do not cover the rules that apply to governmental speech, or the doctrine of "unconstitutional conditions." For discussion of this latter issue, see Mark Tushnet's contribution to the Urban Institute Seminar described in note * above, "How the Constitution Shapes Civil Society's Contribution to Policy-Making."

[4] While the constitutional doctrine that has developed over the last two centuries is necessarily informed by the Western liberal tradition, an exploration of the political theories of equality and liberty is generally beyond the scope of this piece. *See generally* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762); JOHN STUART MILL, ON LIBERTY (1859); THE FEDERALIST, NO. 10 (James Madison) (discussing "factions"); ALEXIS DE TOCQUEVILLE, *supra* note 1; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971); RONALD DWORKIN; TAKING RIGHTS SERIOUSLY (1977); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965); ROBERT A. DAHL, WHO GOVERNS? (1961). *See also* JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA ch. 6, *Civil Society and Intermediate Organizations* (1999) (reviewing political philosophies of Montesquieu, Rousseau, and Tocqueville); JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP: RACE, ETHNICITY, AND NATIONALITY IN THE LIBERAL STATE (1994); KENNETH L. KARST, LAW'S

attempt to set out a normative prescription for creating political and moral values.[5] For every advocate of group rights and group autonomy there exists an equally staunch advocate of individual autonomy and protection from group tyranny. In the end, the debate leads me to caution that while we have a social and political obligation to exercise vigilance over how associations form and operate, we must recognize that our fundamental constitutional norms protect the rights of organizational autonomy in governance and functioning. The greatest challenge to a liberal society — a topic beyond the scope of this Article — will be whether and how to protect the rights of minority members of illiberal groups.

I. FRAMEWORK FOR ANALYSIS

A. Terminology

As a threshold matter, the imprecision of the term "association" can produce seemingly similar discussions that define the subject of their concern differently, depending on whether the commentator cares about the distinction between the individual and the group, between an informal group and a formal group, or between a corporation and an unincorporated organization. Consider two influential law review articles, one from 1916 and the other from 1983.

In the earlier article, *The Personality of Associations*,[6] Harold Laski began with such phrases and terms as "persons who are not men," "group life," churches, clubs, the state, and the trading company, while declaring: "For man is so essentially an associative animal that his nature is largely

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PROMISE, LAW'S EXPRESSION (1993); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 41-42 (1985) (discussing THE FEDERALIST NO. 10 (James Madison)).

[5] *Cf.* Robert M. Cover, *The Supreme Court, 1982 Term: Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 67-68 (1983).

> The statist impasse in constitutional creation must soon come to an end. When the end comes, it is unlikely to arrive via the Justices, accustomed as they are to casting their cautious eyes about, ferreting out jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege. It will likely come in some unruly moment — some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of the indifference or opposition of the state. Perhaps such a resistance — redemptive or insular — will reach not only those of us prepared to see law grow, but the courts as well.

Id.

[6] Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916).

determined by the relationships thus formed."[7] From a legal perspective, though, Professor Laski was interested in the body corporate, the trust, and the unincorporated association. He viewed these collectives as endowed with "a personality that is self-created, and not state-created."[8] He urged the law to recognize that corporations are incapable of confining themselves to the restrictive purposes and other technical doctrines that the state endeavors to impose: "Corporations will have a curious habit of attempting perpetually to escape from the rigid bonds in which they have been encased. May we not say that, like some Frankenstein, they show ingratitude to their creators?"[9] For unincorporated entities, he urged the law to move beyond the law of contract and accept a legal capacity and liability for the trust separate from its trustees and for the unincorporated association separate from its members.[10] Anticipating legal developments that to a large extent have occurred, Professor Laski "urge[d] a radical thesis": "we say that the distinction between incorporate and voluntary association must be abolished. We say that the trust must be made to reveal the life that glows beneath . . . ."[11]

In stark contrast to Laski's rich depiction of formal associative life, Ronald Garet's *Communality and Existence: The Rights of Groups*[12] seems startlingly dismissive: "I view the notion of group-personhood as a kind of mental lapse." He confines corporations to two footnotes.[13] When Professor Garet turns to voluntary associations, though, we see that his interests lie elsewhere: Garet views groupness as important a value as individuality and society because, in part, "freedom and obligation seem

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[7] *Id.* at 404. Aviam Soifer describes how Laski's piece built on Frederick Maitland's assertion that "the line of advance is no longer from status to contract but through contract to something that contract cannot explain, and for which our best, if an inadequate, name is the personality of the organized group." AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 75 (1995) (contrasting Laski, *supra* note 6 with Morris Cohen, *Communal Ghosts and Other Perils in Social Philosophy*, 25 J. PHIL., PSYCHOL. AND SCI. METHODS 673 (1919)).

[8] Laski, *supra* note 6, at 413 (referring to corporation); *see also id.* at 417 ("Even less happy shall we feel when we turn to the association that is, oddly enough, termed voluntary, as if your unincorporate body were any the less the result of self-will than its corporate analogue.").

[9] *Id.* at 407.

[10] *Id.* at 417. "Legally they are no unit, though to your ordinary man it is a strange notion that a Roman Church, a Society of Jesus, a Standard Oil Trust . . . should be thus devoid of group will because, forsooth, certain mystic words have not been pronounced over them by the state." *Id.*

[11] *Id.* at 424.

[12] Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1039 (1983).

[13] *Id.* at 1039 nn.97 - 98.

to vary, not directly, but rather inversely, in groups of moral importance." Finding a "descriptive failure of the associational idea" he continues —

> Many people would consider state, religion, or family of birth to be the prominent group-sources of moral obligation in their experience. Yet these are typically among the most ascriptive and least voluntary of groups. The more voluntary groups – clubs, leagues, and so on – probably appear to most people to be *less* morally qualified to impose obligations . . . ."[14]

Thus, Garet does not assert that voluntary organizations lack associational importance. Rather, he cares more about groups with sovereign-like characteristics, focusing on "traditional-group-village" cases involving the Amish and Native American tribes.[15]

These two examples illustrate how, in both scholarship and legal documents, terminology is often unclear or unspecified. "Association" can mean both the type of right (that is, the right of association) or a particular collective (such as the NAACP). A "group" can refer to a formal organization (such as the NAACP) or an unorganized set of people with a common trait (such as African-Americans).[16] In the discussion below, I will try to limit my use of the term "association" to the type of right. In referring to a formal entity, I will instead use the term "corporation" or "organization"; and I will reserve the word "group" for an informal set. However, in quoting court opinions or commentary, these ambiguities could reappear.

Despite our political system's liberal grounding in the rights of individuals, the Bill of Rights protects not only individual speech but also corporate speech.[17] By contrast, courts view groups defined only by

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[14] *Id.* at 1045.

[15] *See id.* at 1029-36.

[16] Victor Brudney writes:

> Members of non-elective groups often form elective associations to develop and advance their perceived interests as members of the non-elective source group (e.g., a religious society or a gay rights association) or otherwise (e.g., golf clubs, swimming groups, etc.). . . . Indeed, the efforts of members of [non-elective groups] to form exclusive elective associations, like the efforts of other elective associations to exclude on grounds of ethnicity, gender, or religion, can present special problems.

Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1 n.1 (1995); *see* discussion *infra* Part V.

[17] *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990) (describing when corporations achieved rights of free speech,

common characteristics — such as national origin or sex — as contributing (or not) to individual self-definition. Among ascriptive characteristics, however, race sometimes receives a dual treatment, as protection against racial discrimination is specifically enshrined in the Civil War amendments to the Constitution. Religious bodies and practices enjoy separate protection under the First Amendment's Free Exercise Clause, although this topic is generally beyond the scope of this Article.

B. Constitutional Interpretation and the Role of the Courts

Under the separation of powers dictated by the Constitution, legislatures are the democratically elected and deliberative bodies institutionally competent to design comprehensive schemes that take into account all affected interests. The legislature can reverse an erroneous statutory interpretation by the courts, but is powerless to disturb a right found by the courts to be rooted in the Constitution;[18] accordingly, courts attempt to ground their decisions in legislative interpretations, and engage in constitutional interpretation only as a last resort.[19] Moreover, the United States Supreme Court can hear only a

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protection from unreasonable searches and seizures, and protection from taking of property without just compensation).

[18] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-79 (1803). Justice Jackson famously commented: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[19] Judge Henry J. Friendly eloquently defended the difference between legislative and constitutional lawmaking in the context of discriminatory charities:

> To me the incongruity [of standards between philanthropy and government] would be rather if extension of the helping hand of government, even when the help is monetary, were to turn our lively pluralistic society into a deadly uniformity ruled by constitutional absolutes. Philanthropy is a delicate plant whose fruits are often better than its roots; desire to benefit one's own kind may not be the noblest of motives but it is not ignoble. It is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot – even seemingly arbitrary ones – without having to provide a justification that will be examined in a court of law, which stimulates much private giving and interest.

The Dartmouth College Case and the Public-Private Penumbra, 12 TEXAS Q. 1, 30 (2d Supp. 1969).

Friendly also asserted: "the solution generally lies in contract, in regulations, in legislation, rather than in recourse to the Constitution, too blunt and powerful an instrument for the myriad variations here encountered." *Id.* Moreover, he argued, "different values may be assigned to various Fourteenth Amendment protections. To hold that a state cannot constitutionally allow any hospital to refuse to admit a Negro patient does not compel a similar universal as to fair policies for recruiting staff and other

limited number of cases each year, and has the discretion to accept or reject petitions for certiorari. As a result of these institutional features, constitutional jurisprudence develops slowly and without coordination,[20] through a changing makeup of justices — who often produce multiple opinions — amid a changing social landscape.[21] Until the Supreme Court sets out an interpretation, precedent might be set in only one of the federal circuits, or inconsistent or conflicting precedents might co-exist. Moreover, the state supreme courts are the final interpreters of state constitutions and state statutes, which might provide greater protection than does the U.S. Constitution or federal statute[22] — although, as *Boy Scouts of America v. Dale*[23] illustrates, the courts can strike down one person's state right if it clashes with another's federal right.

As a result of these judicial institutional impediments, it should not be surprising that the constitutional "right of association" — which appears nowhere in the text of the Constitution — has proceeded by fits and

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employees, and still less as to procedural due process for their dismissal. Decision that a state cannot allow any secular private college to refuse to admit Jews would not mean that it must force the college to allow complete freedom of speech upon the campus." *Id.* at 22.

[20] *See* Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 488 (1997) (Souter, J., dissenting) ("The fact that no prior case of this Court has applied [the principle that compelled speech is entitled to the same constitutional analysis as restricted speech] to commercial and nonideological speech simply reflects the fortuity that this is the first commercial-speech subsidy case to come before us.").

[21] *See* Beauharnais v. Illinois, 343 U.S. 250, 274-75 (1952) (Black, J., dissenting) (referring to unreliability of "case-by-case, day-by-day majority of this Court" to protect First Amendment freedoms). *See also* Julian N. Eule as completed by Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1630 (1998) (citing to James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 830-31 (1992)) ("We are accustomed to accepting that Supreme Court justices who dissent from a constitutional interpretation of a majority of their colleagues act legitimately without disrupting our sense of what it means to share in a communal identity.").

However, I leave to others an analysis of the most important and fascinating group in this endeavor — the U.S. Supreme Court itself. The record percentage of cases decided by a five-to-four majority in the term ending June 2001 suggests that an equilibrium is far off. *See* Linda Greenhouse, *Divided They Stand*, N.Y. Times, July 15, 2001, § 4 at, 1 (Week in Review) ("One-third of the term's seventy-nine cases were decided by five-to-four votes — often but not always the same five and the same four — a higher proportion than any time in memory. By the time the term ended, the announcement of a split decision had become routine, a familiar reminder of how much the next appointment to the Court will matter.").

[22] *See generally* Note, *Private Abridgement of Speech and the State Constitutions*, 90 YALE L.J. 165, 180 n.79 (1980) (listing state constitutions with affirmative guarantees of free speech).

[23] 530 U.S. 640 (2000).

starts since the Supreme Court officially recognized it in the late 1950s.[24] By contrast, the Court has produced a well-developed (if changing) jurisprudence of the rights specifically enumerated in the First Amendment: speech, religion, and assembly. Cases that might have been construed as associational — such as those brought during the internal war on Communism — needed only a jurisprudence of individual speech;[25] indeed, with the recognition of corporate speech rights, a right of association might be superfluous for other cases as well. The instantly notorious decision in June 2000 involving the Boy Scouts of America has, to some, firmly declared the inviolability of expressive associations, but, to others, only raised more questions about the bounds of protected association.

C. General Legal Framework for Associational Rights

While associations have been described as "little governments,"[26] they are not bound by the Bill of Rights. Although lacking the power to incarcerate those who breach their rules, they effectively enjoy the power of exile through the right to expel. Courts have traditionally adjudicated disputes between a member and a secular organization under simple contract and property laws.[27] With the widespread adoption of state

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[24] *See, e.g.*, SOIFER, *supra* note 7, at 31 (including chapter called "The Right to Form and Join Associations"); Cover, *supra* note 5; George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION 35-63 (Amy Gutmann, ed. 1998) (discussing *Roberts v. Jaycees*.).

[25] As Dale Carpenter describes, early cases dealing with anti-war protests and the Communist Party of the United States of America implicated freedom of association as much as freedom of speech. Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1520-24 (2001); *see also* DAVID FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION 41-53 (1962) (discussing right to join trade union).

[26] SOIFER, *supra* note 7, at 82 ("Constitutional law appears unaware that people live their lives in multiple overlapping groups. Though these associations can sometimes function like little governments, suggesting a kind of private sovereignty, mainstream American constitutionalism has no room for substantive pluralism.").

[27] *See* Schwartz v. Duss, 187 U.S. 8, 15-27 (1902) (upholding agreement of deceased members of Harmony Community to contribute their property irrevocably to group). For a description of how nineteenth-century courts enforced contracts between members and utopian communities, comparing them to social compacts, see CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980). In considering the forfeiture provisions of arrangements for expelled members, Professor Weisbrod explored the limits of freedom of contract:

> What could it mean to say that an individual, raised in such a world as Oneida, had voluntarily and knowingly at the age of twenty-one signed a utopian contract? In a more general form, the question becomes, What is legal capacity for an individual socialized in a radically deviant environment?

statutes, both codifying the common law and vastly supplementing it, we now find not only general corporation statutes, but also such seeming anomalies as "unincorporated nonprofit association" statutes. Disputes with members rarely raise constitutional issues. "In those situations where no arm of government is found to be participating in the alleged interference with free association the only recourse is to the remedies prescribed by statute or by the courts of equity."[28]

In general, though, legislatures follow a *laissez-faire* approach. State enabling statutes usually provide only for the barest of structures for organizational formation and operation, leaving it to the parties to work

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Id. at 191. She also criticized the practice of upholding forfeiture of property interests in the case of expulsion but not withdrawal, where expulsion reflected a disagreement over doctrine. *Id.* at 204.

Another criticism of some Utopian communities was their "hyperdemocratic" nature: "Unlike in religious colonies where the leader could single-handedly expel dissenters, expulsion in these secular egalitarian colonies often required a near-unanimous vote of the general assembly. . . . The inability of the general assembly to come to closure and make decisions meant either the colony rapidly unraveled . . . or . . . de facto power gradually devolved to the board of trustees as the executive body of the company." RICHARD J. ELLIS, THE DARK SIDE OF THE LEFT: ILLIBERAL EGALITARIANISM IN AMERICA 68 (1998). Professor Ellis drew on a study by Robert Hine that showed that California's utopian "colonies' egalitarian political arrangements, although constructed upon assumptions of altruism and harmony, often worked to exacerbate conflict." *Id.* Professor Ellis later describes the technique of the Students for a Democratic Society to justify the "often-trying life inside the collectivity" by "exaggerating the horrors of [nonegalitarian] life outside the group." *Id.* at 132.

Not all separatist communities, of course, are democratic, and some implicate religious freedom rights as well. Laurence Tribe notes that in *Wisconsin v. Yoder*, "the Court indicated that this special solicitude for the prerogatives of traditional Amish communities would not be extended to progressive or utopian communities, religious or secular." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-20, at 1417 n.24 (2d ed. 1988). The Court stated:

> We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. . . . A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . [;] the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis.

Wisconsin v. Yoder, 406 U.S. at 215-16.

[28] GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 239 (1961).

out and provide for any additional desired governance restrictions and membership protections. State statutes permit — but do not require — nonprofit organizations to have members with rights to elect the board of directors and to exercise other extraordinary powers set forth in the statute or the articles of incorporation (such as approving a decision to merge or liquidate). Member control is more common in the mutual nonprofit, such as a labor organization, social club, or business league. Most charities and social welfare organizations, by contrast, have no members, or have members only in the ceremonial sense. Many nonprofits that use the term "member" offer only affinity, not authority. A nonprofit corporation without members, by negative definition, has a self-perpetuating board of directors. As Howard Oleck commented:

> Most state statutes contain few, and sketchy, provisions about associational rights *as such*. Provisions as to voting, qualifications, office holding, and the like, of course are part of associational rights. But little is said, usually, about such things as discipline or expulsion of members.[29]

Notably, any procedures for expulsion adopted by the organization will be treated as part of the bargain, and an organization that follows its procedures is not generally second-guessed by the courts. Even today, courts often cite Zachariah Chafee's 1930 article for the rules to apply in such a dispute between a member and the association.[30]

Among the oldest American associations are, of course, churches. Specific constitutional impediments to government regulation of church affairs appear in the Religion Clauses of the First Amendment, which both guarantee freedom of religion and prohibit government favoritism or establishment. Even so, courts will adjudicate property and contract matters raised by church members, applying the traditional mode of evaluating associational claims. However, while holding congregational churches to any procedural processes they adopt, courts will accept the rulings of hierarchical churches on doctrinal matters.[31]

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[29] HOWARD L. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS § 355, at 901 (5th ed. 1988).

[30] *See* Zachariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930), *cited in, e.g.*, Berrien v. Pollitzer, 165 F.2d 21, *passim* (D.C. Cir. 1947), *and* NAACP v. Golding, 679 A.2d 554, 259-61 (Md. App. 1996). Professor Chafee, however, argued for a tort analysis rather than a contract analysis. *See* Chafee, *supra*, at 1007 (analyzing suits for wrongful expulsion from unincorporated associations).

[31] *See* Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378, 1382-89 (1981). This judicial approach to church disputes comes from the 1871 case *Watson v. Jones*, in which the Supreme Court heard a dispute over

Disputes over membership are thus governed by private law, with courts generally willing to defer to the organization's determination of due process so long as the member is afforded notice and an opportunity to be heard.[32] In particular, courts more closely scrutinize exclusion or expulsion from commercial and professional associations, such as membership in a medical association necessary for hospital privileges.[33] This public policy recognizes the interests of third parties — for example, consumers and patients — as well as the interest of the would-be member to practice his or her trade. The courts' authority in this area, however, is not rooted in the Fourteenth Amendment's Due Process Clause, but rather in their inherent equity powers.[34] If voice within an organization fails, an excluded or departing member is free to form a new association.

The first important Supreme Court decision affecting associational rights arose early in the nineteenth century. Until enactment of the Fourteenth Amendment and the incorporation of the Bill of Rights in the Fourteenth Amendment's Equal Protection Clause, protection against interference by the States in corporate activity was sought by invoking

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the ownership of the property of a local congregation of the Presbyterian Church that had split into two factions during the Civil War. *Id.* at 1385-86. The elders were proslavery, while most of the members supported abolition. *Id.* The Court ruled that by establishing a competing hierarchy, the proslavery elders had withdrawn from the church, thereby abandoning any property rights. *Id.* at 1386. As described by Professor Ellman, the basic propositions of *Watson v. Jones* continue to dictate courts' adjudication of church disputes: (1) disputes between factions of congregational churches "must be determined by the ordinary principles which govern voluntary associations," and will include any procedural requirements such as a vote of the congregation; (2) the contract principle requires courts to accept the decisions of hierarchical churches, because "all who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it; " and (3) a civil court may never adjudicate ecclesiastical questions, because "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.* at 1386-89 (citing Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871)).

[32] *See, e.g.*, Vanderbilt Museum v. American Association of Museums, 449 N.Y.S.2d 399, 407 (1982) ("considerations of 'fair play' dictate that the museum should have been afforded both notice and a hearing on the charges upon which the commission's decision to suspend its accreditation was based") (citation omitted).

[33] The most widely cited case for this proposition is Falcone v. Middlesex County Medical Society, 170 A.2d 791, 799 (N.J. 1961). *See* Note, *Development in the Law: Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 1037-55 (1963) (discussing *Falcone* in context of associational action affecting nonmembers). *Cf. NAACP v. Golding*, 679 A.2d at 562 (observing that State courts, too, "have acknowledged the need for increased judicial oversight in one instance, i.e., where the private organization has assumed a position of 'real economic power' akin to monopoly status.").

[34] *See* Berrien v. Pollitzer, 165 F.2d 21, 22-23 (D.C. Cir. 1947). For an extensive review of the standards for court review applied in a variety of States, see Levant v. Whitley, 755 A.2d 1036, 1043-44 n.11 (D.C. App. 2000).

the Contracts Clause.[35] An 1819 case — *Trustees of Dartmouth College v. Woodward*[36] — held that the governing structure of a college was a contract protected by the Contracts Clause of the Constitution, and thus could not unilaterally be altered by state legislation absent a reservation power.

The Supreme Court first articulated a constitutional right of association (as opposed to assembly) only in the 1957 case *NAACP v. Alabama ex rel. Patterson*.[37] Nearly 20 years later, in 1977, the Court addressed the opposite issue, the limits of state-compelled association. In *Abood v. Detroit Board of Education*,[38] the Court required a public-sector "agency shop" to allow nonunion members, charged dues for collective bargaining purposes, to opt out of paying for the union's expenses of unrelated expressive activities. In the 1984 decision *Roberts v. U.S. Jaycees*,[39] the Court upheld a state law treating the Jaycees as a "public accommodation" subject to a law prohibiting discrimination against women in the admission of voting members. In June 2000, the Supreme Court decided *Boy Scouts of America v. Dale*, holding that a state's interest in eradicating discrimination against sexual orientation could not trump the expressive associational rights of an organization for the development of boys and young men. The constitutional bounds of the freedom of association as described by *NAACP*, *Abood*, *Roberts*, and *Dale* are supplemented by numerous cases regarding political parties, freedom of religion, freedom of speech, freedom of assembly, and

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[35] Article I, Section 10 of the United States Constitution prohibits the States from passing any "Law impairing the Obligation of Contracts." *See generally* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267 (1988). Thomas Merrill writes:

> Indeed, in the days before the enactment of the fourteenth amendment, the contract clause was the second most frequently litigated provision of the Constitution (after the commerce clause), and was the principal vehicle by which the Supreme Court asserted federal constitutional control over the state governments.
>
> Today, the contract clause is but a pale shadow of its former self. With two exceptions, the Supreme Court has rejected every contract clause contention that has come before it in the post-New Deal era.

Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. 597, 597-98 (1987) (footnotes omitted).

[36] 17 U.S. (4 Wheat.) 518 (1819).

[37] 357 U.S. 449, 460 (1958).

[38] 431 U.S. 209, 234-35 (1977).

[39] 468 U.S. 609, 634 (1984).

freedom of intimate association (regarding the family and other small groups).[40]

The most recent Supreme Court decisions evince a willingness to protect an organization's right to choose its membership and speech — from the political to the commercial. The same week it decided *Boy Scouts of America v. Dale*, the Court upheld (by a seven-to-two vote) the California Democratic Party's challenge to a state referendum requiring a blanket primary process, under which a voter of one political party could vote for candidates of another party. "Such forced association has the likely outcome — indeed, in this case the intended outcome — of changing the parties' message," wrote Justice Scalia for the Court. "We can think of no heavier burden on a political party's associational freedom."[41] In June 2001, the Court (by a six-to-three vote) upheld the right of United Foods, Inc., to be free from making congressionally-mandated contributions to a fund that touted the virtues of generic mushrooms. "We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself," Justice Kennedy wrote for the Court.[42]

In general, as described below, the Supreme Court's associational jurisprudence can roughly be summed up in just a few principles:

> 1. A constitutional right to associate exists if it is linked to another constitutional right: intimacy (such as family matters) or expression (speech). (This Article concentrates on expressive association.) No single principle (such as commerciality) has been adopted by the Court to distinguish expressive from non-expressive association. For expressive association, until recently the nonprofit form appeared necessary; in any case it is not sufficient.
>
> 2. If the state has a legitimate purpose, it can require an organization that is not intimate or expressive to admit a member. For intimate or expressive associations, the state must have a compelling interest which must outweigh the associational interest, and the state-compelled association must be narrowly targeted to further that interest.

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[40] *See, e.g.*, William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 80 n.78 (1986) (observing that constitutional right of intimate association has been variously defined as "'an intrinsic element of personal liberty'" (quoting *Roberts*, 468 U.S. at 620), as "deriving from substantive due process or the penumbras of the third, fourth, and ninth amendments," or as a right of privacy).

[41] California Democratic Party v. Jones, 530 U.S. 567, 581-82 (2000).

[42] United States v. United Foods, 533 U.S. 405, 121 S. Ct. 2340 (2001).

3. If a member can voluntarily enter and exit the association, the internal governance structure and the strength of the member's internal voice option are irrelevant.

4. If the affiliation is compelled by the state, then the member cannot be compelled to pay for speech unrelated to the reason she is compelled to join, again regardless of how democratic the process is for determining the speech.

5. Constitutional rights do not inhere in amorphous groups, such as identity groups.

We now turn to an exploration of these principles, taking in order the issues of joining an association ("entrance"), of participating in associational decision-making ("voice"), and of state-compelled association ("exit").

II. ENTRANCE: DEVELOPMENT OF "THE RIGHT OF ASSOCIATION"

A. "Congress shall make no law": The Fine Print

We enjoy First Amendment and other Bill of Rights protections against state action, not private action. However, state action can appear in various guises. Where the actor is itself a state agency, such as a public college or employer, it must adhere to Equal Protection and other constitutional requirements. By contrast, in theory, private organizations can operate in all their fractious and insular splendor, free of what Nancy Rosenblum calls the "logic of congruence" — the demand "that the internal life and organization of associations mirror liberal democratic principles and practices."[43] Yet the state regulates private speech and association all the time. Because these rights are not absolute, children must attend school (or satisfy a state-prescribed curriculum); public parades and speeches can be restricted as to time, place, and manner; private employers, landlords, and home sellers may not discriminate based on race and other protected characteristics; minors may be banned from dance halls;[44] charities may be compelled to

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[43] NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 36-41 (1998) (warning of dangers of applying "the logic of congruence" between public institutions and private organizations).

[44] City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (holding that dance hall for teenagers with a thousand patrons per night was neither intimate nor expressive). The proprietor had wanted to open his doors to all ages, and challenged a local ordinance that

register with state and federal agencies;[45] and Congress and the states may regulate certain campaign finance activities.[46]

Rights clash, and a liberal legal system recognizes the negative side to these positive freedoms: One person's "freedom to" is also a "freedom from," and can be another's *lack* of freedom. One's liberty to speak means another's inability to be free from hearing. In resolving the tension between the state's interests in equality and civility and the individual's interest in liberty, courts consider the constitutional strength of the right being regulated. The state's interest in eradicating discrimination or in furthering the good society might lead it to condemn "bad" speech — like the distribution of literature asserting the inferiority of those of certain races.[47] The First Amendment, however, forbids government to censor private speech based on its content; nor may government prohibit private association simply because it furthers non-egalitarian purposes. Indeed, with a few notable exceptions discussed below, it is not considered state action for the courts to recognize and enforce lawful private discriminatory arrangements.

Before the civil rights movement, to the extent the federal or state governments acted to limit associations, it was political associations (and political speech) they were worried about. Even the first Supreme Court cases recognizing a right of association reflected ancillary associational concerns — for example, defending the right of the NAACP to hire a lawyer, and to "do business" in the Southern States without having to disclose its membership lists. After *Brown v. Board of Education*, and with the enactment of increasingly expansive civil rights legislation, more and more "private" activities became subject to regulation: housing,

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separates 14- to 18-year-olds from what may be the corrupting influences of older teenagers and young adults, arguing for an associational interest on the part of the younger teenagers. Countered Justice Rehnquist: "The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment." *Id.* at 24.

[45] *But see* Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 639 (1980) (invalidating on First Amendment grounds municipal ordinance prohibiting solicitation of contributions by charitable organizations that did not use at least 75 percent of their receipts for charitable purposes); *see also* Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 970 (1984) (invalidating a statute that forbade contracts between charities and professional fundraisers if, after costs, the fundraiser retained more than 25 percent of collections); Riley v. National Federation of the Blind, 487 U.S. 781, 795 (1988) (barring a state from, among other things, requiring professional fundraisers to disclose to potential donors the percentage of prior contributions retained as fees).

[46] *See* Buckley v. Valeo, 424 U.S. 1 (1976), and discussion *infra* Part IV.

[47] Occasionally, the state has sought to compel speech — like a loyalty oath — in private association that today we would consider violative of public policy.

employment, and education.[48] *Boy Scouts of America v. Dale* represents the first defeat for the application of a state anti-discrimination law; time will tell how broadly it will apply.

Finally, the Supreme Court distinguishes between (prohibited) regulation of speech and (permissible) regulation of conduct.[49] Moreover, association to commit a crime is not protected; the Court upheld the conviction of members of the Communist Party essentially on the theory that the defendants conspired to overthrow the government.[50] As we will see in Part V, though, a speaker who commits "group libel" today would not likely be held responsible for any resulting injury.

B. Recognizing a Right of Association: The NAACP and Membership Lists

In 1957, the Supreme Court declared a constitutional right of association in finding that the NAACP need not disclose its membership

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[48] *See, e.g.*, JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 4 (1986) ("[R]ights that today monopolize our attention, such as freedom of occupation, the right to abortion, freedom of association, the rights of women, and the right to privacy, were unknown during the revolutionary era."). Stanley N. Katz observes in *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J. AM. HIS. 747, 754 (1988), that the Fourteenth Amendment, adopted in 1868, guarantees equal protection of the laws, rather than equality; and was directed at narrowly-defined "civil" rights rather than social rights. It took *Brown*'s rejection (but not reversal) of *Plessy v. Ferguson* to expand the scope of rights and to begin the "new equal protection," which saw fruition in the civil rights legislation and court decisions of the 1960s. *Id.* at 759. "Civil rights now took on a richer range of meaning, extending to employment, public accommodation, education, and many other significant realms of public activity. . . . For Americans coming of age since the Warren revolution, equality had become an operative, meaningful public value." *Id.*

[49] *See* Reynolds v. United States, 98 U.S. 145, 168 (1878) (upholding polygamy conviction of member of Mormon Church). "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164. As David Strauss explains, "there is a difference between (suppressible) speech proposing an illegal transaction and (protected) speech advocating an illegal transaction, such as advocacy of drug use." David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 344 n.30 (1991).

[50] Dennis v. United States, 341 U.S. 494, 517 (1951) (affirming conviction of leaders of American Communist Party of violating Smith Act of 1940, which made it a crime to teach or advocate overthrow of government by force or violence). However, there was no evidence in this case that the defendants ever did anything more than teach abstract principles, and the case, while never overruled, remains of doubtful precedence. *See* Yates v. United States, 354 U.S. 298, 327 (1957) (although not overruling *Dennis*, reversing 14 Smith Act convictions). *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 97-160 (1970) (discussing application of sedition laws). For a history of the prosecution of Communist Party members and the Supreme Court decisions, see MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1977).

lists to hostile state authorities. The Court conceived of the right of association as belonging to the individual members — as augmenting the power of their individual speech.[51] The opinion employed sweeping First Amendment language not limited to political, or even social, issues:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, *it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters*, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.[52]

Later cases returned to the idea of the association as amplifier. In a case involving a lobbying group,[53] the Court declared that the value of a private association "is that by collective effort individuals can make their views known, when individually, their voices would be faint or lost."[54]

In the explicitly political realm, the Supreme Court has considered numerous cases involving the right of political parties to control their processes. In 1981, the Court unambiguously recognized "the freedom to associate for the 'common advancement of political beliefs,' [which] . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those

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[51] Compare the general observation of Robert Horn, writing in 1958 about the Supreme Court's jurisprudence affecting associations:

> The rights of associations have been raised upon the rights of individuals to associate. Indeed, it is a rare thing to find in the judicial opinions with which we shall be concerned any overt discussion of the nature of groups or the rights of groups. The Justices focus the light of their learning upon the individual before the bar, but if one looks at the rear wall of the courtroom, one can see, large and distinct, the shadow of the group for whom the individual litigant stands.

ROBERT A. HORN, GROUPS AND THE CONSTITUTION 17 (1958).

[52] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958) (emphasis added) (citations omitted).

[53] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.").

[54] *Id.*

people only."[55] Five years later, the Court reiterated: "The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."[56]

Among several cases involving the associational rights of the NAACP in its battle to advocate for civil rights in Southern States, the most relevant to our issues involved states seeking to require the NAACP to produce the names and addresses of its membership.[57] The Court recognized that the states had no legitimate interest in these lists, but rather sought to publish the information in order to induce private parties to harass the members through firings and physical intimidation. Before so ruling, the Court declared that the NAACP may act to assert "the rights of its members, and . . . as their representative before this Court", "a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists."[58]

In this age of commodification and the common practice of charities to sell their donor lists, it can be easy to forget the importance of confidentiality of supporters. The issue recently re-arose in the scandal

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[55] Democratic Party of United States v. Wisconsin *ex rel.* La Follette, 450 U. S. 107, 122 (1981) (citation omitted).

[56] Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986). *See also* Eu v. San Francisco County Cent. Democratic Comm., 489 U.S. 214 (1989), discussed *infra* Part III.

[57] *See NAACP*, 357 U.S. at 449; Bates v. Little Rock, 361 U.S. 516 (1960).

[58] *NAACP*, 357 U.S. at 458-59. *But see* New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 76-77 (1928) (upholding conviction of Ku Klux Klan official because of failure of his organization to disclose its membership list, as required by a New York law applicable to organizations that required an oath for membership). More recently, see Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 106-07 (1982) (rejecting application of public disclosure requirements to Socialist Workers Party). Compare Allee v. Medrano, discussing similar approach for unions:

> In this case the union has standing as a named plaintiff to raise any of the claims that a member of the union would have standing to raise. Unions may sue under 42 U. S. C. § 1983 as persons deprived of their rights secured by the Constitution and laws, . . . and it has been implicitly recognized that protected First Amendment rights flow to unions as well as to their members and organizers. . . . [C]f. NAACP v. Button, 371 U.S. 415, 428. If, as alleged by the union in its complaint, its members were subject to unlawful arrests and intimidation for engaging in union organizational activity protected by the First Amendment, the union's capacity to communicate is unlawfully impeded, since the union can act only through its members. The union then has standing to complain of the arrests and intimidation and bring this action.

416 U.S. 802, 819 n.13 (1974) (citation omitted). In the trade association context, see Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977).

over outgoing President Clinton's pardon of Marc Rich. When Congressman Dan Burton, chair of the House Committee on Government Reform, sought the names of anyone who had donated or pledged more than $5,000 to the William J. Clinton Presidential Library Foundation, nonprofit organizations from the Heritage Foundation to the Southern Poverty Law Center protested that this information was protected by the *NAACP* cases. It is not clear, though, whether the lack of physical danger faced by library foundation donors would tilt the constitutional balance in favor of the congressional interest in investigating possible impropriety. Frances Hill cautions that we do not know to what extent membership protection also extends to contributors.[59] Moreover, she observes that "exempt organizations can be used by people who like to obscure how they're raising and using money for any number of purposes, including political activity."[60] Indeed, *Buckley v. Valeo* upheld government-required disclosure in the context of campaign finance reform, and, in campaign finance reform legislation enacted in July 2000, Congress required near-contemporaneous disclosure of contributions to tax-exempt organizations formed for political purposes but not required to register with the Federal Election Commission.[61]

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[59] *See* Elisa Crouch, *Clinton Foundation Plots Tactics Members Face Subpoena Deadline Today for Releasing Donors List*, ARK. DEMOCRAT-GAZETTE, Feb. 22, 2001, at A1.

[60] Harvy Lipman, *Lawmakers' Dispute with Clinton Library Seen as Test of Donor Privacy*, CHRON. PHILANTHROPY, Mar. 8, 2001.

[61] I.R.C. §§ 527(j), 6104(a) (as added and amended by Act of July 1, 2000, Pub. L. 106-230, § 2(a)). *But see* McIntyre v. Ohio Elections Commission, 514 U.S. 334, 353 (1995), where the Supreme Court upheld, as against a State law, a lone pamphleteer's right to engage in anonymous speech in a ballot measure election. As Richard Hasen describes, "[l]ower courts are struggling over how to reconcile this case with *Buckley*'s ruling upholding disclosure, and it is uncertain what the case means for the regulation of sham issue advocacy." Richard L. Hasen, *The Campaign Finance Mess*, 30 EXEMPT ORG. TAX REV. 257, 260 (2000). A challenge to the new federal law on this ground might reach the Supreme Court.

In general, although charities can be required to disclose the names of substantial donors to the Internal Revenue Service, these names are not subject to public disclosure along with the rest of the IRS Form 990 information return filed by exempt organizations. *See* I.R.C. § 6104(d)(3)(A) (donors to charities other than private foundations are not subject to public disclosure). However, the names and addresses of officers and directors of all exempt organizations are disclosable, as is similar information filed in annual reports with the states.

C. Federal Anti-Discrimination Laws: Runyon v. McCrary

Almost by definition, private association can conflict with anti-discrimination laws in a variety of contexts.[62] The 1976 Supreme Court decision *Runyon v. McCrary*[63] is the most interesting and the most jurisprudentially troubling case in this area. Forced to desegregate their public schools by *Brown*, Southern States took drastic action, financially starving their public schools and providing funds to or for the benefit of whites-only private schools.[64] When Michael McCrary and other black students were denied admission to unintegrated private schools, their parents brought a civil suit against the schools under a post-Civil War federal law prohibiting racial discrimination in the making and enforcing of private contracts. The Supreme Court found that these schools, because of their methods of soliciting students, were "more public than private"[65] and did not fall under any exceptions in the statute. Accordingly, the Court addressed the constitutionality of the federal law.

The Court proceeded to uphold the federal statute against the schools' claim of freedom of association. First, the Court suggested that, because private discrimination enjoys no constitutional right of enforcement, the courts can never enforce private agreements to discriminate.[66] Second,

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[62] Important cases include Hishon v. King & Spalding, 467 U.S. 69 (1984) (law firm partnership); Runyon v. McCrary, 427 U.S. 160 (1976) (education); Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (employment); Tillman v. Wheaton-Haven Recreational Ass'n., 410 U.S. 431 (1973) (private swimming club); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (private club open to all whites in geographic area); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (purchase of real property); Railway Mail Ass'n. v. Corsi, 326 U.S. 88 (1945) (labor union).

[63] 427 U.S. 160 (1976).

[64] *See, e.g.*, DERRICK BELL, RACE, RACISM AND AMERICAN LAW (4th ed. 2000); Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1444-47 (1973). In striking down a Mississippi program that furnished textbooks to school children regardless of whether they attended a public or private school, the Supreme Court recognized the explosion in whites-only academies and the simultaneous disappearance of white students from public schools. The Court declared, "although the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." Norwood v. Harrison, 413 U.S. 455, 469-70 (1973).

[65] *Runyon*, 427 U.S. at 173 n.10.

[66] Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (14th Amendment "erects no shield against merely private conduct" and inhibits "only such action as may fairly be said to be that of the States," *citing to* Civil Rights Cases, 109 U.S. 3 (1883); but judicial enforcement of a racially restrictive covenant constitutes proscribed state action); *see also* Pennsylvania v. Brown, 270 F. Supp. 782, 789 (E.D. Pa. 1967) (finding that act of Orphan's Court in removing, on its own initiative, trustees of Girard Trust for refusing to enforce racial restriction constituted improper state action "which transcended mere testamentary

the Court held that requiring a school to admit black children does not require the school to alter its message:

> From this principle [of free association] it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood v. Harrison*, . . . while "[invidious] private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections. . . ." . . . . In any event, as the Court of Appeals noted, "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."

The Court emphasized that this case did not involve any question of "the right of a private social organization to limit its membership on racial or any other grounds[;] . . . the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith[; or] . . . the application of [the federal statute] to private sectarian schools that practice racial exclusion on religious grounds."

The lesson of *Runyon v. McCrary* might simply be that race is different, education is different, and racial discrimination in education is a unique evil.[67] In his dissent, however, Justice White warned that stretching the

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supervision"), *aff'd* 392 F.2d 120, 125 (3d Cir. 1967) ("Given everything we know of Mr. Girard, it is inconceivable that in this changed world he would not be quietly happy that his cherished project had raised its sights with the times and joyfully recognized that all human beings are created equal."), *cert. denied* 391 U.S. 921 (1968). *See generally* Stuart M. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 GEO. L.J. 272, 313 (1967) ("The real point is that much of the focus on state involvement is not terribly significant today because even 'private' discrimination is a product of the structure of society. . . . Certainly not all discriminations are inconsistent with the concept of charity, but it is submitted that a trust exclusively for whites results in more pain than benefit to society.").

The American Law Institute would invalidate unconstitutional servitudes, rather than simply make them unenforceable. RESTATEMENT OF THE LAW (THIRD) OF PROPERTY: SERVITUDES, § 3.1 & cmt. d, at 354 (2000). As a general rule, though, the A.L.I. comments: "The policies favoring freedom of contract, freedom to dispose of one's property, and protection of legitimate-expectation interests nearly always weigh in favor of the validity of voluntarily created servitudes." *Id.* cmt. i, at 364. "If the adverse impacts falls largely on third parties or future generations, courts are generally more willing to intervene than if the consequences will be felt by the parties who create the servitude." *Id.* at 364-65.

[67] Thus, in the tax context, the Supreme Court held that a racially discriminatory

definition of contract to these relationships exposes the courts to a flood of pretextual lawsuits over admission to private associations.[68]

D. State Public Accommodations Laws: Roberts v. U.S. Jaycees

While federal law bars discrimination on the basis of race, color, religion, or national origin in "places of public accommodation,"[69] many states and municipalities have gone further, both in their enumeration of protected classifications,[70] and in their definition of "public

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private school is not entitled to exemption under section 501(c)(3) of the Internal Revenue Code. Bob Jones Univ. v. United States, 461 U.S. 574, 586, 595-96 (1983) (holding that Congress, through enactments outside Internal Revenue Code, did not intend definition of charity in Code section 501(c)(3) to include groups that violate "established public policy" — in this case, racial discrimination). Justice Powell, concurring in Bob Jones, observed that over 106,000 organizations filed information returns as section 501(c)(3) organizations in 1981. *Id.* at 608. He found "it impossible to believe that all or even most of those organizations could prove that they 'demonstrably serve and [are] in harmony with the public interest' or that they are 'beneficial and stabilizing influences in community life.'" *Id.* at 609. The *Bob Jones* "public policy" test has not been extended to other forms of discriminatory activity, such as sex discrimination, or to racial discrimination beyond the educational context. *See generally* Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291 (1984). *See also* David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000) (describing some dangers of extending Treasury's public policy power beyond discrimination against racial minorities).

[68] Justice White stated:

> Whether such conduct should be condoned or not, whites and blacks will undoubtedly choose to form a variety of associational relationships pursuant to contracts which exclude members of the other race. Social clubs, black and white, and associations designed to further the interests of blacks or whites are but two examples. Lawsuits by members of the other race attempting to gain admittance to such an association are not pleasant to contemplate. As the associational or contractual relationships become more private, the pressures to hold § 1981 inapplicable to them will increase. Imaginative judicial construction of the word "contract" is foreseeable; Thirteenth Amendment limitations on Congress' power to ban "badges and incidents of slavery" may be discovered; the doctrine of the right to association may be bent to cover a given situation. In any event, courts will be called upon to balance sensitive policy considerations against each other — considerations which have never been addressed by any Congress — all under the guise of "construing" a statute. This is a task appropriate for the Legislature, not for the Judiciary.

Runyon, 427 U.S. at 212 (White, J., dissenting). While the Supreme Court later explicitly considered, but rejected, overruling Runyon (see Patterson v. McLean Credit Union, 491 U.S. 164, 171-75 (1989)), Justice White's fears of Section 1989 challenges for admission to private associations have not been borne out.

[69] Civil Rights Act, Title II, 42 U.S.C. § 2000a (1994).

[70] In *Boy Scouts of America v. Dale*, Justice Rehnquist noted the growth in the types of classifications reached by nondiscrimination laws: "Some municipal ordinances have even

accommodation."[71] The U.S. Constitution, however, provides an outer limit to the reach of these statutes and ordinances.

In 1984, eight years after *Runyon v. McCrary*, the Supreme Court considered the application of Minnesota's anti-discrimination law to the local chapters of the United States Jaycees, which excluded women from voting membership.[72] Reiterating the grounding of the right of association in individual rights under the First Amendment, Justice Brennan declared:

> An individual's freedom to speak, to worship, and to petition the Government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed . . . . Consequently, we have 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.

In sharp contrast to the holding of *Runyon v. McCrary*, Justice Brennan declared: "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate."[73]

Nevertheless, the Court unanimously upheld the application of Minnesota's anti-discrimination law to the Jaycees. The Court described two types of protected rights: intimate association (protected by a penumbra of privacy rights)[74] and expressive association.[75] The Court found that such an open and large membership business organization as

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expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology." 530 U.S. 640, 656 n.2 (2000).

[71] Interestingly, in a seven-to-two decision, the Supreme Court recently concluded that the PGA Tour was a place of public accommodation under the Federal Americans with Disabilities Act of 1990. PGA Tour v. Martin, 532 U.S. 661 (2001).

[72] Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[73] *Id.* at 623.

[74] *Id.* at 617-18. The Court had previously held that the Constitution protects such intimate associational decisions as whom to marry, whether to bear children, how to rear children, and cohabitation with relatives.

[75] *See* William O. Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1368-70 (1963).

the Jaycees did not qualify as intimate. It further concluded that, under the facts, the state's interest outweighed the Jaycees': "We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."

In upholding the right of women to be admitted as full voting members, the Court did not suggest that the Jaycees must alter its existing purpose of promoting the interests of young men. Rather, it found that the Jaycees had not proven that having female voting members would alter its voice.[76] Justice Brennan dismissed the Jaycees' argument by labeling it as "social stereotyping" and "unsupported generalizations about the relative interests and perspectives of men and women."[77] Emphasizing the instrumental as well as the fulfillment aspects of association, Brennan declared that stereotyping does not justify discrimination, because it "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."

Because of the Jaycees' failure of proof, the Court did not have to decide whether the state's interest in eradicating sex discrimination would still outweigh the Jaycee's associational rights had the organization made a "substantial" showing that the admission of unwelcome members "will change the message communicated by the group's speech."[78] An *amicus curiae* brief filed by a group of single-sex membership organizations protested the contention that sex was

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[76] According to the Eighth Circuit, the Jaycees' expressive activities included —

> the adoption of resolutions on number of political issues. These resolutions include support of a balanced budget, 'voluntary prayer in American schools,' and the economic development of Alaska. The national organization has also taken stands in favor of the draft, the ratification of the Panama Canal Treaty, and President Reagan's economic policies. It has opposed 'socialized medicine,' federal funds for teachers' salaries, and pornography.

709 F.2d at 1569-70.

[77] "In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, . . . the Jaycees relies solely on unsupported generalizations about the relative interests and perspectives of men and women." 468 U.S. at 627-28. "[T]he Jaycees has failed to demonstrate . . . any serious burdens on the male members' freedom of expressive association." *Id.* at 626. Six weeks after the Supreme Court's opinion, the national Jaycees voted to admit women. *See* Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1898 (1984).

[78] *Roberts*, 468 U.S. at 626-28.

irrelevant to the message.[79] Laurence Tribe points out the irony that the Jaycees, which had admitted women as nonvoting members, might have suffered in litigation "because they had not been *even more exclusionary*."[80]

Justice O'Connor's often-discussed concurrence would instead divide organizations into either of two groups, depending on their predominant characteristic: expressive associations (entitled to constitutional protection under the compelling-state-interest, least-restrictive-means test) and commercial associations (subject to rational anti-discrimination regulation).[81] Justice O'Connor wanted to avoid "the possibility that certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination."[82] She suggested that once an association "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[83]

The holding of *Roberts* attracted no dissenters on the Supreme Court,[84] but a great deal of criticism from commentators. To Nancy Rosenblum, "the majority opinion . . . was wrong. It is gravely underprotective of expressive organizations."[85] She concluded: "The only sure result of

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[79] The Conference of Private Organizations ("CONPO") included several large, all-male organizations, including the Benevolent and Protective Order of Elks, with 1,650,000 members in 2,250 lodges; the Supreme Lodge, Knights of Pythias, with 140,000 members in 2,000 lodges; the Loyal Order of Moose, with 1.3 million members in 2,250 lodges; and the United States Jaycees, with 295,000 members in 7,400 local chapters. In footnote 3 of its brief, CONPO listed other large single-sex national organizations, and concluded: "An informal survey of Minnesota associations indicates that those with membership limited to females have over 40,000 members."

[80] TRIBE, *supra* note 27, § 15-17, at 1406 (emphasis added).

[81] Justice O'Connor emphasized that a lower standard for commercial association would permit state regulation that was rationally related to the public interest: "The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring).

[82] *Id.* at 622 (O'Connor, J., concurring).

[83] *Id.* at 632. The Minnesota Supreme Court, in holding the public accommodation law applicable to the Jaycees, had found that, "[l]eadership skills are 'goods', [and] business contacts and employment promotions are 'privileges' and 'advantages.'" United States Jaycees v. McClure, 305 N.W.2d 764, 772 (Minn. 1981).

[84] The Court reached its decision without the participation of the "Minnesota Twins," Chief Justice Burger and Justice Blackmun. Burger was chapter president of the St. Paul Jaycees in 1935, while Blackmun was a former member of the Minneapolis Jaycees. Linder, *supra* note 77, at 1880 (citing MINN. STAR & TRIB., July 4, 1984, at 10A, col. 4).

[85] *See* Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, *in* FREEDOM OF ASSOCIATION (Amy Gutmann, ed. 1998).

compelled association is that male Jaycees join the company of those historically discriminated against in seeing themselves as victims of powerful, hostile social forces and of a government indifferent to their freedom of association."[86] Douglas Linder characterized as "wholly implausible" Justice Brennan's "argument that not only did application of the Minnesota statute represent the least restrictive means of ensuring equal access to the Jaycees' goods and privileges, but that it presented no serious burden at all."[87] In defense of Justice Brennan's sex-blindness, however, Deborah Rhode reminds us that: "Claims about 'women's point of view' in cases like Jaycees are analogous to arguments that have divided American feminism for decades." She argues for a more contextual analysis: "If men and women as groups tend to differ in their approach to certain moral or political issues, it does not necessarily follow that the particular men and women likely to join a particular organization will differ."[88] We consider criticisms of Justice O'Connor's alternative commerciality test in Part VI, below.

E. The Boy Scouts of America v. Dale

When the Supreme Court dropped the *Roberts* shoe, it apparently already held the Boy Scouts shoe in the other hand. The possibility that a state might require the Boy Scouts of America to abandon its position against godless or gay members was raised by the litigants in *Roberts* — indeed, the Boy Scouts filed an *amicus curiae* brief on behalf of the Jaycees — and was much on the minds of the Justices during the *Roberts* oral argument.[89] Sixteen years, however, separate the two decisions,[90] and

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[86] *Id.* at 86.

[87] Linder, *supra* note 77, at 1892.

[88] Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 1119 (1986). Professor Rhode concludes, "Organizations, of course, would remain free to consider political affiliations in selecting their membership; they simply could not rely on sex-based generalizations to justify categorical exclusions. Given the availability of more accurate screening devices, sexual integration need not impair an organization's expressive activities. Rather, it might enrich understanding of issues on which the sexes have a common interest." *Id.*

[89] *See* Linder, *supra* note 77, at 1899 (footnotes omitted). "The Boy Scouts, and to a lesser extent the Girl Scouts and Cub Scouts, received attention because everyone — except Minnesota's counsel in oral argument — seemed anxious to assure the Scouts that their single-sex membership policy was not in serious jeopardy." *Id.* In a footnote, Professor Linder elaborated: "When asked by Justice O'Connor in oral argument whether the aggressive marketing techniques of the Girl Scouts would make the Scouts a 'public accommodation' under Minnesota law, Richard L. Varco, Jr., Minnesota's Special Assistant Attorney General, concluded that it would." *Id.* at n.104 (citing 52 U.S.L.W. 3785-86 (May 1, 1984)).

there was no guarantee that a case involving the Boy Scouts' policy would ever reach the Court. Under both federal civil rights law (which does not prohibit discrimination on the basis of sexual orientation)[91] and many state and local anti-discrimination laws, a membership association is not the typical "place of public accommodation."[92] Notably, the California courts excluded the Boy Scouts from its statute's definition.[93] Finally, though, the New Jersey Supreme Court held that the Boy Scouts were a public accommodation under its statute, and that its policy violated state law.

Under principles of federalism, the New Jersey Supreme Court's interpretation of its state statute cannot be reversed by a federal court, and the court had ruled unanimously. Moreover, if the people of New Jersey are unhappy with this statutory interpretation, the state legislature can clarify its definition of public accommodation. Therefore, when the Supreme Court agreed to hear the Boy Scouts' case (four votes being required to grant certiorari) it could only mean that the Court was prepared to visit the constitutional issue. Not only was this bad news for James Dale, the expelled gay troop leader, but it also put the nonprofit sector in a difficult position: Strategically, charities did not want to support the type of discrimination engaged in by the Boy Scouts; tactically, however, they feared that if they did not weigh in on the Boy Scouts' side, the pluralism of the sector could be jeopardized. In the end, filing a total of 14 *amici curiae* briefs on behalf of James Dale were 37 nonprofits, 7 cities, and 11 states; for the Boy Scouts, 43 nonprofits filed

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[90] In the meantime, the Court decided two other cases involving clubs. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) (California's prohibition on discrimination by "business establishments"); New York State Club Ass'n. v. City of New York, 487 U.S. 1 (1988) (New York's ban on discrimination by any "place of public accommodation, resort or amusement"). These cases are often referred to as "the *Roberts* trilogy."

[91] *See* Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) (holding Boy Scouts of America not place of public accommodation under Title II).

[92] For example the Ninth Circuit found that the Cult Awareness Network was not a "public accommodation" under California law. Clegg v. Cult Awareness Network, 18 F.3d 752, 755-56 (9th Cir. 1994) (rejecting statutory basis for membership sought by "an African-American and self-avowed member of the Church of Scientology," who "desired membership in the organization to discuss the link between racial bigotry and religious intolerance").

[93] Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218, 220 (Cal. 1998) (finding Boy Scouts of America not covered by California's Unruh Civil Rights Act, and therefore permitting group to deny homosexual the right to be troop leader), Randall v. Orange County Council, Boy Scouts of America, 952 P. 2d 261 (Cal. 1998) (same, and so may deny membership to someone refusing to affirm belief in God).

21 briefs. Different organizations of Methodists — the largest sponsors of Boy Scout troops — filed on *both* sides.[94]

At the end of its term, on June 28, 2000, the Supreme Court upheld the constitutional right of the Boy Scouts of America to define its expressive activities in a way that excludes gay troop leaders.[95] Even with years of warning and the deluge of filings, though, the Court produced a surprisingly anemic decision. Unlike the unanimous decision in *Roberts*, the *Dale* Court split five to four, and coalition-building among the Justices can result in odd opinions. Still, Justice Rehnquist's opinion for the Court seems both result-oriented — almost tailored to achieve victory for the Boy Scouts — and so broad that the limits of the holding are difficult to assess.[96] *Dale* will either dramatically change the associational jurisprudence or be quickly limited to its facts.

In essence, five Justices held that the Boy Scouts are entitled to define their membership as they see fit because of the expressive nature of their activities. Indeed, Justice Rehnquist's opinion defined "expressive"

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[94] Professor Carpenter suggested that the Boy Scouts capitulated to the Catholic Church, the Church of Jesus Christ of Latter-Day Saints, and a scouting organization within the United Methodist Church, which threatened to withdraw if the organization changed its policy against gays and atheists. Carpenter, *supra* note 25, at 1560-61. At the same time, the General Board of Church and Society of the United Methodist Church, "the public policy and social action agency of the United Methodist Church," filed an *amicus* brief on behalf of James Dale. After pointing out that "the United Methodist Church is the largest single sponsor of Boy Scout troops in the country . . . consisting of more than 415,000 boys and men," this organization complained that "we have never seen any written reference, in any Scouting literature sent to us, to an anti-gay policy." Brief of Amici Curiae the General Board of Church and Society of the United Methodist Church, et al., available in LEXIS, usplus file, as 1999 U.S. Briefs 699, at 6 (Nov. 24, 1999).

[95] The decision did not involve the membership of a boy who was not also a leader. *See Dale*, 530 U.S. at 653.

[96] Michael Stokes Paulsen has a theory that the vote was almost five-to-four the other way:

> [T]here are linguistic and structural clues in the earlier sections of the Stevens dissent that suggest that his opinion at one time may have been a draft majority opinion — the long, detailed recitation of facts setting up the legal analysis, the telltale "we" formulations in Part III of the opinion that do not read naturally for a dissent, and the like. The brevity of the majority's analysis tends to reinforce this hypothesis, suggesting the possibility of a late change from a dissent to a majority opinion, or a quickly drafted new majority opinion. It thus seems *entirely possible that at one point in the Court's deliberations, perhaps even close* to the date of decision, the Court was balanced 5-4 against the Boy Scouts. Such a decision would have been one of great significance — a cataclysm — for the future of the First Amendment freedom of expressive association.

Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1939 n.94 (2001).

broadly to reach organizations — like the Boy Scouts — that neither form in order to make particular statements nor clearly articulate particular policies:

> [A]ssociations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.[97]

Moreover, Rehnquist recognized the expression of the *organization*, even if it conflicts with the views of individual members: "[T]he 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.'"[98] In sum, "The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."[99]

Because James Dale was admittedly an exemplary Scout and leader — whose identity as a homosexual came to light only as a result of a story in his college newspaper — the *Dale* opinions struggle with the distinction between speech and status. After all, both *Runyon* and *Roberts* taught us that stereotypical conclusions about individuals do not outweigh the state interest in eradicating discrimination in public dealings — that constitutionally speaking, membership and message were not to be equated. Instead, the state has a right to demand that in such associations, a member, regardless of ascriptive characteristics, could be expelled only for violating the beliefs of the organization or other cause. By contrast, the *Dale* majority treated Dale as a billboard for a point of view simply because he is gay. As a result, the court refused to take into account the Boy Scouts' failure to expel heterosexual members who disagreed with the Scouts' policy, declaring: "The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."[100]

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[97] *Dale*, 530 U.S. at 655.

[98] *Id.*

[99] *Id.* at 656.

[100] *Id.* at 655-56. To one commentator, however, the Court's characterization of Dale as an "activist" suggests that the Boy Scouts required more than gay status. David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121, 140 (2001). "On this view, the question whether the Scouts would have a speech-based right to exclude a gay man who was not an

In his dissent, Justice Stevens challenged the majority's reliance on a case in which the Court unanimously upheld the right of the organizers of a St. Patrick's Day parade to exclude a gay organization:

> Dale's exclusion in the Boy Scouts is nothing like the case in *Hurley* [*v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)]. His participation 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 . . . . [I]f merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in any expressive activities. That cannot be, and never has been, the law.[101]

To Dale Carpenter, Justice Rehnquist's approach to inquire into the sincerity of the Boy Scout's message, without more, resembles the Court's approach in religious cases.[102] For the majority of the Court, "The only question should be whether the organization's interpretation of its beliefs is offered in good faith."[103] By contrast, the four-Justice dissent would require that: "At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view."[104] Such a requirement, though, means to Professor Carpenter that "unpopular opinion will suffer disproportionately under the dissent's approach because associations with controversial opinions often speak ambiguously and equivocally in order to protect themselves from popular backlash."[105] Indeed, Richard Epstein describes, "Consistent

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activist is left unresolved." *Id.*

[101] *Dale*, 530 U.S. at 695 (Stevens, J., dissenting). Justice Stevens added: "The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone — unlike any other individual's — should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes." *Id.* at 696.

[102] Carpenter, *supra* note 25, at 1539 ("Courts are not to referee disputes over the proper interpretation of an expressive association's beliefs any more than they can act as 'arbiters of scriptural interpretation.'") (footnote omitted).

[103] *Id. See* discussion *supra* Part I.

[104] *Dale*, 530 U.S. at 676 (Stevens, J., dissenting).

[105] Carpenter, *supra* note 25, at 1542.

with the demands of its broad membership base, the Boy Scouts' general philosophy is a model of diffidence, evasion, and restraint."[106] He elaborates:

> In light of the demands on its organization, no one should think for a second that the Scouts' bland declarations represent a lack of understanding, conviction, or foresight. Rather, they represent the kind of studied compromise that a large and successful organization must make to stave off schism or disintegration. And it does take a certain courage to resist devoted loyalists who want a stronger edge to the organization. Noncommodifiers should admire the way in which the Scouts has organized its affairs and they should recognize the dangers of state intervention that would force the Scouts to take hard-edged positions.[107]

Professor Epstein defends the decision in *Dale* on the broad ground that, in the absence of a monopoly, the state should not prohibit a private organization from discriminating.[108] After all, someone barred from one association can simply join or form another. This approach does ignore the high social and emotional (if not economic) costs of both entry and exit. While the law regulates monopolies, it does not regulate "switching" costs.[109] Yet some organizations are more desirable to join than others: The bigger the organization, the greater its social legitimacy and the better the network effects.[110] To be sure, an unhappy departing member or rejected potential member could start a new organization, but this new entity carries what the organizational literature calls "the liability of newness."[111] On the other hand, as Daniel Farber describes, a large organization has its disadvantages:

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[106] Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 127 (2000).

[107] *Id.* at 128-29. *See also* McGowan, *supra* note 100, at 144-54 (describing range of "Scouts' viewpoint(s)" in detail). "[H]omosexuality threatened to fragment the Scouts as an organization precisely because Scouting's sponsors do not agree on what message to send on the subject." *Id.* at 154.

[108] Epstein, *supra* note 106, at 121. *See* additional discussion *infra* Part VI.

[109] I thank Henry Perritt for this observation.

[110] *See* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 551-61 (1998). Consider, too, the often-overlooked "loyalty" aspect of Albert Hirschman's trilogy.

[111] Daniel Farber adds: "And no less importantly, [those who form a new scouting organization] would lack the considerable advantages that the government has conferred upon the Boy Scouts of America as an organization." Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1505 (2001).

> [T]he loss of product differentiation needed to attract a large membership may limit further expansion — a group that is too encompassing may find that its message is becoming increasingly bland, creating the opportunity for new groups with more focused messages to attract away members.... [P]eople may sometimes prefer smaller or more exclusive groups, and find it distasteful to be associated with strangers or individuals with characteristics they regard as undesirable.[112]

So, "[i]s *Dale* a disaster?"[113] In reading the voluminous commentary that has already issued, one is struck by the contrast with the reaction to *Roberts*. As women pressed their rights to be admitted to the brotherhood, wherever centers of male power existed, a contrary result in *Roberts* was almost unthinkable.[114] (Recall that the decision was unanimous.) By contrast, even some in the gay rights community read *Dale* as desirable — essentially, in preserving the rights of gay organizations to discriminate against straight members in leadership roles.[115] This concern for the autonomy of minority organizations reflects a false symmetry.[116] No one has read *Roberts* as suggesting that private

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[112] *Id.* at 1506.

[113] Carpenter, *supra* note 25, at 1515 (footnote omitted). Professor Carpenter continues:

> To some, [freedom of association] is an excrescence of the First Amendment, its frightful right-wing step-child. To these critics, the phrase 'freedom of association' itself has begun to sound rather like 'states' rights' — part of the clever code language of conservative politics that is often nothing more in practice than a seemingly innocuous cover for bigotry.

Id. at 1516.

[114] Not that the war is over. *See, e.g.*, Borne v. Haverhill Golf & Country Club, 1999 Mass. Super. LEXIS 523 (1999) (holding that defendant may not discriminate against its female members in categories of membership, with their varying allocation of tee times and use of club facilities); *see also* Kathleen Burge, *Women Take Haverhill Golf Club Back to Court*, BOSTON GLOBE, Aug. 25, 2001, at B3 ("The Haverhill Golf and Country Club, already fined $1.9 million for discriminating against female golfers and later scolded by a judge for continued violations, was back in court yesterday to face charges that women are still treated as inferior members."); Marcia Chambers, *Steep Sex-Bias Penalties for Golf Club*, N.Y. TIMES, Nov. 30, 1999, at A27 (reporting that jury awarded $1.9 million in compensatory and punitive damages after finding club was public accommodation).

[115] Professor Carpenter describes how the First Amendment has been the savior of persecuted groups like gays. Carpenter, *supra* note 25, at 1532-33.

[116] We do not consider here whether a victory for Dale would have required the Boy Scouts to admit girls. Michael Dorf comments:

> During the oral argument, some of the Justices expressed concern that a victory for Dale would mean that states could require the Boy Scouts to admit girls as troop members and women as leaders. That is hardly clear, however. Granting the Boy Scouts associational autonomy may be appropriate in the face of a claim

women's groups must admit men.[117]

The Supreme Court's close decision in *Dale* might have ended the legal battle, but the dispute has now shifted to the private and political arenas. Some parents have withdrawn their sons from the Boy Scouts; some municipalities have sought to terminate the Scouts' right to use public facilities;[118] reform Jewish leaders recommended ending troop sponsorship; local United Ways debate terminating support; and the education bill recently passed by Congress blocks federal money to any State or local agency that discriminates against the Boy Scouts of America in providing equal access to school premises or facilities.[119] Troops in Oak Park, Illinois, defied the restriction, and were expelled; but a local council in New Jersey agreed with its United Way funder not to discriminate.[120] A new association for boys that does not discriminate against gays — Scouting for All — has sprung up. *Newsweek* reports that 30 percent of Scout parents disagree with the discrimination policy.[121]

> by a girl because there exist alternative co-educational and all-girls organizations that provide roughly the same opportunities as the Boy Scouts. For children, at least, separate-but-equal on grounds of sex does not seem nearly as invidious as separate-but-equal on grounds of race. . . . The social meaning of the Boy Scouts' exclusion of girls and women is separate but equal. The social meaning of their exclusion of gay troop leaders and members is the subordination of gays.

Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2185-86 (2001) (footnotes omitted).

[117] *Cf.* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (holding that State nursing school's exclusion of male students was not rendered constitutionally permissible by its asserted intent to remedy past discrimination against women).

[118] *See* Boy Scouts of Am. v. Till, 136 F. Supp. 2d 1295, 1311 (S.D. Fla. 2001) (enjoining Boy Scouts from using Broward County schools during off hours, because exclusion was not content neutral). "[T]he hurt of exclusion is part of the price paid for the freedom to associate. . . . Freedom of speech and association has its costs, and tolerance of the intolerant is one of them." *Id.* at 1310.

[119] No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9525 ("Equal Access to Public School Facilities") (2002).

[120] *See* Maria Newman, *United Way to Continue to Aid Scouts*, N.Y. TIMES, Aug. 31, 2001, at A19 (describing growing number of local councils that have decided to follow nondiscriminatory policy, despite possibility of disaffiliation). *But see* Robert L. Smith, *Troop Caught in Middle Over Gay Ban*, [CLEVELAND] PLAIN DEALER, Aug. 24, 2001, at A1 (reporting on transfer of Scout troop from its 90-year church sponsor to another, after original sponsor asked all organizations using church property to sign nondiscrimination policy; troop was told that it would lose its Boy Scouts charter if it complied).

[121] *David France, Scouts Divided*, NEWSWEEK, *Aug. 6, 2001. See also Brief of the General* Board, *supra* note 94, declaring:

> [W]hile some BSA members may believe that gay boys and men are immoral, *amici curiae* and the public entities involved in the Boy Scouts do not, rendering untenable the Boy Scouts' assertions that we, Scouting's members, have come together to express a shared view of the morality of gay boys and men or that the

This simultaneous exercise of voice and exit dramatically illustrates both the virtues and consequences of a freedom to associate. In the end, we accept high transactions costs in entering and exiting association because the alternative — obliteration of difference — brings higher social costs in the form of reduced autonomy and liberty.

III. VOICE: INTERNAL GOVERNANCE AND DETERMINING MESSAGE

Once an organization has formed, who is protected by a right of association — are the individual members distinct for this purpose from the organization? Does it matter how the organization determines its voice — of what relevance is internal democracy or other mechanism of organizational decision making? As we will see, the law generally leaves governance issues to the organization, viewing the extent of the members' rights (if any) as part of what they have agreed to join.

A. Whose Associational Rights?

Lost in the disputes over regulation of association is the "who?" aspect of association and group speech. In *NAACP v. Alabama*, the Court permitted the NAACP to speak on behalf of its members; that is, their interests were identical. By contrast, in *Roberts* and *Dale*, it is not clear whose First Amendment rights the Court is to take into account. Granted, we know that the would-be members' interests are represented by the state (acting on behalf of the general public) — but who is on the other side of the balancing equation?

At a simplistic level, of course, the answer is "the association." The Supreme Court has never moved beyond this level. As we have seen, the Court — when it thinks about the question at all — is most comfortable viewing an association as the individual multiplied. This means, in Justice Souter's words, that an individual does not lose constitutional protection "simply by combining multifarious voices. . . ."[122] But what about the other way around? Is the whole greater than (or different from) the sum of its parts? At the end of June 2001, a divided Court held that the election laws may properly restrict a political party's candidate-coordinated expenditures (as opposed to truly independent expenditures) to minimize circumvention of contribution limits. In so holding, Justice Souter, writing for the five-member

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inclusion of gay boys and men in the Boy Scouts will impair our ability to express those views that did, in fact, bring us all together.

[122] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569-70 (1995).

majority, commented: "[W]e do not understand the Party to be arguing that associations in general or political parties in particular may claim a variety of First Amendment protection that is different in kind from the speech and associational rights of their members."[123]

Needless to say, the Supreme Court has not asked whether organizations collect voices, amplify voices, multiply voices, soften the hard edges and work a compromise, or suppress voice — or all of these at different times or on different issues.[124] Consider the following five structures:

1. Some organizations are hierarchical and others are democratic.[125]

2. Some organizations permit nonmembers to participate in

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[123] Fed. Election Comm'n. v. Colorado Republican Fed. Campaign Comm., 121 S.Ct. 2351 (2001). A lengthy footnote 10 followed, in which Justice Souter wrote:

> We have repeatedly held that political parties and other associations derive rights from their members. E.g., . . . Tashjian v. Republican Party of Conn., 479 U.S. 208, 214-215. . . (1986); Roberts v. United States Jaycees, 468 U.S. 609, 622-623 . . . (1984); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459-460 . . . (1958) . . . . While some commentators have assumed that associations' rights are also limited to the rights of the individuals who belong to them, . . . that view has been subject to debate . . . *see generally* Issacharoff, *Private Parties with Public Purposes*, 101 COLUM. L. REV 274 (2001). There is some language in our cases supporting the position that parties' rights are more than the sum of their members' rights . . . , but we have never settled upon the nature of any such difference and have no reason to do so here.

Id. at 2362 n.10.

[124] *See* ROSENBLUM, *supra* note 43, at 205 (the "assumption, that voice precedes association, supposes that independent individuals intend the same communication and that association simply aggregates and amplifies their voices. This describes a crowd of cheering sports fans, not a voluntary association.").

[125] Watson v. Jones, 80 U.S. 679 (1871) (comparing different organizational structures for churches); *see also* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976) (civil courts have no authority to resolve church disputes turning on church doctrine, practice, polity or administration). *See generally* Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1743 (1993) (arguing that "strong protection of associational rights for parties is as likely to impede the goal of responsible party government as to further it"). Professor Lowenstein diagrams the interwoven relationship between parties and governments, concluding that "when the government 'regulates' the parties, to a very large extent the parties are regulating themselves." *Id.* at 1756. Moreover, in describing the amorphous nature of "a" party, Lowenstein observes: "The only locus of a political party that resembles in form the governing bodies of other private associations in our society is the extragovernmental organization, with its local, state, and national committees and its executive officers." *Id.* at 1764. Yet parties do not control voters; "organizations that are thought to play or have played such a role are reviled in the American idiom as 'bosses' or 'machines.'" *Id.* at 1765.

determining their message.[126]

3. Some organizations that speak on ideological issues are for-profit, or, if nonprofit, are supported by funding from business, while others are noncommercial.[127]

4. Many nonprofit organizations, even advocacy organizations, have no members at all.[128]

5. In a few types of organizations, membership is state-mandated or compelled by economic necessity.[129]

For national organizations with a federated structure, the decision making can be doubly complicated: The members of the national body might be the affiliated locals, rather than the individual members of the locals.[130] In other federated organizations, the national body controls the structure of the local affiliates. In *Roberts*, the Minneapolis and St. Paul Jaycees wanted to admit women as voting members; when informed by the national that this would violate the organization's bylaws, the locals affirmatively invoked the state anti-discrimination law.[131]

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[126] Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (holding that Republican Party has constitutional right to permit independents to participate in its primary, despite State statute limiting voting in primaries to registered party members).

[127] *Compare* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *with* Fed. Election Comm'n. v. Mass. Citizens for Life, 479 U.S. 238 (1986), discussed *infra* Part IV.

[128] *See* Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 461 (Theda Skocpol & Morris P. Fiorina, eds.) (1999) (writing about trend in advocacy arena toward professionalized organizations either with organizations instead of individuals as members or with "checkbook" individual members). "Summary statistics about 2,966 'social welfare' and 'public affairs' organizations founded in the 1960s, 1970s, and 1980s show that close to half of these associations indicate no members at all, and another quarter claim fewer than 1,000 'members.'" *Id.* at 480 (footnote omitted).

[129] *See* Part IV, where we discuss union shops, integrated bar associations, and economic regulation calling for compelled financial support.

[130] *Cf.* Lowenstein, *supra* note 125, at 1777 (observing that when statutes affecting political parties "are challenged in court by other party members or party entities, the invisible issue in the litigation is: Who gets to speak for 'the party'?"). Professor Lowenstein comments: "It is remarkable that this issue has received so little explicit attention." *Id.*

[131] *See* Brief of Conference of Private Organizations as Amicus Curiae in Support of Affirmance, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (No. 83-724) (Mar. 23, 1984) ("The mandatory order of the Minnesota Commission here . . . not only destroys a principal membership qualification of the U.S. Jaycees in Minnesota, but it allows state and local Jaycees units in Minnesota to continue using the 'Jaycees' name and program even if the U.S. Jaycees withdraws from the State."). See also, e.g., NAACP v. Golding, 679 A.2d 554 (Md. App. 1996) (declining to interfere in decision of national NAACP in suit brought

Moreover, by tying expressive associational rights to First Amendment free speech jurisprudence, the Supreme Court extends the "who" question beyond the association and its members. The Supreme Court has identified a dual function of speech: the self-fulfillment of the speaker, and the interests of the potential hearer (the marketplace of ideas metaphor).[132] Speech thus has an instrumental value divorced from the process by which it is generated, and regardless of whether it represents the ideas of an individual or an association. As we will see in Part IV, the Court has held that the Constitution protects a corporation's speech not because the corporation has a right to speak but because the public has a right to hear its views. Compare this benign view of group speech with James Madison's famous worry about the role of factions in the political sphere. His solution, described in *The Federalist No. 10* (1787), was to allow factions to proliferate, "against the event of any one party being able to outnumber and oppress the rest" within a large (national) republic.[133]

B. Models of Internal Governance

Nonprofit organizations are complex and sometimes indeterminate creatures.[134] Over the last few decades, economists, sociologists, and

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by Baltimore branch, which wanted to permit youth members to vote in branch election).

[132] As a jurisprudential matter, though, one commentator observed that the development of the doctrine that applies to speech advocating unlawful action "took place in cases involving overtly political speech." Strauss, *supra* note 49, at 338 n.10 (citing, among other cases, Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); DeJonge v. Oregon, 299 U.S. 353 (1937); Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); and NAACP v. Claiborne Hardware, 458 U.S. 886 (1982)).

While this discussion suggests that the most highly valued speech is political speech, the free speech doctrine protects even privately-expressed thoughts. *But see* Liz Sidoti, *10-Year Term for Shocking Journal*, CHI. TRIB., July 14, 2001, at 1 (ten-year sentence for man who pled guilty to writing fictitious account of child pornography in his private journal); Bob Herbert, *The Thought Police*, N.Y. TIMES, July 19, 2001, at A25; Ashcroft v. Free Speech Coalition, *cert. granted sub nom.* Holder v. Free Speech Coalition, 531 U.S. 1124 (2001) (challenging constitutionality of Child Pornography Protection Act of 1996, in which Congress criminalized material that "appears to be" or "conveys the impression" of minors engaged in sexually explicit conduct, even if those images do not involve actual children).

[133] Madison provided the following definition of what we might now term "special interests" as well as political parties: "By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

[134] *See generally* Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457 (1996).

management specialists have peered into the "black box" of organizational behavior within the corporate and public sectors, and sunshine is finally falling on the nonprofit sector.[135] Scholars have come to appreciate the effects on internal governance of multiple stakeholders, diffusion of mission, and dependence on key resources. While the typical nonprofit organization is a corporation that lacks members with power to vote for the board or on policy issues, the nonprofit board is hardly untethered. Relationships — some voluntary, some contractual, some political (in the broad sense) — exist within and between organizations, and between nonprofit organizations and business, government, and the public at large. At the same time, business corporation boards are neither as responsive to their shareholders, nor politicians to voters, as a simple principal-agent model would suggest. Every organization — for-profit, governmental, or nonprofit — is accountable to a variety of constituents in a variety of contexts. Market forces such as competition for donors, shareholders, voters, workers, volunteers, governmental funding, clients, and overall reputation serve as powerful constraints on centralized decision making, and events beyond any manager's control bedevil the best-laid plans. Private as well as public funders can lead to orthodoxies: For example, both private and governmental funders can require adherence to a nondiscrimination policy.

In the charitable sector, one voice can uniquely trump all others: the donor's. If the donor imposes a particular charitable purpose on a charitable trust, and the purpose fails, the courts may apply the *cy pres* doctrine to reform the trust to as close a purpose as possible to the original.[136] Some courts have applied the *cy pres* doctrine not only to

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[135] As described in note *, above, this Article was prepared for the ninth in a series of 10 seminars on "Nonprofit Advocacy and the Policy Process," organized by The Urban Institute's Center on Nonprofits and Philanthropy. Two of the seminars focused on the varied organizational structure of nonprofit organizations, and the issues involved in representation, participation, and accountability. For information about these seminars, and summaries of these papers and discussions see http://www.urban.org/advocacyresearch.

[136] However, if the donor has not specified a general charitable intent, the trust instead fails, and the assets revert to the donors' heirs. Applying this rule, the Supreme Court upheld the reversion to the family of property donated for a park "for whites only," which could no longer be so restricted after civil rights reform. Evans v. Abney, 396 U.S. 435 (1970). In August 2000 the National Conference of Commissioners on Uniform State Laws approved a Uniform Trust Code, and time will tell whether states adopt it. Section 413 would also allow *cy pres* where the donor's purpose becomes "impracticable" or "wasteful." The Comment to the section states that the rule "modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent."

trusts but also to nonprofit corporations.[137] Similarly, some believe that all charity boards (trust or corporate) owe a duty of obedience to the original mission of the organization.[138] As a practical matter, the issue rarely arises because most charities were formed with missions broad enough to accommodate evolving needs, and restricted gifts do not ordinarily constitute a large percentage of assets. The real battles occur when other stakeholders (such as members, students, grantees, or beneficiaries) seek to influence the institution within the confines of its purposes.[139]

The Supreme Court has not squarely addressed the question of the process by which a nonprofit entity determines its voice. In *Roberts*, the Court upheld the state regulation on membership because it "did not trespass on the organization's message itself."[140] Thus, the Court's further observation that "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members" does not tell us how the Court would have ruled if a club's membership did not determine its policies. Justice Rehnquist's opinion for the Court in *Dale* seems to grasp at the barest of statements and internal writings of the association in finding that the Boy Scouts had articulated a message — indeed, Justice Stevens' dissent charged that this articulation was taking place for the first time by the Boy Scouts' lawyers in the litigation itself.[141] Yet Professor Carpenter defends even

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[137] "Those who give to a home for abandoned animals do not anticipate a future board amending the charity's purpose to become research vivisectionists." Attorney Gen. v. Hahnemann Hosp., 494 N.E.2d 1011, 1021 n.18 (Mass. 1986) (quoting position of attorney general).

[138] *See* DANIEL L. KURTZ, BOARD LIABILITY 84-90 (1988).

[139] The inherently conservative nature of this legal structure pleases those who fear the prospect of unfettered discretion by current trustees, and frustrates those who believe, like Jefferson, that "the land belongs to the living." Some reformers believe that this focus on donor direction so permeates the legal regulation of charities that it infringes on charity fiduciaries' ability to govern. As a procedural matter, the State attorney general is effectively the only enforcer of donor restrictions. Few private parties have standing to bring suit for trustee or director breach of fiduciary duty: certainly not the donor herself, or beneficiaries, or members lacking power to vote for the board. In the absence of donor restrictions, though, who is in a better position to decide whether to alter a charity's historic purposes, the charity's board or the state attorney general or court? *See generally* Evelyn Brody, *The Limits of Charity Fiduciary Law*, 56 MD. L. REV. 1400 (1998).

[140] 515 U.S. at 580-81.

[141] Professor Farber complains that "this focus on organizations also distracts the Court from potential disjunctures between the leadership and the members. The leadership's positions are taken to be those of the group as a whole, although the membership may be only faintly aware of the leadership's positions or may have no collective consensus on the subject." Farber, *supra* note 111, at 1496-97.

silence as a protectible mode of expression.[142]

C. Democracy and Its Discontents

Commentators occasionally call for the law to increase the power of the members of a nonprofit organization. Suggestions for enhancing the internal voice of members result in what Julian Eule called "transportation" of First Amendment norms to the private sector.[143] Such yearnings for replicating citizen rights within private associations date as far back as the birth of our nation. Revolutionary fervor for democracy initially led some states to recognize the rights of churches only if they follow democratic internal decision making processes.[144] And there are different kinds of democracy: In the early days of business corporations states uneasily adjusted to "one share, one vote."[145] Erwin Chemerinsky and Catherine Fisk would require a court to assess an organization's message by polling the members (actually, they leave unspecified the mechanics of determining the members' will):

> In short, the Court's error in *Dale* was allowing the corporate governors of the Boy Scouts complete latitude in defining the organization's expressive message and in ignoring the views of the members, which should be at the center of any determination of the group's communicative goal. Such an inquiry is more consistent with the underlying reasons why freedom of association is protected and would greatly limit the ability of groups to engage in invidious discrimination.[146]

By contrast, Steffen Johnson argues that the Boy Scouts' procedures *are* democratic because the Scouts "have clear internal procedures for

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[142] Carpenter, *supra* note 25, at 1555-57.

[143] Eule, *supra* note 21.

[144] *See* Liam Séamus O'Melinn, *The Sanctity of Association: The Corporation and Individualism in American Law*, 37 SAN DIEGO L. REV. 101 (2000).

[145] *See* Brudney, *supra* note 16, at 62 n.58 ("The fear of undue political power inhering in a system of voting by the share was reflected in the early requirement in some states of voting by the shareholder rather than by the share."). Professor Brudney cites to David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"*, 56 CORNELL L. REV. 1, 6-8 (1970); Charles R. O'Kelley, *The Constitutional Rights of Corporations Revisited: The Political Impact of Legal Mythology*, 67 GEO. L.J. 1347, 1349-51 (1949); William Patton & Randall Bartlett, *Corporate "Persons" and Freedom of Speech: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 1981 WIS. L. REV. 494, 498, 509-10.

[146] Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595 (2001) (Perspectives on Constitutional Exemptions to Civil Rights Laws: Boy Scouts of America v. Dale).

establishing positions on moral issues and choosing leaders, and each local chapter agrees to abide by them when it applies for its annual charter."[147]

Democratic processes have their disadvantages, of course, by opening up issues to debate, revealing the lack of unanimity of opinion within an organization, and simply taking time to reach consensus. They also challenge the current power structure. Even in the electoral context, advocates for democracy within political parties are matched by advocates for strong, centralized parties.[148] Writing about the right of universities to adopt "speech codes" in the face of state laws imposing free speech norms on private as well as public campuses,[149] Julian Eule separated the constitutionally required from the possibly desirable: "As the claim to First Amendment protection stems from the private association's constitutive and expressive purposes, not necessarily its internal democratic character, the community may be defined as embracing all who are engaged in the educational or like enterprise, and the speech regulations can emerge through a process that does not entail broad democratic participation — however desirable that might be as a matter of respect and participatory value."[150]

Efforts to democratize private association — even if they could be effectuated — miss the point. A membership is a complex relationship, and motives vary greatly for joining.[151] Many organizations have

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[147] Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639, 1651-52 (2001) (footnotes omitted).

[148] *See* Lowenstein, *supra* note 125, at 1768 (describing view that: "Attempts to create intraparty democracy are not only superfluous but harmful, because a small inner group of leaders must be given means to ensure a cohesive effort to carry out party programs and to provide strong, centralized point of resistance to unreasonable special interest demands.").

[149] *See* discussion *infra* Part VI.

[150] Eule, *supra* note 21, at 1629-30.

[151] *Cf.* FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 202-06 (1982) (indirectly considering various legal definitions of "member" in campaign finance context). The Federal Election Campaign Act permits corporations (and unions) to make campaign expenditures only out of separate segregated funds (PACs), and provides that a corporation without capital stock (that is, a nonprofit) may solicit contributions to such a fund only from its "members." The Supreme Court unanimously upheld the FEC's determination that the National Right to Work Committee violated that law when it solicited PAC contributions from some 267,000 persons who had in the past made a contribution to the Committee. The organization's article and bylaws made no provision for members. Without determining whether this ended the inquiry, the Court ruled that the definition of "member" under FECA could not extend as far as the Committee wished. Writing for the Court, Justice Rehnquist concluded: "The analogy to stockholders and union members [in the legislative history] suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under [FECA]." *Id.* at 204. Here, Justice Rehnquist commented, "[m]embers play

multiple purposes, and not all members are satisfied with each position or expressive activity. Nevertheless, regardless of the type of membership, the decision making process within an organization is part of the member's bargain. It is easy to see why members might not want democracy — might not want to be required to take a position. Recall the discussion from Part II of the multiple constituencies that pull on the Boy Scouts. As Richard Epstein elaborates:

> Many of the Scout families who are uneasy about homosexual practices — especially as it relates to their own children — do not regard themselves as bigoted or prejudiced, just worried, troubled, and confused. That population will not take kindly to strong declarations that overstate the level of their uneasiness and force them to publicly defend strident anti-gay and lesbian positions to which they cannot give full-throated endorsement. Such members, however, may be able to identify activities that they are prepared to tolerate at a distance but that they would not wish to see or condone close at home. In order to hold their complex coalition together, it may make sense for the Boy Scouts to gravitate toward a compromise that proves more stable in practice than coherent in theory.[152]

By the same token, participants in a voluntary association can bring about internal change. Where association is voluntary, even without government dictate no membership organization is immune from the complex interaction of voice and exit (or merely threatened exit) so eloquently described by Albert Hirschman.[153] For example, when the ACLU supported the right of a Nazi organization to march in Skokie, it lost 15 percent of its membership;[154] *Newsweek* reports that the

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no part in the operation or administration of the corporation; they elect no corporate officials, and indeed there are apparently no membership meetings." *Id.* at 206. After this decision, the FEC published regulations defining "member" as someone who satisfies the organization's requirements for membership and either has a significant financial attachment, voting rights, or some other "significant organizational and financial attachment to the association." 11 C.F.R. § 114.1(e). *See also* Treas. Reg. § 56.4911-5(f) (defining "member" under an exception for "communications with members" in the lobbying rules that apply to certain Internal Revenue Code section 501(c)(3) organizations). For an extended discussion of membership, see Elizabeth Reid & Jeffrey Krehely, "Idiosyncrasies of 'Membership' in U.S. Nonprofit Regulation and Political Practice" (paper presented at the 30th Annual Conference of the Association for Research on Nonprofit Organizations and Voluntary Action, Miami, Fl., Dec. 1, 2001).

[152] Epstein, *supra* note 106, at 129.

[153] *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

[154] Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1028 & n.95 (1998).

membership in the Boy Scouts fell 4.5 percent last year, 7.8 percent in the Northeast.[155] Under our legal system, however, providing for internal democracy is a decision left to private organizations. Even in the political process, when a litigant argued that the state had a compelling "interest in the 'democratic management of the political party's internal affairs[,]'" the Supreme Court found that "this is not a case where intervention is necessary to prevent the derogation of the civil rights of the party adherents."[156] In ruling that membership in a union which plaintiffs voluntarily joined does not carry with it a constitutional right to vote, a federal district court, citing *Roberts* and *Dale*, declared: "Indeed, government actions may infringe the First Amendment rights of an associations' members by interfering with the internal operation of a membership group, such as by dictating to it the rights and privileges of membership."[157] In sum, *how* an association distributes voice power within the organization is just as much a part of what it means to be a member — or otherwise affiliated with the organization — as the message it expresses. The medium and the message are both the expression.[158]

IV. EXIT: COMPELLED ASSOCIATION AND COMPELLED SPEECH

Nancy Rosenblum has termed a "danger" the "undisciplined multiplication of associations that amplify self-interest, encourage arrant interest group politics, and exaggerate cultural egocentrism."[159] Kathleen Sullivan sees this distinctive feature of factionalization as a virtue: "To the extent that voluntary groups amplify individual wants, they embody partial rather than universal interests or preferences. To the extent they operate as settings for personality formation and social integration, they embody partial rather than universal perspectives or world views. In this context, partiality is the point."[160] To put a twist on Madison's

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[155] France, *supra* note 121.

[156] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 232 (1989).

[157] New York 10-13 Ass'n v. City of New York, 2000 U.S. Dist. LEXIS 13855, at 28-29 (S.D.N.Y. 2000).

[158] *Cf.* Kateb, *supra* note 24, at 37:

> To characterize any association . . . as a mere instrument, a mere means, is to ignore some part of its role in a person's life. . . . Indeed, the means may matter more than any end: the web of relations housed in an association can take on a tremendous value, greater than the goals of the association.

[159] ROSENBLUM, *supra* note 43, at 32.

[160] Kathleen Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714-15 (1988).

solution to the dangers of faction — let a thousand factions bloom – individuals' narrow identification with specific associational interests is saved by their potential impermanence. The Supreme Court's *laissez-faire* attitude towards freedom of contracting and internal governance similarly requires that the association and speech be consensual. Accordingly, being able to change one's mind about belonging – exit – is the point.

Of course, in a society filled with complex ties, few associations are completely unconstrained, but we often have a choice of constraints. As a matter of constitutional law, the Supreme Court looks out for *state*-compelled association and *state*-compelled payment to support speech. As the Court declared a year after *Dale*: "Before addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary . . . ."[161] The Court applies the same standard to judging state-compelled speech as it does to state-imposed restrictions on speech.

A. Crafting the Compelled-Association Remedy for Objectionable Speech

The remedy the Court provides in cases of compelled association is the right of the objector to opt out of funding the unrelated speech of the organization.[162] The Court developed this approach in four major cases: *Abood* (a labor union),[163] *Keller* (a mandatory bar association),[164]

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[161] United States v. United Foods, 533 U.S. 405 (2001).

[162] The dissent in Glickman v. Wileman Bros. & Elliott, Inc., explains that an objector need not even be a dissenter:

> [T]he requirement of disagreement finds no legal warrant in our compelled-speech cases. In *Riley*, for example, we held that the free-speech rights of charitable solicitors were infringed by a law compelling statements of fact with which the objectors could not, and did not profess to, disagree. . . . See also *Hurley*, 515 U.S. at 573 ("[The] general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . .") . . . . Indeed, the *Abood* cases themselves protect objecting employees from being forced to subsidize ideological union activities unrelated to collective bargaining, without any requirement that the objectors declare that they disagree with the positions espoused by the union. . . . Requiring a profession of disagreement is likewise at odds with our holding two Terms ago that no articulable message is necessary for expression to be protected, *Hurley*, 515 U.S. at 569; protection of speech is not limited to clear-cut propositions subject to assent or contradiction, but covers a broader sphere of expressive preference.

521 U.S. 457, 488-89 (1997).

[163] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

Southworth (student fees at state university),[165] and *United Foods* (generic mushrooms ads).[166] In *Abood*, *Keller*, and *United Foods*, the organization remained free to speak on ideological issues unrelated to the activity for which association was properly compelled – just not with the objector's money. In *Southworth*, the Court could have declared that students cannot complain about paying for the speech of others, because of the broad mission of an institution of higher learning. Instead, though, the Court finessed the issue by analogizing the funding mechanism to a "public forum," and rejecting the suggestion that the speech of any particular student organization could be attributed to particular objecting students. In sum, under this jurisprudence, internal democracy does not save a private organization from unconstitutionally compelling the speech of an objector, the way it does in the tax context.[167] The danger of an opt-out approach, however, is the uncertain end point. Given the unclear distinction between the public and private realms (as discussed in Part VI), one starts to fear for the longstanding rule that an objecting taxpayer cannot successfully hold back on taxes.[168]

State-compelled association arises primarily in the commercial setting, where courts defer the most to legislatures' regulatory powers.[169] The state may constitutionally mandate the association — and the payment of dues — to overcome free-rider problems. Economic players, though,

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[164] Keller v. State Bar of Cal., 496 U.S. 1 (1990).

[165] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

[166] United States v. United Foods, 533 U.S. 405 (2001).

[167] Cases where taxpayers refuse to pay taxes on ideological grounds are usually dismissed on the ground that taxpayers lack "standing" to complain about decisions reached through the political process. By contrast, the courts recognize that: "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United Foods, Inc.*, 121 S. Ct. at 2338.

[168] Justice Breyer, dissenting in *United Foods*, viewed the regulatory program as proper tax:

> [T]he contested requirement that individual producers make a payment to help achieve a governmental objective resembles a targeted tax. See *Southworth*, 529 U.S., at 241 (Souter, J., joined by Stevens and Breyer, JJ., concurring in judgment) ("The university fee at issue is a tax"). And the government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. *Id.*, at 229 (majority opinion). *Cf.* Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

121 S. Ct. at 2346 (Breyer, J., dissenting).

[169] *See* Mayer, *supra* note 17, at 605-20 (asserting that business corporations have replaced Fourteenth Amendment challenges to economic regulation with First Amendment and other Bill of Rights challenges, with great success).

might take positions on ideological issues unrelated to the purpose for which states may compel association. In *Abood* the Supreme Court held that a nonunion-member employee required to pay agency shop fees to a union for collective bargaining coverage cannot be compelled to fund unrelated ideological speech of the union.[170] In *Keller*, the Court upheld the rights of conservative members of California's "integrated" (mandatory) bar association not to pay dues to finance the bar's positions on a range of legal issues, including the death penalty, abortion, prayer in the public schools, and gun control. As we discussed in Part III, the Court does not inquire into the processes by which an organization determines it messages. Rather, where exit is not an option because of state action, the Court finds the Constitution to require that voice cannot be financially coerced for unrelated speech.

The Supreme Court has also addressed both the free-speech and compelled-speech interests of corporations themselves. The simple issue of whether corporations — nonprofit or for-profit — have the right to speak on ideological issues arises clearly in the context of campaign finance reform. I discuss in Part IV.B, below, a trilogy of Supreme Court decisions that distinguish between for-profit and nonprofit speech, and between business and non-business interests: *First National Bank of Boston v. Bellotti*; *FEC v. Massachusetts Citizens for Life*; and *Austin v. Michigan Chamber of Commerce*. In these cases, the Justices debated not only the potential for corruption of the electoral process — the traditional concern of campaign finance reform — but also the rights of shareholders of business corporations to avoid association with speech with which they disagree. Corporations themselves have the right not to be compelled to support commercial speech. In *United Foods*, a grower of branded mushrooms objected to having to contribute to a fund to advertise mushrooms generically, and the Court upheld its right not to have to pay. This June 2001 decision puts in doubt a line of cases that suggested that commercial speech enjoys less First Amendment

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[170] *See also* Communications Workers v. Beck, 487 U.S. 735, 745 (1988). As Martin Malin explains:

> Unions and employers frequently provide in their collective bargaining agreements that employees who are members of the bargaining unit but are not members of the union must pay the union a fee not to exceed the regular periodic dues charged to union members. These fees, frequently called agency shop or fair share fees, are imposed on nonmembers to prevent them from receiving the benefits of union representation without having to pay for them.

Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 855 (1989) (footnote omitted).

protection than other speech.[171]

Complicating the analysis of organizational speech is the interaction between associational rights and speech rights.[172] If a state needs only a rational basis to compel certain association (generally, non-intimate, non-expressive association), then the individual cannot complain that mere public identification with the organization violates the member's constitutional rights.[173] The *Roberts* Court, however, applied a higher level of scrutiny in finding that the men's interest was outweighed by the state's compelling interest in eradicating sex discrimination. Because the *Roberts* Court rejected the stereotyping of women's views, the men who belonged to the Jaycees could not invoke the logic later invoked by Justice Rehnquist that James Dale's mere presence as a troop leader "sends a message" with which the Boy Scouts disagree. Nevertheless, as we saw, state-mandated association must provide a mechanism for objectors to opt out of funding unrelated speech. But who is the association and what is its speech once the organization has admitted women with the right to vote? Which members can abate their dues — any members, male or female, who are outvoted; or only men, who are now compelled to associate with women; or no one?

To the dissenters in *Dale*, the reverse issue arose: They viewed the Court, in effect, as permitting the organization to opt out of members' unrelated speech by excluding those persons from membership.[174]

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[171] These cases include a case decided only three years earlier upholding a broad regulatory regime, part of which imposed an obligation to contribute to a joint advertising campaign. Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457 (1997).

[172] For a thorough analysis of this, *see* Malin, *supra* note 170.

[173] Indeed, for trade or professional-based compelled associations, the public may make the identification regardless of whether the state compels the association. As Professor Malin quotes Schneyer, *The Incoherence of The Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 52: "To the extent that the public incorrectly attributes the bar association's views to individual lawyers, the erroneous attribution will occur regardless of whether there is a unified bar." Malin, *supra* note 170, at 865, n.54.

[174] *See* Brudney, *supra* note 16, at 7 n.18:

> Interventions that affect or curb the collective ideological voice of the multi-purpose group may take a variety of shapes — a requirement to fracture individual members' contributions so as to rebate (ex ante or ex post) a proportion of dues equal to the proportion of the group's expenditures, or a requirement of super-majority consent to advocacy speech or activities, or even a prohibition of such activities or speech. Intervention may be effected by judicial action, or by legislative or administrative action. The legislative or administrative process offers significant advantages over judicial intervention by way of flexibility, detail, monitoring, and adaptability to particular institutional configurations and changing circumstances. However, judicial intervention may be the only remedy available to protect discrete and insular minorities for whom

Justice Stevens' dissent rejected the suggestion that membership in the Boy Scouts of America, a nationwide organization with millions of members, in any way exposes every member to identification with every position of every other member of the organization:

> [S]urely many members of BSA engage in expressive activities outside of their troop, and surely BSA does not want all of that expression to be carried on inside the troop. For example, a Scoutmaster may be a member of a religious group that encourages its followers to convert others to its faith .... From all accounts, ... BSA does not discourage or forbid outside expressive activity, but relies on compliance with its policies and trusts Scouts and Scoutmasters alike not to bring unwanted views into the association. Of course, a disobedient member who flouts BSA's policy may be expelled.[175]

While in theory, then, a compelled member can still be publicly identified with speech with which she does not agree (and does not pay for), the process of disaggregating an organization's speech is not easy.[176] An organization faced with financial defections for unrelated speech might be forced to cease all ideological speech. The practical result of the Court's approach might be that fewer compelled associations will embrace multiple purposes. Indeed, after the U.S. Supreme Court ruled in *Keller* that the California Bar Association could compel the payment of dues only for activities relating to regulating the profession and

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legislation is more likely to be the problem than the solution.

[175] 530 U.S. at 691 (Stevens, J., dissenting). "Consider, in this regard, that a heterosexual, as well as a homosexual, could advocate to the Scouts the view that homosexuality is not immoral. BSA acknowledges as much by stating that a heterosexual who advocates that view to Scouts would be expelled as well.... But BSA does not expel heterosexual members who take that view outside of their participation in Scouting, as long as they do not advocate that position to the Scouts." *Id.* at 691 n.19. Indeed, the amicus brief filed on behalf of Dale by a Methodist group declared that they were not expelled for their position that homosexuals should have equal membership rights. Brief of General Board, *supra* note 94.

[176] *See* Richard Epstein, *Tuskegee Modern, Or Group Rights under the Constitution*, 80 KY L.J. 869, 879 (1992) (footnote omitted):

> It is therefore no surprise that the Justices of the Supreme Court are wholly unable to agree about what activities a group can undertake with the funds of members that were forced to join the group against their will in the first place. Eliminate the initial use of coercion in the formation of the group, and the problem disappears. The group can draft provisions that state who will be bound and when, and decide what mix of voice and exit to allow for the expression of dissenting views.

improving the quality of legal services, the Bar ceased collecting dues altogether until its role was clarified by statute.

Most recently, in *Southworth*, the Court sidestepped the issue of compelled speech in the context of student activity fees paid at a state university.[177] The University of Wisconsin, said the Court, did not collect the student activity fees in order to engage in its own speech, but rather as a collection device to fund the speech of the myriad student organizations. Accordingly, the Court upheld the fee by "analogy" to the public forum cases, where regulation may address such matters as time, place, and manner if it is content-neutral. Significantly, though, the *Southworth* Court cast enrollment in a public university in a commercial light: "If the University conditions the opportunity to receive a college education, an opportunity comparable in importance to joining a labor union or bar association, on an agreement to support objectionable, extracurricular expression by other students, the rights acknowledged in *Abood* and *Keller* become implicated."[178] The Court also recognized "the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."[179]

However, the Court found that in a university context, unlike the situations in *Abood* and *Keller*, limiting compelled speech to what is "germane" is "unworkable," and "gives insufficient protection both to the objecting students and to the University program itself[,] . . . particularly where the State undertakes to stimulate the whole universe of speech and ideas."[180] By the same token, the student activity program makes it "all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs."[181] In dicta, the Court described a constitutionally acceptable alternative remedy to the viewpoint-neutral principle adopted by the University:

> If the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which he or she will or will not support. If a university decided that its students' First Amendment interests were better protected by some type of optional or refund system it would be free to do so.

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[177] 529 U.S. 217, 229 (2000) (indicating that less restrictive rules apply to governmental speech).

[178] 529 U.S. at 231.

[179] *Id.*

[180] *Id.* at 232.

[181] *Id.*

> We decline to impose a system of that sort as a constitutional requirement, however. The restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective. The First Amendment does not require the University to put the program at risk.[182]

B. The Constitutional Significance of Non-Commercial, Nonprofit Status

1. *First National Bank of Boston v. Bellotti*: Corporate Speech

In 1978, the Supreme Court decided *First National Bank of Boston v. Bellotti* by a five-to-four vote.[183] This decision declared unconstitutional a state law that prevented a corporation from making expenditures in a ballot measure campaign. Earlier, in *Buckley*,[184] the Court had upheld regulation of campaign finance because of the potential (or perception) of "corruption of elected representatives through the creation of political debts."[185] This rationale does not apply to ballot measures, where the public itself is acting as legislature. For our purposes, the important holding of *Bellotti* is the Court's instrumental view that the same First Amendment interests in free speech are implicated when a corporation speaks as when an individual does.[186] Writing for the court, Justice Powell cautioned: "If a legislature may direct business corporations to 'stick to business,' it also may limit other corporations — religious, charitable, or civic — to their respective 'business' when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment."[187]

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[182] *Id.* The Court emphasized that this case did not involve the University's own speech (that is, government speech) or that of its faculty, in which case other principles would apply. *Id.* at 234-35.

[183] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[184] Buckley v. Valeo, 424 U.S. 1 (1976).

[185] *Bellotti*, 435 U.S. at 788 n.26.

[186] 435 U.S. at 775-76. Justice Powell wrote for the Court,:

> The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" first amendment rights, and if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does.

Id.

[187] *Id.* at 785.

Dissenting, Justice White charged that "the communications of profitmaking corporations are not 'an integral part of the development of ideas, of mental exploration and of the affirmation of self.'"[188] Justice White distinguished corporations from their shareholders: "Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion." He asserted that "the government has a strong interest in assuring that investment decisions are not predicated upon agreement or disagreement with the activities of corporations in the political arena."[189] While agreeing with an instrumental rationale for free speech, Justice White would apply a lesser standard where the speech does not relate to the business of the corporation: "[The right to hear speech] does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression."[190] Echoing Professor Laski's Frankenstein metaphor, discussed above in Part I, Justice White would allow states to limit corporations' power:

> [My position] is not one of equalizing the resources of opposing candidates or opposing positions, but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. The State need not permit its own creation to consume it.

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[188] *Id.* at 805 (White, J., dissenting) (quoting THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966)).

[189] *Id.* at 819. Justice White elaborated:

> A State may legitimately conclude that corporations would not serve as economically efficient vehicles for such decisions if the investment preferences of the public were significantly affected by their ideological or political activities. . . . The common law was generally interpreted as prohibiting corporate political participation. Indeed, the Securities and Exchange Commission's rules permit corporations to refuse to submit for shareholder vote any proposal which concerns a general economic, political, racial, religious, or social cause that is not significantly related to the business of the corporation or is not within its control.

Id. (footnotes omitted).

[190] *Id.* at 807.

Not only corporations' political speech can prove controversial: The House Commerce Committee recently considered requiring publicly traded companies to disclose an itemized list of charitable contributions above a level set by the Securities and Exchange Commission.[191]

2. *FEC v. Massachusetts Citizens for Life*: An Ideological Nonprofit

Eight years later came another five-to-four decision, *Federal Election Commission v. Massachusetts Citizens for Life*.[192] Here the Court ruled that a federal statute requiring the use of separate segregated funds (PACs) for corporate support of candidates for federal office could not apply to ideological, not-for-profit corporations that do not take contributions from labor unions or corporations. The Federal Election Campaign Act prohibited corporations from spending treasury funds to support candidates. The Massachusetts Citizens for Life, while nonprofit, was a corporation. Nevertheless, the Court found that this small nonprofit had "features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of [its] incorporated status."[193]

Writing for the Court, Justice Brennan emphasized that both the association and the speech reflected voluntary, ideological action:

> Individuals who contribute to appellee are fully aware of its political purposes, and in fact contribute precisely because they support those purposes. . . . [I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor. . . . Finally, a contributor dissatisfied with how funds are used can simply stop contributing.[194]

Justice Brennan set forth a three-part test to distinguish MCFL from other corporations: (1) it is a nonprofit corporation formed to promote political ideas; (2) its members do not face an economic incentive to

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[191] *See* Fred Stokeld, *House Panel Withdraws Bill on Corporate Contributions to Charity*, 28 EXEMPT ORG. TAX REV. 25 (2000).

[192] 479 U.S. 238 (1986).

[193] *Id.* at 263.

[194] *Id.* at 260-61.

associate with it; and (3) it does not accept contributions from business corporations or labor unions.[195] Dissenting in part, Justice Rehnquist complained that the Court, by crafting an exception for "[groups] such as MCFL," engaged in line-drawing properly confined to legislatures: "The three-part test gratuitously announced in today's dicta . . . adds to a well-defined prohibition a vague and barely adumbrated exception certain to result in confusion and costly litigation."[196]

3. *Austin v. Michigan Chamber of Commerce*: A Nonprofit for Businesses

Finally, four years later, the Court decided *Austin v. Michigan Chamber of Commerce*, by a six-to-three vote.[197] This decision upheld a state law prohibiting corporations — for-profit or nonprofit — from making independent expenditures favoring candidates for state office. The Court found it significant that the nonprofit in this case was a chamber of commerce, whose members were businesses and whose funding came from business profits: "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures."[198]

The Justices debated the relationship between voice and exit. The Michigan statute that the Court upheld exempted unions. Despite the suggestion in Justice Scalia's dissent that unions won special treatment because of their political power in the state,[199] citing *Abood* the majority opinion emphasized that union members, unlike shareholders of business corporations, cannot be compelled to pay for speech unrelated

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[195] *Id.* at 263-64. Specifically, Justice Brennan stated:

> In particular, MCFL has three features essential to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

Id. (footnotes omitted).

[196] *Id.* at 271 (Rehnquist, J., concurring in part and dissenting in part).

[197] Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

[198] *Id.* at 660.

[199] *Id.* at 692 (Scalia, J., dissenting).

to labor-management issues. "As a result, the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury."[200]

By contrast, for a chamber of commerce, the Court adopted an expansive notion of compulsory affiliation that effectively precluded members from opting out of contributing toward corporate speech, and thus the Court found that the state's interest in suppressing the speech outweighed the corporation's right to speak. Specifically, Justice Marshall's opinion for the Court concluded, "Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community."[201] In his dissent, Justice Kennedy rejected the suggestion that "some members or contributors to nonprofit corporations may find their own views distorted by the organization" because "the disincentives to dissociate are not comparable." His conception of compelled association is narrow, and would preserve maximum autonomy for a nonprofit:

> One need not become a member of the Michigan Chamber of Commerce or the Sierra Club in order to earn a living. To the extent that members disagree with a nonprofit corporation's policies, they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own. Allowing government to use the excuse of protecting shareholder rights to stifle the speech of private, voluntary organizations undermines the First Amendment.

Justice Scalia's separate dissent in *Austin* took issue with the distinction "between for-profit and not-for-profit corporations insofar as the need for protection of the individual member's ideological psyche is concerned." He asked:

> Would it be any more upsetting to a shareholder of General Motors that it endorsed the election of Henry Wallace (to stay comfortably in the past) than it would be to a member of the American Civil Liberties Union that it endorsed the election of George Wallace? I should think much less so. Yet in the one case as in the other, the

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[200] *Id.* at 666.

[201] *Id.* at 663.

> only protection against association-induced trauma is the will of the majority and, in the last analysis, withdrawal from membership.

The result in *Austin* resembles the result in *Roberts* (which it did not cite): In both cases, the First Amendment interest of the organization was outweighed by the state interest — in *Roberts* to compel association, and in *Austin* to recognize economically compelled association as a reason to limit the organization's campaign speech. In neither case, however, did the Court consider the *Abood* compromise of requiring the organization to accept all business persons or businesses as members while allowing members to opt out of funding the objectionable speech unrelated to their commercial reason for joining.[202] Of course, in our complex world of cognitive dissonance, a redistribution-inclined shareholder could at the same time be financially happy with a profit-maximizing corporation that seeks, and obtains, industry-specific tax benefits.

C. Effect of Exit Option on Voice

Finally, consider the relationship between voice and membership from the other direction. As Albert Hischman described, the easier the exit, the weaker voice needs to be. After discussing Michel's "Iron Law of Oligarchy," "according to which all parties (and other large-scale organizations) are invariably ruled by self-serving oligarchies," Hirschman comments: "as a matter of positive political science, it is useful to note that the greater the opportunities for exit, the easier it appears to be for organizations to resist, evade, and postpone the introduction of internal democracy even though they function in a democratic environment."[203]

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[202] Compare Justice White's dissent in *Bellotti*:

> [E]ven if corporations developed an effective mechanism for rebating to shareholders that portion of their investment used to finance political activities with which they disagreed, a State may still choose to restrict corporate political activity irrelevant to business functions on the grounds that many investors would be deterred from investing in corporations because of a wish not to associate with corporations propagating certain views. . . .

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 818 (1978) (White, J., dissenting).

[203] HIRSCHMAN, *supra* note 153, at 84 & n.*. Hirschman relates how this insight came to him:

> The strict democratic controls to which supreme political authority is subjected in Western democracies are contrasted in [a recent article by Michael Walzer] with the frequently total absence of such controls in corporate bodies functioning

V. IDENTITY GROUPS AND THE CHALLENGE OF GROUP LIBEL

Some legal commentators have considered whether the Constitution protects not just intimate and expressive association, but also "cultural association" for ethnic, racial, and religious groups.[204] At the outset, William Marshall cautions that this "trail traverses pure quicksand."[205] This question overlaps to some degree a broader question that has also interested many political scientists and sociologists: Do rights adhere in groups? — where a group is a less-than-formal set of individuals bound by an ascriptive or less-than-fully voluntary characteristic.

The associational analysis of entrance/voice/exit, discussed above, cannot be applied when we move away from formal organizations (incorporated or not) and consider membership in amorphous groups. If we recognize the rights of individuals to self-expression, self-fulfillment, and self-actualization, on what do we ground civil rights to identity groups? I see two difficult constitutional problems. First, how do we decide who speaks for the group — what if the individual members or organizations within that group disagree,[206] and what of the views of

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> within these same states. As the author shows, this absence or feebleness of voice in most commercial, industrial, professional, educational, and religious organizations is often justified by the argument that "if [their members] don't like it where they are, they can leave" . . . , something they cannot do in relation to the state itself.

[204] For a sample of commentators, see Laski, *supra* note 6; Thomas Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L. J. 1 (1964); SOIFER, *supra* note 7 (including a chapter called "Guilt by Association, Association by Guilt," discussing cases involving NAACP and Ku Klux Klan, and a chapter called "Groping for Group Rights: Beyond Politics and Expression"); Garet, *supra* note 12; James W. Torke, *What Price Belonging: An Essay on Groups, Community, and the Constitution*, 24 IND. L. REV. 1 (1990).

[205] Marshall, *supra* note 40, at 85; *see also* Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303 (1986).

[206] Different organizations in the same area of interest fiercely defend their differences. I refer here not to antagonists, such as pro-life and pro-choice advocates, but rather to those which adopt varying goals and strategies on the "same side." *See, e.g.*, Deborah Rhode, *Perspectives on Group Representation*, 80 KY L.J. 887, 889-90 (1992) (footnotes omitted):

> Litigation by and for a group often presents difficulties in defining the group's identity and interests. Members may differ on legal strategies, remedial objectives, and willingness to compromise. Trade-offs may be necessary between current and future class members and between prospective or compensatory relief. As is obvious from litigation like the Boston school desegregation case described in Derrick Bell's classic article, such conflicts are not adequately addressed by vague procedural mandates about adequate representation of class interests.

The threshold — and often dispositive — issue to any public-interest lawsuit is the "standing" of the plaintiff to bring suit. *See, e.g.*, Valley Forge Christian Coll. v. Americans

those outside the group on matters that affect the group?[207] Moreover, simultaneous membership in multiple groups can produce or mask conflict; for example, Kimberlè Crenshaw "has criticized Black leaders for speaking on behalf of African-Americans in a way that hides the voice of women and feminists for speaking on behalf of women who do not ever seem to be African-American."[208] Second, can all potential members of the group be forced to belong to the group (and if so, what about freedom *from* association)? The idea of guilt by association — so repugnant to us — is actually just the flip side of group rights. That is, if an individual enjoys legal protection simply by being a member of a group, would the law impose on her responsibility for what the group does?[209]

United for Separation of Church & State, 454 U.S. 464 (1982). In 1972, Justice William O. Douglas, in dissent, suggested cutting out the public-interest middle-man altogether: "The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage." Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting) (footnote omitted). Such an approach does not, however, eliminate the difficulty of determining the public interest — a task for a legislative body, not a court, under our legal system.

[207] I am grateful to David Brennen for reminding me of this aspect of the issue.

[208] Greenwood, *supra* note 154, at 1022 (drawing from Crenshaw's *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* AFTER IDENTITY: A READER IN LAW AND CULTURE 335 (Dan Danileson & Karen Engels eds., 1995)).

[209] For formal organizations, compare the membership cases involving the Communist Party of the USA — particularly Dennis v. United States, 341 U.S. 494 (1951) (analogizing the CPUSA to a criminal conspiracy) — with NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (where the Supreme Court refused to hold all members *per se* libel for the illegal acts of a few, and the National NAACP for the actions of the local). An organization is, however, liable for the acts of its agents. The Cult Awareness Network was recently bankrupted by a punitive damage award won by an adherent of the Life Tabernacle Church, who was kidnapped at age 18 after a CAN volunteer referred his parents to a "deprogrammer" she had seen on television. The dissenting opinion from a denial for rehearing en banc by the Ninth Circuit wrote: "the panel ignores the threat that vicarious tort liability poses to the freedom of CAN's members to associate with one another. In direct contravention of the Supreme Court's holding in *Claiborne Hardware*, the majority literally holds CAN guilty by association." Scott v. Ross, 151 F.3d 1247, 1248 (9th Cir. 1998) (Kozinski, J., dissenting, in opinion joined by six other judges). CAN had lost on the merits in 140 F.3d 1275 (9th Cir. 1997), *cert. denied* (1999). The dissent in that earlier opinion charged (footnotes omitted):

> This result is troubling regardless of where one falls on the political spectrum. Should ACT UP be litigated out of existence if one of its protestors punches a photographer? Should Planned Parenthood be shut down because a pro-choice doctor performs an abortion on a minor without obtaining parental consent where required by state law? Should the NRA be put out of business because one of its field representatives provided a firearm to a minor, contrary to the organization's policy? *Claiborne Hardware* already answers these questions in the

In April 2001, an organization of Italian-Americans made news by filing a lawsuit against the producers of the hit HBO series *The Sopranos*. The American Italian Defense Association ("AIDA") — whose members number about 100 — charged that the show offends the dignity of Italian-Americans.[210] AIDA bases its claim on the dignity clause of the Illinois Constitution, adopted in 1970: "To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religion, racial, ethnic, national or regional affiliations are condemned."[211] The only reported case litigated under this provision rejected the availability of a private remedy.[212] Accordingly, AIDA's attorney was careful to suggest that the American Italian Defense Association can achieve nothing more than social vindication:

> negative, for much the same reasons that the New York Times can't be held liable if an advertisement ruffles some feathers, a delegate can't be convicted for attending a meeting of the Communist Labor Party, a KKK leader can't be arrested for organizing a protest and Nazis can goose-step in Skokie. We have taken a great leap backwards in the protection of First Amendment freedoms.

Id. at 1250.

[210] *See Transcript: Good Morning America*, ABC News, "Attorney Enrico Mirabelli of American Italian Defense Association and David Bianculli, New York Daily News Television Critic, Discuss Lawsuit Against TV Show 'The Sopranos'," (Apr. 6, 2001), *available in* LEXIS, News Library, Curnws File. A press release claims that AIDA "is a leading advocacy group representing the interests of an estimated 20 million Italian Americans in the United States, the nation's fifth largest ethnic group." *Reminder/ Aida Faces off Against HBO and "The Sopranos" on August 29*, BUSINESS WIRE (Aug. 29, 2001), *available in* LEXIS, News library, Curnws file.

[211] ILL. CONST., art. I, § 20 (1970).

[212] Irving v. J.L. Marsh, Inc., 360 N.E.2d 983, 984 (Ill. App. 1977) (reciting that store clerk had written racial epithet in describing customer on refund receipt). The court quoted from the legislative history:

> The provision creates no private right or cause of action, and it imposes no limitation on the powers of Government. It is purely hortatory, "a constitutional sermon." Like a preamble, such a provision is not an operative part of the Constitution. It is included to serve a teaching purpose, to state an ideal or principle to guide the conduct of government and individual citizens.

Id. at 984, *quoting* Ill. Ann. Stat., 1970 CONST., art. I, § 20, Constitutional Commentary, at 676 (Smith-Hurd 1971).

The court additionally rejected claims that the defendant's action resulted in "libel per se" or intentional infliction of severe emotional distress. "While the derogatory and highly offensive character of defendant's actions is not condoned by this court, the law, in its present state, does not permit recovery for the humiliation plaintiff was forced to endure." *Id.* at 986.

> Mr. MIRABELLI: . . . . The purpose of the suit . . . is not seeking money damages, it's not seeking to remove it from the air, we're not in the business of being TV critics or censors. The suit simply seeks a ruling from a jury in Cook County that this program and the way it portrays Italian-Americans violates the individual dignity clause of the Illinois Constitution. . . . That's the beginning and end of what we're seeking at this time.[213]

The constitutionality of a group libel statute effectively depends on the continuing validity of a 1952 U.S. Supreme Court case, *Beauharnais v. United States*.[214] This case upheld, by a five-to-four vote, an Illinois group libel statute that criminalized portrayals of "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion," thereby exposing these citizens "to contempt, derision, or obloquy."[215] Even though *Beauharnais* has never been overruled, scholars unanimously agree that the Supreme Court would not uphold a criminal group libel law today.[216] Thus, while a libel of a particular organization might be actionable,[217] a large, informal group cannot be libeled: Once a

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[213] Counsel to AIDA admitted that the lawsuit was filed in Illinois because its constitution is the only one in the country to contain a dignity clause. *See* Julia Brunts, *Italian-American Group Seeks to "Whack" Sopranos in Court*, CHIC. DAILY L. BULL., Aug. 30, 2001. The circuit court granted HBO's motion to dismiss, ruling that assessing monetary damages or an injunction would violate HBO's First Amendment rights, and that AIDA had not established its standing to bring suit. *See* Julia Brunts, *Suit by Italian-American Group Against "Sopranos" Dismissed*, CHI. DAILY L. BULL., Sept. 19, 2001, at 3.

[214] Beauharnais v. Illinois, 343 U.S. 250, 251 (1952). The case is perhaps best known for Justice Black's dissent, concluding with a reference to Pyrrhus: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'" *Id.* at 275 (Black, J., dissenting).

[215] 343 U.S. at 251. *See* People v. Spilman, 149 N.E. 466, 469 (Ill. 1925) (upholding six-months' prison sentence and fine of one dollar plus costs for defaming American Legion). Like most other State criminal libel laws, Illinois' was repealed. *See also* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913-1952*, 66 BROOK. L. REV. 71 (2000).

[216] *See* EMERSON, *supra* note 50, at 396, *citing* New York Times v. Sullivan, 376 U.S. 254 (1964), *and* Garrison v. Louisiana, 379 U.S. 64 (1964). *See also* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (invalidating conviction of Ku Klux Klan member under statute "which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate" without also inciting or producing imminent lawless action); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (upholding right of National Socialist Party of America (neo-Nazi organization) to march in Skokie, Illinois, home to many Holocaust survivors), *cert. denied* 439 U.S. 916 (1978) (Blackmun, J., dissenting in order to resolve any conflict with *Beauharnais*).

[217] Finnish Temperance Society Sovittaja v. Finnish Socialistic Publ'g Co., 130 N.E. 845, 847 (Mass. 1921) ("A corporation . . . may have a reputation which is equally as valuable to it as to a natural person, and may be injured in that reputation in the same way.").

statement applies to more than a small, identifiable group of persons, it reflects a social view that cannot be regulated by the state.[218] To illustrate:

> To the extent that the Behar Article uses the term "Scientology," Chief Judge Walker is of the view that the term as used denotes a belief system, or, as the Article puts it, a "cult," and that therefore references to "Scientology" are not "of and concerning" the plaintiff Church of Scientology International of Los Angeles, California. This is true as surely as invective directed generally at Catholicism cannot be considered defamatory of an individual Catholic or a particular parish church; such "group libels" are not actionable by discrete members of the group.[219]

Standing does not, however, ensure success in a court of law. The anti-abortion group Operation Rescue ran into a federal immunity statute when it sued Senator Ted Kennedy for his comment to a reporter that the proposed (and subsequently enacted) "Freedom of Access to Clinics Act" — which would establish criminal penalties and civil remedies for interfering with access to facilities providing reproductive health care, including abortions — was needed because "we have a national organization like Operation Rescue that has as a matter of national policy firebombing and even murder . . ." Operation Rescue Nat'l v. United States, 975 F. Supp. 92 (1997), *aff'd*, 147 F.3d 68, 95-96 (1st Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

[218] *See* RICHARD A. EPSTEIN, TORTS 489 (1999) (characterizing as "genuine puzzle" common law's treatment of statement about large group as defamation of no one). Courts and commentators have generally employed a cutoff of 25 persons in the group. *See* RESTATEMENT (SECOND) OF TORTS 564A cmt. b (1976). Joseph King would make 25 a threshold requirement, as well as adopt other prerequisites to sending a case to a jury. John H. King, Jr., *Reference to the Plaintiff Requirement in Defamatory Statements Directed at Groups*, 35 WAKE FOREST L. REV. 343 (2000). *See also* Strauss, *supra* note 49, at 343:

> When wounding words are spoken directly to the victim, with little or no other audience, there is little chance that any persuasion is occurring. The government's well-established power to punish harassment, fighting words, and assaults — forms of expression that are directed at a victim who is face-to-face with the speaker — is therefore consistent with the persuasion principle. When speech is addressed to a larger audience, however, there is a greater danger that the government is actually concerned not with the wounds that the speech inflicts, but with the possibility that the speech will have a persuasive effect on the audience. This explains why the government's power to restrict group defamation or speech that induces a hostile audience reaction is so limited.

[219] Church of Scientology Int'l v. Behar, 238 F.3d 168, 173 (2d Cir. 2001) (finding failure to establish libel because "public figure," such as the Church of Scientology, must prove defendant acted with actual malice). The court concluded, "[a]ccordingly, we do not reach the question whether any of these statements is 'of and concerning' CSI." *Id.* The "of and concerning" issue depends, of course, on what the defendant stated. *But see* Church of Scientology of Cal. v. Flynn, 744 F.2d 694, 697 (9th Cir. 1984) ("The group libel rule applies when a group member brings a defamation suit based on statements made regarding the group. In contrast, CSC has alleged that Flynn's remarks were reasonably understood to

A law against disparaging particular groups has powerful appeal. Reducing verbal as well as physical attacks on victim groups both preserves their sensibilities from assault and elevates the level of civility in society. What could be wrong with classifying group libel the same way we classify obscenity or incitements to violence, both of which can be banned under the First Amendment? The recent debate over whether the state can regulate hate speech consistent with the Constitution has produced some unusual alliances of left and right commentators.[220] However, consider four of the difficulties of a ban on group libel:

1. Use by majority group: *Wisconsin v. Mitchell* — the first application of enhanced sentencing for a hate crime, upheld by the Supreme Court, involved a black defendant who used racial epithets during an unprovoked physical attack on a white victim.[221]

2. Value-based groups: In a dispute between pro-choice and anti-abortion factions, which side can sue for group libel? Catherine McKinnon and others have argued that pornography amounts to the group libel of women. Some critics have suggested that men could sue feminists for demeaning men.

3. Remedying status groups: Not everyone can be "above

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refer specifically to CSC, rather than to Scientology as a whole.").

[220] *See* the articles and essays collected in HATE SPEECH AND THE CONSTITUTION (Stephen J. Heyman ed., 1996), including selections from pieces assembled into MARI J. MATSUDA, ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT, and the review of that book by Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37. Professor Heyman argues for the power of the state to regulate hate speech:

> By denying recognition to the personhood and rights of others, [hate] speech violates a fundamental principle of a legal order based on rights. In addition to being wrongful in this general sense, hate speech in many instances violates the concrete rights of individuals — to security of person and property; to privacy, dignity, and emotional tranquillity; to membership in the community; and to civil and political equality — as well as various rights of the community itself. Finally, I argued that hate speech generally should not be privileged, because the wrongs that it inflicts are not justified by its contributions to individual self-realization, political self-government, or the search for truth. Thus, on this view, hate speech does not pose an irreconcilable conflict between free speech and other values, for hate speech generally is not entitled to protection under the First Amendment.

HATE SPEECH AND THE CONSTITUTION, *supra*, at lxviii (*Introduction*).

[221] Wisconsin v. Mitchell, 508 U.S. 476 (1993) (upholding sentence enhancement for racially motivated crime). *But see* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (rejecting local hate crimes ordinance in cross burning case).

> average," and increases in the status of one group pulls down another.[222]
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> 4. Commercially defined groups: Some states have "agricultural disparagement" statutes — recall Oprah Winfrey's successful defense against the Texas cattlemen.[223] The "Veggie Libel Laws" are not, of course, really about insulting food items, but rather about endangering the livelihood of those who market perishable goods.

As the Supreme Court considered the constitutionality of group libel laws, the wisdom as well as the constitutionality of group libel regulation provoked intense debate by its affected organizations and their counsel. A thorough study of the rival strategies and beliefs of several leading Jewish organizations appears in a recent law review article.[224] These organizations were torn between advocating the subordination of individual rights to the rights of groups (which

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[222] J.M. Balkin, *Race, Sexuality, and Religion: The Constitution of Status*, 106 YALE L.J. 2313, 2328 (1997) (quoting Garrison Keillor's claim for the children of Lake Wobegon, and describing status as zero-sum game). *Compare* Romer v. Evans, 517 U.S. 620, 634 (1996) (declaring Colorado's Amendment 2 — which would have deprived local governments of power to treat sexual preference as protected class under anti-discrimination ordinances — as unconstitutional in part because motivated by "'a bare . . . desire to harm a politically unpopular group'"), *with* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (calling for greater constitutional protection for "discrete and insular minorities"). Professor Balkin elaborates, *supra*, at 2339 (citing Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988)):

> Struggles for equality are often bound up with other struggles that are not so egalitarian. The civil rights movement, for all of its moral authority, was allied with the drive by northern managerial and technical elites to dominate and reshape the culture of southern working-class whites. . . .
>
> In like fashion, the current struggle over gay rights is more than a battle between the Goliath of heterosexual America against the David of the gay rights movement. Among the most vocal opponents of gay rights initiatives are Christian conservatives, who are themselves struggling to increase their status and respect vis-a-vis secular America.

Id. (footnotes omitted).

[223] In 1996, television personality Oprah Winfrey was sued by a Texas cattle producer under the state's agricultural disparagement statute after a guest on her show claimed American cattle were or could be contaminated by "mad cow disease," and Oprah commented she would never eat another hamburger. *See* David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 167-68 (1997). *See generally, e.g.*, David J. Bederman, *Limitations on Commercial Speech: The Evolution of Agricultural Disparagement Statutes*, 10 DEPAUL BUS. L.J. 169 (1998).

[224] Schultz, *supra* note 215.

assimilationist organizations were loathe to do) and abandoning the crime of group libel.[225] The American Jewish Congress supported a proposed federal law banning defamatory material from interstate commerce, arguing that "racial defamation cannot be overcome merely by counter-propoganda."[226] By contrast, the American Jewish Committee wanted a broader law, but feared that juries might acquit libelers, either because of anti-Semitism or a belief in free expression; in the end, this organization recommended silence.[227] The Anti-Defamation League of the B'nai B'rith additionally feared "'boomerang effects,' whereby such laws might be used to censor the very groups they were designed to protect."[228] Separately, the ADL worried that "some group libel statutes, especially those making truth a defense to the libel charge, would actually cause further harm to the Jews by 'turning the courtroom into a forum for discussion of such issues as whether or not Jews are evil.'"[229]

The idea of individuals endowed with liberty of contract remains central to the Supreme Court's view of association. So long as members can voluntarily enter and exit an association, the Court need not inquire into whether the group speaks for them. Thus, as Kathleen Sullivan describes, "While classification on the basis of involuntary group affiliations is subject to attack in the name of equality, voluntary associations are protected in the name of liberty."[230] As a result of the

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[225] *Id.* at 127-29. Their positions were aired at a 1949 symposium where "four major Jewish defense organizations expressed their views about group libel in response to a bill offered in Congress that would ban defamatory material from the mails and from interstate commerce." *Id.*

[226] *Id.* at 129.

[227] *Id.* at 129-30.

[228] *Id.* at 130. "The ADL stated that it was unclear if 'an effective statute can be drawn which copes with the evil of group libel without, at the same time, so threatening freedom of bona fide discussion of public questions as to react to the prejudice of the very minority groups which the statute is supposedly designed to protect.'" *Id.*

[229] *Id.* Professor Schultz quotes a summarizing statement by the Jewish Labor Committee at the 1949 symposium of these organizations:

> For many years those active in the fight for civil liberties have sought in vain to draft legislation which would punish racial bigots, without at the same time opening the door for widespread attacks upon justifiable comment and upon civil liberties. The dilemma which has been caused is well illustrated by the proposed Federal bill drafted by the American Jewish Congress. In its anxiety to safeguard civil liberties, it is full of so many qualifications and limitations that, in our judgement [sic], it cannot bring about the punishment of those who with professional skill spread racial prejudice and racial hatred. Yet, in all probability, fewer limitations could not be drafted without leaving a threat to civil liberties.

Id. at 131 (footnotes omitted).

[230] Sullivan, *supra* note 160, at 1714-15.

"tradition in American constitutional law . . . that views civil rights and civil liberties as supporting social fluidity rather than entrenchment in fixed groups," she observes, "protections in favor of voluntary group affiliation and against disadvantage based on ascribed identity create myriad overlapping identities, no one of which structures an individual's life entirely."[231]

VI. CHALLENGES AHEAD IN ASSOCIATIONAL JURISPRUDENCE

Commentators, unhappy with every attempt to define the subject of this Article, are not even sure about the term "voluntary association": to some, the term "right of association" better expresses the relationship with less-than-fully-voluntary, but private, associations than does the term "freedom of association";[232] others, including Alexis de Tocqueville, use the term "voluntary association" to include businesses as well as nonprofit organizations. The *availability* of exit distinguishes the organization, "but it is a salient fact about voluntary associations that members need not and do not always resign immediately from associations whose activities run counter in certain ways to their own original desires."[233] Moreover, as Professor Frug also demonstrates, "the voluntary/involuntary distinction does not by itself neatly separate private from public corporations."[234] From one direction, all looks coercive (the associational decisions will be enforced by the courts); from the other direction, all looks voluntary (if we don't like our governmental constraints, we can always move).[235]

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[231] Kathleen Sullivan, *Freedom of Expression in the United States: Past and Present*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION AND ORDER IN AMERICAN DEMOCRACY 1, 12 (Thomas R. Hensley ed., 2001). The one involuntary arrangement to which the Court pays special attention is birth — and the tension between the rights of children and the rights of their parents are usually resolved in favor of the parents, in the absence of physical harm.

[232] *Cf.* Garet, *supra* note 12, at 1037 (describing "freedom of association" as an interpersonal transaction, making "the voluntary association the normative group of libertarian individualism"); *see also* Arthur Selwyn Miller, *The Constitution and the Voluntary Association: Some Notes Toward a Theory*, *in* NOMOS XI: VOLUNTARY ASSOCIATIONS 233, 238 (J. Roland Pennock & John W. Chapman, eds., 1969) (describing replacement of individuality of contract with "a 'new feudalism' in which 'contracts of adhesion' tend to be the norm"). "Freedom remains, but it is the attenuated liberty of choosing which contract or group to 'adhere to.'" *Id.*

[233] William Leon McBride, *Voluntary Association: The Basis of an Ideal Model, and the "Democratic" Failure*, in NOMOS XI, *supra* note 232, at 202, 211.

[234] Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1134 (1980).

[235] Professor Frug describes the two opposing arguments that lead to the same conclusion that either all is state coerced or all is consensual: "the involuntary aspect of submission to economic power" through the state protection of private property, and "the

In this final Part, I consider why the Supreme Court has not adopted Justice O'Connor's commerciality test — or any other — to distinguish expressive from non-expressive associations. A commerciality test contains echoes of an older endeavor, that of distinguishing "public" from "private" in order to confine constitutional protections to state action. However, as a brief look at homeowners associations and universities will show, both of these attempted distinctions are ultimately impossible to apply with certainty. Finally, the current debate over federal funding of social services by churches adds religious concerns to the mix. In assuring associational constitutional rights, no single approach can avoid the case-by-case analysis engaged in by the Court.

A. Public or Private: Comparing Gated Communities and Universities

At some point a private organization can engage in sufficient state action or perform functions so typical of public functions that the private organization is treated like the state for constitutional law purposes. For example, in February 2001, the Supreme Court ruled (five-to-four) that a formally private association regulating interscholastic sports in Tennessee high schools is a public entity for purposes of the First Amendment; a private high school had challenged a recruiting restriction as an infringement on its right of free speech.[236] A related line of cases requires company towns to permit the exercise of First Amendment rights on city streets.[237]

Because the Constitution constrains governmental, but not private, action, the Court perpetuates a sometimes artificial distinction between municipalities and voluntary associations.[238] Recent taxpayer revolts and

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voluntary aspect of participation in city affairs" by the choice of where to live. *Id.* at 1133 - 35.

[236] Brentwood Academy v. Tennessee Secondary Athletic Ass'n., 531 U.S. 288 (2001). *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 544-47 (1987) (holding that conduct by United States Olympic Committee did not rise to level of state action under public function analysis).

[237] Marsh v. Alabama, 326 U.S. 501 (1946) (allowing exercise of constitutionally protected rights on streets of company town). *Cf.* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (holding that First Amendment does not protect owner of shopping center from State constitutional provision giving public right to speak in public forum). Professor Eule noted, however, that ten States have explicitly refused to extend protected speech rights to the grounds of shopping centers. Eule, *supra* note 21, at 1569.

[238] Gerald Frug observed that colonial towns "could be viewed as bearing a resemblance to the kind of associations that created the medieval towns, and thus their power could have been perceived as based on the freedom of association rather than on corporate rights." Frug, *supra* note 234, at 1097 (footnote omitted). Professor Frug

the resulting financial pressures on local government have forced a re-evaluation of what we mean by "community." In the residential sphere, the explosion in the number and size of condominiums, housing cooperatives, and planned-unit developments effectively transforms homeowner associations into private governments.[239]

The American Law Institute (A.L.I.) recently issued a Restatement of the Law of Property to cover the topic of "servitudes"; a separate chapter addresses homeowners associations and other "common-interest communities."[240] The A.L.I. asserts that "there may be greater need for judicial review of common-interest-community decisions than of decisions of other corporations or associations" because (1) "the stakes of association members are generally much higher" given that the member's home "is often the largest single asset the member owns, and . . . has personal and social significance far beyond the monetary value"; (2) "the range of power the association holds over the member's well-being and the range of decisions the association is called on to make is significantly broader"; and (3) "association members cannot ordinarily sell their homes as easily as they can sell shares of stock in a business."[241] On the other hand, the A.L.I. comments, "political checks on actions of associations are more effective than political checks on corporate governance. Members of associations may be relatively few in number and live in close proximity to one another."[242]

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cautioned that "we must be careful not to confuse the concept of association with that of democracy or equality. . . . It is the relationship of the people to one another as a unit and not the rule under which the unit operates that creates an association." *Id.*

[239] *See* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994). For discussion of constitutional issues arising in homeowner associations, *compare* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989), *with* Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273 (1997); *see also* Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

[240] RESTATEMENT OF THE LAW (THIRD) OF PROPERTY: SERVITUDES, ch. 6, "Common-Interest Communities" (2000). The RESTATEMENT identifies two separate relationships: Section 6.13 governs the relationship between the association and the members; section 6.14 governs the relationship between the directors and officers and the association. Existing state statutes vary. For example, Illinois' Condominium Property Act, 765 Ill. Comp. Stat. Ann. 606/18.4(h), grants the condominium board the authority to adopt rules governing the use of property provided that it does not impair those rights guaranteed by the First Amendment to the U.S. Constitution or the Free Speech provisions of the Illinois Constitution.

[241] RESTATEMENT, *supra* note 240, § 6.13 cmt. b, at 237.

[242] *Id.* at 238. *Cf.* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996) (arguing that ownership will tend to be found in group with common, narrow interests).

The public/private distinction was never wholly satisfactory.[243] Justice Harlan described the difficulties of applying such a test: "While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity, the example of schools is, I think, sufficient to indicate the pervasive potentialities of this 'public function' theory of state action."[244]

Moreover, as Robert Mnookin wrote twenty years ago, "the very activities labeled private by liberal Democrats are considered public by conservative Republicans, and vice versa. These differences can be dramatically exposed by asking for the dimensions of the 'public' and 'private' spheres in the realm of sexual expression and in the pursuit of economic goods."[245] Julian Eule recently asserted: "As applied by the Court, the state action doctrine creates no coherent zone of private autonomy. . . . Its yardstick is government responsibility. . . . The private sphere is merely residual."[246]

While the borders between the nonprofit sector and both the business and governmental sectors have always been blurry,[247] the fact that a nonprofit organization has received either corporate status or tax exemption does not render it a state actor.[248] On the other hand, the Boy

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[243] *See The Public-Private Penumbra — Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (extensive symposium on public/private distinction) (introduction by Henry J. Friendly).

[244] Evans v. Newton, 382 U.S. 296, 322 (1966) (Harlan, J., dissenting). A federal civil rights statute provides that no person acting "under color of any statute . . . of any State" shall deprive another of any right, privilege or immunity "secured by the Constitution and the laws" of the United States. 42 U.S.C. § 1983. "An entity can be deemed to have acted 'under color' of state law either under the state actor analysis or the state action analysis." Hack v. President and Fellows of Yale College, 16 F. Supp. 2d 183, 187-88 (D.C. Conn. 1998) (dismissing suit to compel Yale College, which requires freshman to satisfy an on-campus living requirement, to offer single-sex housing alternative to orthodox Jewish plaintiffs).

[245] Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1430 (1982). "It's as if there were agreement that a river separates Manhattan from Brooklyn, but disagreement over which borough is Manhattan and which is Brooklyn." *Id.* at 1439-40. To Professor Mnookin, this suggests "that scholars are challenging the legitimacy of the dichotomy itself — the idea that there is a sphere of private autonomy that the state should respect." *Id.* at 1440.

[246] Eule, *supra* note 21, at 1549 (footnotes omitted).

[247] *See generally* Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433 (1996).

[248] As for incorporation, *see generally* NORMAN I. SILBER, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE NONPROFIT SECTOR 2001 (describing shift for corporate status from privilege to right). As for tax exemption, *see, e.g.*, New York Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975) (tax exemption "creates only a

Scouts evidently enjoy a variety of favorable arrangements for free or low-cost use of public school facilities. A Circuit Court of Appeals once ruled that the lease of dock land for $1 a year from a city to a private yacht club constituted sufficient state action to permit a court to enjoin discrimination by the club.[249] Several major cities — including Chicago and San Francisco — have stopped providing free use of public facilities to the Boy Scouts.[250]

The current debate over campus speech codes dramatically illustrates the consequences of losing the distinction between public and private. This latter concern is not (shall we say) academic: A few years ago Stanford University found its speech code ruled a violation of a California education statute called the Leonard Law, which guarantees secular college and university students the same right to free speech on campus as they enjoy when off campus.[251] Stanford, like many liberal

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minimal and remote involvement" by government in exempt entity's activities); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Fischer v. Driscoll, 546 F.2d 861 (E.D. Pa. 1982). *But see* Jackson v. Statler Found., 496 U.S. 623, 634 (2d Cir. 1973), *cert. den.* 420 U.S. 927 (1975) ("if on remand the district court finds that the defendant foundations are substantially dependent upon their exempt status, that the regulatory scheme is both detailed and intrusive, that the scheme carries connotations of government approval, that the foundations do not have a substantial claim of constitutional protection, and that they serve some public function, then a finding of 'state action' would be appropriate"). *See generally* David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 B.Y.U.L. REV. 167 (2001) (arguing that statutory civil rights laws could be interpreted to embrace an express policy prohibiting particular tax-supported groups, like tax-exempt charities, from engaging in invidious discrimination).

[249] Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir. 1975).

[250] *See* France, *supra* note 121. This *Newsweek* story cites data from the Gay, Lesbian and Straight Education Network that over 4,400 schools nationwide have ended preferential arrangements with the Boy Scouts.

[251] *See* Cal. Ed. Code § 94367 (West Supp. 1996). Subsection (a) provides:

> No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

Subsection (c) provides an exception for a religious institution, "to the extent that the application of this section would not be consistent with the religious tenets of the organization." This special treatment adds to the dubious constitutionality of the statute. *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (invalidating, under the Establishment Clause, a sales tax exception for religious publications). For a history of Stanford's policy written by its drafter, *see* Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 892-97 (1996).

institutions, seemed to be trying to have it both ways: The court found no infringement on Stanford's expressive rights because Stanford had declared its belief to be one of free and open debate.[252] The proponents of the Leonard Law were conservatives also trying to have it both ways: They wanted to protect the rights of conservative students both to attend a prestigious private institution and to reject its teachings.[253]

As Julian Eule explained at length, California's Leonard Law takes sides by guaranteeing that one constituency of the university retains the same speech rights it has outside the campus.[254] To Professor Eule, the state law accordingly "trespasses on the school's particular message of inclusion, or its expression of the felt need to control certain kinds of offensive speech in order to foster inclusion, or both."[255] In constitutional terms, he cited the Supreme Court jurisprudence "to claim that measures like the Leonard Law devalue private schools' established due process rights to offer, and students' and their parents' right to seek, an educational experience alternative to that offered in government-operated schools."[256]

For a state to pass such a statute — to force the university, at least with respect to its students — into a public forum does more than obliterate the public/private distinction. In effect, California views the choice by *every* student of *any* one institution of higher education as a "necessity," the way joining a closed bar is a necessity for an attorney who wants to practice law. Even if students have a choice of free-speech venues for their education — including a public institution — California has determined that every student everywhere in the state stands separate and apart from "the association." A contract for higher education can no longer include submission to the institution's restrictions on student

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[252] Corry v. Leland Stanford Junior Univ., No. 740309, at 37 (Cal. Super. Ct. Feb. 27, 1995), *available at* http://www.law.stanford.edu/library/special/corrym.shtml ("Stanford is committed to the principals of free inquiry and free expression. Students have a 'right to hold and vigorously defend and promote their opinions . . . . Respect for this right requires that students tolerate even expression of opinions which they find abhorrent.' [Speech Code at 5]."). Note that in *Dale*, Justice Rehnquist refused to draw legal significance from the fact that the organization's expression was internally inconsistent.

[253] *See* Michael S. Greve, *Forcing Free Speech*, REASON, July 1995, at 56 (presenting libertarian defense of campus speech codes).

[254] *See* Eule, *supra* note 21, at 1600 "The wish to extend the dominion of the First Amendment is born of a desire to augment the sum total of opportunities for speakers to speak, for ideas to disseminate, and for information to be received. But, more often than is acknowledged, transportation [of First Amendment norms to the private sector] redistributes expressive opportunities." *Id.*

[255] *Id.* at 1612.

[256] *Id.* at 1613, citing to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

discourse, regardless of its pedagogic or moral purpose.

David Bernstein sees *Dale* as coming to the rescue. He argues that because of federal funding, private universities risk being as bound by anti-discrimination and free speech requirements as public institutions.[257] While acknowledging that a governmental attempt to impose viewpoint orthodoxies through the funding lever could be ruled an "unconstitutional condition," he views *Dale* as eliminating any doubt about the authority of private universities to follow affirmative action policies and to adopt campus speech codes against hateful and other uncivil discourse.

B. Limits of a Commerciality Test: Is All Expressive?

Dale did not overrule *Roberts*, but there might be little left of the *Roberts* holding save the Jaycees' failure to prove its expressiveness. We do know, however, that the *Dale* majority needed Justice O'Connor's vote, and she authored the concurring opinion in *Roberts* that would compel predominantly commercial associations to yield to state interests in eradicating discrimination.[258] Indeed, Michael Dorf detected the need for

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[257] David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL OF RTS. J. 619, 620 (2001). State schools, bound by the Equal Protection Clause, may not generally engage in affirmative action. *See* Johnson v. Bd. of Regents, 263 F.3d 1234 (11th Cir. 2001) (striking down use of race alone in achieving diverse student body at University of Georgia); Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (University of Texas Law School may not adopt admissions preferences for Black and Hispanic applicants where the law school is not remedying its own prior discrimination); *see also* Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (diversity rationale), *appeal granted*, and Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich 2001) (University of Michigan Law School's use of race in admissions is unconstitutional), *stay granted pending appeal* 247 F.3d 631 (2001). The prevailing view is that such a constitutional restriction should not apply to a private school merely because it receives public funds. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 840-42 (1982) (no Section 1983 relief for employees fired by private school for maladjusted students; school not acting under color of law even though students are referred by public school system and 90 percent of funding is from government agencies, and legislation guaranteeing public funding for maladjusted high school students did not make such specialized education "the exclusive province of the State"); *see* note 249, *supra*, and accompanying text.

[258] O'Connor's concurring opinion in *Roberts* pointedly stated: "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." 468 U.S. 609, 636, n. __* (1984) (referring to the handbooks of the Girl Scouts and the Boy Scouts). Asserts Professor Carpenter, *supra* note 24, at 1570: "There is little doubt that a majority of the Court is now following Justice O'Connor's approach in delineating associational freedom. I only urge that the Court do so explicitly, with a slight adjustment discussed . . . below for quasi-expressive associations." Professor Carpenter describes a variety of contexts where the Court distinguished between commercial and noncommercial speech, *supra* at 1566-70 — but he wrote before the Court's

Justice Rehnquist to craft his opinion for the Court to appeal to her: "To its credit, the *Boy Scouts* Court did not rely exclusively on the distinction between commercial and non-commercial activities. Nonetheless, the distinction played a distressingly substantial role in the decision."[259] To Professor Dorf, the Rehnquist Court "often employs the economic/non-economic distinction as a substitute for a public/private distinction."[260] Yet, as Professor Dorf describes, "the fit is quite poor":

> As de Tocqueville knew, "private" associations are very much enmeshed in, and supported by, commercial activity. Moreover, these same private associations serve fundamentally public functions. There may be constitutionally sound, indeed pressing, reasons to confer some form of regulatory immunity on various activities or associations because they are local or private. But in our inter-connected world those reasons will rarely be justified by the objective characteristics of the activities or associations. Seen this way, the attempt to separate the economic from the non-economic is a flight from the sorts of value judgments necessary to construct a viable domain of regulatory immunity.[261]

Consider the difficulty of applying Justice O'Connor's test to a fraternal, ethnic- or religious-based organization that both sells discount insurance and engages in significant lobbying.[262] Is it primarily commercial or primarily expressive? If commercial, then under Justice O'Connor's approach the state could overrule any discriminatory membership test. Incidentally, the associational (and commercial) drive

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June 2001 decision in *United Foods*, the generic mushroom case discussed in Part IV.

[259] Dorf, *supra* note 116, at 2165, 2169 (footnotes omitted).

[260] *Id.* at 2165.

[261] *Id. See, e.g.*, Kateb, *supra* note 24, at 56 ("the trouble is that by sleight of hand, O'Connor transforms the Jaycees into a 'non-expressive' association"); Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 98 (1987) ("For most people economic rights . . . are more important than whether the Jaycees admit women or whether a political party must seat the delegates selected in a primary rather than a caucus."). *Cf.* Dorf, *supra* note 116, at 2185 ("even if the Boy Scouts are in some sense a non-commercial organization, they are very much a public one, and it is this dimension of the organization that the Court's decision most clearly overlooks"). Moreover, Linder commented in his post-*Roberts* article, "It is not at all obvious that equality of access to expressive associations may not be just as important. Are the benefits of membership in the Boy Scouts (predominantly expressive) less important than the benefits of membership in the Jaycees (predominantly commercial)?" Linder, *supra* note 76, at n.74.

[262] *Cf.* Greenwood, *supra* note 154, at 1027 ("organizations that offer a diverse package of attractions may be able to maintain large memberships (i.e., avoid exit) even though a significant part of their membership disagrees with various activities of the organization"). *See generally*, OLSON, *supra* note 4.

would more likely go in the other direction: A number of federal postal unions have offered associate memberships — at lower dues and without a vote — to federal workers who want to sign on to their health insurance programs, but are not covered by collective bargaining.[263]

Some commentators have decried the seemingly open-ended invitation of *Dale* for a range of entities to declare themselves expressive to avoid the commerciality tag.[264] Jed Rubenfeld describes the coming flood: "Almost all associations — every business, every apartment complex, every residential neighborhood —... that wants to discriminate should now be able to file an action under the First Amendment and to demand strict scrutiny of virtually every discrimination law applied against it." And, he declares, these claims should be successful "if strict scrutiny were honestly applied in such cases": "After all, why shouldn't states be obliged to accommodate discrimination — exemptions for, say, small businesses or small neighborhoods genuinely dedicated to expressing the belief that blacks, Jews or women don't belong in the same places as whites, Christians, or men?"[265]

Other commentators not only support Justice O'Connor's commerciality test, but also have urged that it be tightened to avoid giving a free pass to an organization once it can show itself to be primarily expressive. As Professor Marshall illustrated, "a noncommercial advocacy organization such as 'Save the Whales' would . . . be entitled to exclude black females even though the exclusion has nothing to do with the positions that the organization maintains."[266] Professor Marshall (writing before *Dale*) proposed instead adopting a test that focuses on the relationship between the organization's

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[263] *See, e.g.*, American Postal Workers Union v. United States, 925 F.2d 480, 483 (D.C. Cir. 1991) (holding that associate member dues constitute unrelated business taxable income to union).

[264] *See also* Cole, *supra* note 2, at 214 ("Even business associations provide a sense of identity and meaning to the lives of those who choose to associate themselves with them. And if the line between the ACLU and Standard Oil seems clear, how should we characterize the New York Times, Working Assets, or Benneton, for-profit businesses that seek to maximize profits but whose purpose includes the expression of certain points of view?").

[265] Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 812 (2001). *See also* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) "*Dale* seems to have drawn a roadmap to the freedom not to associate; to claim that freedom, a group must define itself and its objectives in exclusionary terms that mirror its membership policies. It remains to be seen how many groups will choose to follow that roadmap." *Id.*

[266] Marshall, *supra* note 40, at 79.

discriminatory criteria and its advocacy, such as "the white supremacist group, [whose] exclusion of blacks directly advances its ideological position."[267] Professor Carpenter (writing after *Dale*), would adopt a tripartite test: (1) commercial organizations should be subject to all anti-discrimination laws, (2) expressive associations would not be subject to anti-discrimination laws; and (3) quasi-expressive associations would be classified on a per-relationship basis depending on whether a particular affiliation involved an "activity or internal operation" that "is primarily expressive . . . [or] commercial."[268]

While Justice Rehnquist's opinion in *Dale* proclaims a broad autonomy for expressive associations, a narrower relatedness requirement between message and desired discrimination should give the Boy Scouts the result it sought. Larry Backer, however, fears that *Dale*'s low level of required proof makes even this showing too easy: "as the majority opinion in [*Dale*] now makes clear, the germane associative purpose doctrine is only as effective as the willingness of a court to independently determine the actual expressive purpose of an organization."[269] He derides the majority's "sly use of procedure to undercut the thrust of prior court-made interpretive doctrine without the bother of overturning the prior result — or even acknowledging the nature of the constitutional project attempted."[270] Similarly, Samuel

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[267] *Id.* at 79-80.

[268] Carpenter, *supra* note 25, at 1572-73, 1575-76. *Cf.* Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Relations, 748 N.E.2d 759 (Ill. App. May 1, 2001) (remanding to determine whether a gay job applicant "was seeking a nonexpressive position that does not abridge the *Dale* decision" because Chicago Area Council of Boy Scouts of America contends that its employment policy covers only "role-model" or communicative positions).

[269] Larry Cata Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 TULSA L.J. 117, 137 (2000). Professor Backer also detects a double standard against the category of sexual preference:

> It seems odd that a majority of justices who are quite willing to carefully examine the expressive purposes of associations in the context of women seeking admission to all male associations or individuals seeking to avoid use of their association dues for expressive ends with which they disagree, should determine that such analysis of association purpose is unnecessary when a gay man seeks admission to an all male club. Doctrinal symmetry is broken. Again, we are left to wonder whether the fear of the homosexual predator drove the court to constitutional folly.

Id. at 139 (footnotes omitted).

[270] *Id.* at 133. Professor Linder, however, writing shortly after *Roberts*, predicted that future cases of discriminatory association might come out the other way:

Issacharoff criticizes the Court for departing from the "functional approach" of *Roberts*, which would have asked "what the purpose of the organization is, what compromises of that purpose would be entailed in the proposed regulation of its activities, and what societal interest would be advanced that would justify the imposition of the restriction on organizational independence."[271]

To Richard Epstein, however, the *Dale* case is correct but not broad enough. This ardent defender of individual liberty argues that all non-monopolistic private associations, commercial as well as expressive, should enjoy associative autonomy: "What must be recognized is that freedom of association is 'derivative' not only of speech, but also of liberty and property as ordinarily conceived."[272]

C. Bringing Religion Into the Mix: Expanding "Charitable Choice"

We are beginning to get a glimpse of another form of state-compelled association that adds a troubling religious aspect to the constitutional

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> It is the Supreme Court which is the principal expositor of constitutional law, and that role sometimes presents opportunities for compromise in the Court which are not open to courts which primarily decide constitutional cases, not make constitutional law.... [U]nder the test propounded by the Court, it is likely in many future cases where *U.S. Jaycees* is the most significant precedent that the balancing of associational freedom and equality will produce an opposite result.

Linder, *supra* note 77, at 1884.

[271] Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 297 (2001). Professor Issacharoff continues:

> [T]he Boy Scouts' claim to independence as a condition of imparting distinct values to its members... would then have to be weighed against the sheer number of boys who pass through the ranks of the Scouts, the general inclusiveness of the membership process, the community interest in the socialization of children at a particularly formative stage, the customary reliance on school grounds and other public facilities to carry out scouting functions, and the general interpretation of Scouting and the core values of the society.

Id. at 297-98 (footnotes omitted).

[272] Epstein, *supra* note 106, at 120. Professor Epstein describes the Boy Scouts' perilous competitive environment: "The Boy Scouts... competes with everything from Little League Baseball to 4-H Clubs, not to mention the possibility of other new entrants in any portion of its business." *Id.* at 121-22. In seeking to expand the range of protection beyond speech to liberty and contract, he points out: "Indeed, it is worth remembering that the protection afforded for educational liberties in... *Pierce v. Society of Sisters*... stemmed from the Due Process Clause and not from the emanations or penumbras of the First Amendment." *Id.* at 141 (footnotes omitted).

analysis.[273] The House has passed, and the Senate is now debating, President Bush's proposal to expand the government's authority to contract for social services not just with secular organizations, but also with churches — "faith-based organizations" to use the current euphemism. This proposal raises two separate associational concerns: The rights of recipients to obtain social services free of unwanted religious messages, and the rights of employees of the faith-based organizations to obtain and retain work free from discrimination.

In 1996, the welfare reform act adopted "Charitable Choice" legislation that permits faith-based groups to compete for welfare-to-work programs such as job training and child care.[274] The 2001 proposal would embrace a variety of new social service programs, including juvenile justice, crime prevention, housing assistance, job training, elder care, hunger relief, and domestic violence prevention. In a very real sense this is commercial activity — for-profit businesses as well as nonprofit organizations compete to supply these services.

Under the proposal, as under existing Charitable Choice legislation, no discrimination as to clientele would be allowed, and any client who objects to the religious message provided must be provided with a secular alternative service provider. Employment is another matter: The Community Solutions Act of 2001, passed 233-198 by the House on July 19, 2001, provides that a funded religious organization shall enjoy exemption from the Civil Rights Act of 1964, thus permitting it to hire

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[273] *Cf.* Rubenfeld, *supra* note 265, at 810 n.96:

> Religious activity is clearly expressive activity, and religious groups are expressive associations par excellence. Many free exercise claims can, as a result, be recast as a freedom of speech or freedom of expressive association claims. Accordingly, many claims that used to be brought under *Sherbert [v. Verner]* — almost all of which were rejected . . . could now be brought again under *Boy Scouts*. Consider, for example, a Christian homeowners' association that wants to exclude blacks, women, Jews, unmarried couples, or anyone else on religious grounds.

[274] The original "Charitable Choice" legislation, enacted as part of the 1996 welfare reform, appears at 42 U.S.C. § 604a (1997). This provision permits states to contract with private organizations (for-profit or nonprofit) for the provision of certain social services, but if the state does so, it may not discriminate against faith-based organizations. A client must be offered a secular alternative, if requested. While constitutional challenges to this regime are in process, no decision on point has yet issued. *See, e.g.*, Freedom from Religion Foundation, Inc. v. McCallum, 2002 U.S. Dist. LEXIS 280 (W.D. Wis. Jan. 7, 2002) (while invalidating Wisconsin's grants to a private "faith-based" alcohol- and drug-treatment program — as amounting to "unrestricted, direct funding of an organization that engages in religious indoctrination — also finding that "this case does not involve a challenge to the constitutionality of the charitable choice statute").

only co-religionists to provide funded services; moreover, while other provisions maintain the standard federal employment nondiscrimination obligations on the basis of race, color, national origin, disability, age, and sex, the proposal would preempt additional classifications under state and local laws, thus permitting discrimination on the basis of sexual orientation, marital status, or pregnancy.[275] Congressman Bobby Scott of Virginia dubs this "the civil rights poison pill."[276]

Moreover, the House proposal would allow funding agencies to provide "indirect assistance" to faith-based organizations via vouchers provided to clients.[277] Supreme Court rulings under the Establishment

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[275] Community Solutions Act of 2001, H.R. 7, 147th Cong. (2001), Cong. Rec. H4222, H4242 (daily ed. July 19, 2001) § 201, enacting new § 1991 of Title 42, at paragraphs (e) and (f). Congressman Frank commented in floor debate:

> But, sadly, all too often in America, religion becomes a proxy for race. When Orthodox Jews get this money in Brooklyn, no blacks will be hired. When the Nation of Islam gets this money in Baltimore to deal with public housing, no whites will be hired. In fact, religion is all too often correlated with race. And when you say to religious groups, provide a purely secular activity with Federal tax dollars but in employing people to serve the soup or build the homes or clean up or give drug treatment, hire only your own co-religionists, you are empowering people de facto to engage in racial segregation.

Id. at H4255. Congressman Nadler remarked:

> The bill allows broad religious discrimination and nullifies the laws of 12 States and more than 100 localities to the contrary. Do not be fooled by the argument that this applies only to lesbian and gay rights, important though they are. This applies to all local antidiscrimination laws, whether they protect women or minorities or single mothers or whatever local communities may have committed to take a stand on. That is an important difference from past charitable choice legislation, which specifically said that State and local laws would be preserved.

Id. at H4246.

[276] 2001 TNT 81-39 (Apr. 26, 2001), *Scott Release on Faith-based Plan's "Poison Pill"* (Apr. 24, 2001). In the floor debate, Congressman Weiner asked why ideology played a role in the services for which the government would be contracting, such as job training. He wondered: "What does a right-wing typing teacher do, only type with the right hand?" H.R. 7, Community Solutions Act of 2001, 147 CONG. REC. H 4222, H 4225 (July 19, 2001).

[277] Specifically, the House version of Section 201 of H.R. 7, in paragraph (l) of new section 1991 of Title 42 provides:

> When consistent with the purpose of a program described in subsection (c)(4), *the Secretary of the department administering the program may direct the* disbursement of some or all of the funds, if determined by the Secretary to be feasible and efficient, in the form of indirect assistance. For purposes of this section, "indirect assistance" constitutes assistance in which an organization receiving funds through a voucher, certificate, or other form of disbursement under this section receives such funding only as a result of the private choices of individual beneficiaries and no government endorsement of any particular

Clause have upheld voucher-type programs, on the theory that the consumer rather than the state chooses the religious provider, but the incidental benefit to religious providers must be part of a neutral legislative scheme.[278] In floor debate, Congressman Nadler complained about the "effort to allow the administration to completely rewrite the billions of dollars of social service programs into vouchers, without any legislative investigation into what we are talking about there, without congressional consideration, and allowing religious groups to subject the most vulnerable in our society to religious pressure and proselytizing using Federal dollars."[279]

As we further blur the distinction between public and private through the privatization of social services, the voucher trend becomes dangerous from the other direction. The fundamental compelled association is citizenship, and one of the most expensive compelled payments is for public school education. Note that only the funding is compelled, not attendance — parents are free to send their children to private school.[280]

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religion, or of religion generally, occurs.

Id. at H4242.

[278] *See* Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (upholding state's expenditure to provide transportation to school children, including parochial school children); *see also* Zelman v. Simmons-Harris, *cert. granted*, 122 S. Ct. 23 (2001) (school vouchers). *Cf.* Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (declaring unconstitutional the creation of special school district designed to be coextensive with religious community). *See generally* Nomi Maya Stolzenberg, *A Tale of Two Villages (Or, Legal Realism Comes to Town)*, *in* NOMOS XXXIX: ETHNICITY AND GROUP RIGHTS 290, 314 (Ian Shapiro & Will Kymlicka eds., 1997) (describing Kiryas Joel as homogeneous, exclusive and religious community dependent on rights of private property and contract (including restrictive covenants), as well on the rights of "family privacy" and private education). "If a state action has the *effect* of making a religious group into a governing agency, or creating a governmental body that represents the interests of one religious group, why should that be a matter of constitutional indifference?" *Id.* at 303. Professor Stolzenberg suggests, however, the difficulty of drawing a line between the religious and the secular: "the same activity may serve *both* religious and secular functions simultaneously"; "certain kinds of activities formerly regarded as secular [may] become invested, by tradition, with religious significance"; and "activities that used to form part of a seamless web of religious life [may] become separated from their religious significance." *Id.* at 307. *See also* Farber, *supra* note 111, at 1509 (footnotes omitted) ("As government increasingly uses religious organizations to help distribute social services, the risk of open or covert favoritism toward particular groups will inevitably rise.").

[279] 147 CONG. REC. at H 4229 (July 19, 2001). *See also* 2001 TNT 137-13 (July 17, 2001), *Conyers Letter to Judiciary Committee Chair Sensenbrenner on H.R. 7 Concerns* (reproducing July 12, 2001 letter) ("such 'voucherized' programs would be exempt from the requirement that the religious organization not discriminate against beneficiaries on religious grounds as well as the requirement that any sectarian instruction, worship, or proselytization be 'voluntary' and 'offered separate' from the government funded program.").

[280] Pierce v. Society of Sisters, 268 U.S. 510 (1924).

However, the push from the Right for vouchers for primary and secondary school education illustrates what an opt-out structure could look like if the democratically determined tax base were disaggregated. Indeed, consider what public choice theory has taught us about the process by which the government determines its message.

CONCLUSION

A right to choose one's associates presents the fundamental clash between an egalitarian political structure and discriminatory private action — the tension between equality and liberty. Of course the state has an interest in eradicating barriers to fulfillment, advancement, and social justice. Of course individuals seek the freedom to resist homogenization. We will never resolve the conflict between the benefits of communitarianism, pluralism, and social capital building that associations provide, and their impediment to the benefits of solidarity, tolerance and respect, and patriotism that a nation seeks.[281]

As a matter of constitutional law, however, the Supreme Court finds associational autonomy only where another constitutional right exists, notably a First Amendment right of expression. But whose expression counts? Because there is really no such thing as the association, the law assigns or ignores individual rights no matter what approach it takes to membership disputes.[282] Difficult though these legal questions may be, they are not constitutional questions; as we saw, the Court respects the decision making structure and processes of organizations as part of the members' bargain.[283] What protects participants where voice fails is the

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[281] *See also* William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 875-76 (1999) (arguing that permitting discrimination is necessary social cost for benefits of preserving distinctiveness of private organizations).

[282] *See, e.g.* Chafee, *supra* note 30, at 1029 (describing problem of relationship between member and association as part of larger issue of relationship between associations and state); Mark Tushnet, *The Constitution of Civil Society*, 75 CHI.-KENT L. REV. 379, 380 (2000) (footnotes omitted) ("A paradox lies at the heart of this interest in revitalizing the institutions of civil society as a check on government: Those institutions are themselves constituted by the government . . . in the sense that their boundaries are defined by the government . . . [and] the state provides institutional guarantees to ensure that civil society's institutions are viable."); *see also* Denise G. Réaume, *Common-Law Constructions of Group Autonomy: A Case Study*, *in* ETHNICITY AND GROUP RIGHTS 257, 259 (Ian Shapiro & Will Kymlicka, eds., 1997) ("When a dispute erupts within such a [religious] community and ends up before the civil courts, the judges are confronted with a normative framework that they may not share or even initially understand. . . . [I]n resolving a dispute within a religious community the court is an outsider.").

[283] In the harder case "where a condition of civil war obtains within the association,"

right of exit — and the right to form new associations. On the other hand, while in a sense organizations have rights, constitutional jurisprudence still views individual members of identity groups as individuals.

As a result of this *laissez-faire* approach to collective activity, the fact that an association forms as a nonprofit organization tells us little about the value of its speech or capacity for civic capacity building: Some associations are democratically run by members, others do not even have members.[284] Expressive associations form on all sides of social issues. As Justice Brennan once commented, "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies."[285]

Lon Fuller cautioned: "When a court intervenes in such a case it is not vindicating legal integrity within the association, but deciding what the internal law of the association shall be and who shall control its processes; it is, in effect, defining the association itself." Lon L. Fuller, *Two Principles of Human Association*, *in* NOMOS XI, *supra* note 233, at 3, 21.

[284] Beyond the scope of this Article is the greatest challenge facing members of groups in a liberal society: How to protect the rights of a member of an illiberal group. *See* Chandran Kukathas, *Cultural Toleration*, *in* NOMOS XXXIX, *supra* note 278, at 69, 94 & 99 (arguing that liberal society can tolerate intolerant groups in response to the question, "Why should the liberal state not prohibit its voluntarily incorporated members from forming illiberal subgroups?").

[285] Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting). *See generally* ROSENBLUM , *supra* note 43, at 36-41 (1998); MICHAEL WALZER, ON TOLERATION 84 (1997) (contrasting two forms of toleration, individual assimilation and group recognition). Stanley N. Katz, *The Legal Framework of American Pluralism: Liberal Constitutionalism and the Protection of Groups*, in BEYOND PLURALISM: THE CONCEPTION OF GROUPS AND GROUP IDENTITIES IN AMERICA 11-27 (Wendy F. Katkin, et al., eds., 1998).