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"Closet Case": *Boy Scouts of America v. Dale* and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility

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"Closet Case": *Boy Scouts of America v. Dale* and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility

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This Article argues that the Supreme Court's decision in Boy Scouts of America v. Dale *misapplies and ignores controlling First Amendment precedent and incorrectly defines "sexual identity" as a clinical or biological imposition that exists apart from expression or speech. This Article provides a doctrinal alternative to* Dale *that would protect vital interests in both equality and liberty and that would not condition, as does* Dale, *sexual "equality" upon the silencing of gay, lesbian, bisexual, and transgender individuals.*

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I. INTRODUCTION

The Supreme Court's closely divided decision in *Boy Scouts of America v. Dale* holds that the First Amendment right of "expressive association" permits the Boy Scouts of America (Boy Scouts) to exclude gays and lesbians from its membership.[1] The Court thus rules

1. 530 U.S. 640, 644 (2000). I am deeply connected to the facts and legal issues of this case, having represented James Dale, *pro bono*, in my capacity as an Associate at Cleary,

that application of the New Jersey Law Against Discrimination (NJLAD)—which bans, among other things, discrimination on the basis of "sexual or affectional orientation" in places of public accommodation[2]—would infringe upon the organization's constitutional liberties.[3]

To reach these conclusions, the decision finds that the Boy Scouts' expressive activities include the condemnation of homosexuality.[4] The Court also holds that the forced inclusion of *openly* gay and lesbian people–not simply individuals who are gay and lesbian—in the Boy Scouts would frustrate the organization's expressive activities.[5] Faced with minimal evidence—evidence that the New Jersey Supreme Court,[6] a New Jersey appellate panel,[7] and four dissenting justices viewed as unpersuasive[8]—to support the Boy Scouts' defense under existing precedent, the Court, for the first time, holds that it must give "deference" to both a discriminator's allegations as to the content of its expressive activities and to a discriminator's assertion that the forced inclusion of an unwanted class would complicate these expressive goals.[9] The Court also draws a distinction between gay and lesbian status and public expressions of sexual identity.[10] The Court concludes that the First Amendment permits the

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Gottlieb, Steen, and Hamilton in New York City. The views expressed in this Article are mine alone.

2. The NJLAD provides:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

N.J. STAT. ANN. § 10:5-4 (West Supp. 2001).

3. *Dale*, 530 U.S. at 649.

4. *Id.* at 648-53.

5. *Id.* at 653-56.

6. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1223-25 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

7. Dale v. Boy Scouts of Am., 706 A.2d 270, 290-93 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000) (rejecting Boy Scouts' First Amendment defense of its antigay discrimination).

8. *Dale*, 530 U.S. at 663 (Stevens, J., dissenting); *id.* at 700 (Souter, J., dissenting).

9. *Id.* at 651-53 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

10. *Id.* at 653-54.

Boy Scouts to discriminate on the basis of the latter, but not the former alone.[11]

Finally, the Court rejects arguments that application of the NJLAD to the Boy Scouts furthers a compelling interest and thus could withstand strict judicial scrutiny.[12] While the Court does not decide whether state civil rights statutes that prohibit sexual orientation discrimination generally advance compelling state interests in the First Amendment context, the Court, nevertheless, finds that application of the statute in this case constitutes an unjustifiable, "severe intrusion" into the Boy Scouts' speech interests.[13] Consequently, *Dale* reverses a decision of the New Jersey Supreme Court which holds that the First Amendment could not shield the Boy Scouts' antigay discrimination.[14]

Dale is important for several reasons. First, it is one of only four cases in which the Court has analyzed either claims of discrimination or privacy infringement brought by gay, lesbian, bisexual, or transgender individuals.[15] The case also has vital implications for First Amendment doctrine[16] and for the broader context of civil rights enforcement and equality politics.[17] The opinion is most striking,

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11. The Court rules:

> That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation."

Id. at 653.

12. *Id.* at 656-59.

13. *Id.* at 659 ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association.").

14. Boy Scouts of Am. v. Dale, 734 A.2d 1196, 1230 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

15. *See Dale*, 530 U.S. at 659 (holding that enforcement of state civil rights statute to preclude antigay discrimination would infringe upon defendant's right of expressive association); Romer v. Evans, 517 U.S. 620, 635-36 (1996) (holding that state constitutional amendment banning implementation of laws prohibiting antigay discrimination violated equal protection); Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572-81 (1995) (holding that forced inclusion of contingent of gays, lesbians, and bisexuals in parade through civil rights enforcement would impermissibly dictate the content of parade organizers' speech); Bowers v. Hardwick, 478 U.S. 186, 189-91 (1986) (holding that there is no fundamental right to engage in "homosexual sodomy").

16. John C. O'Quinn, Recent Development, *"How Solemn Is the Duty of the Mighty Chief": Mediating the Conflict of Rights in* Boy Scouts of America v. Dale, *120 S. Ct. 2446 (2000)*, 24 HARV. J.L. & PUB. POL'Y 319, 321 (2000) (arguing that *Dale* "provided an opportunity not only to delineate the meaning of the right of intimate association, but also to forge greater consensus generally on the protections afforded by the freedoms of speech and association").

17. *See infra* Parts II-III.

however, for the important issues that it "closets" or reduces to invisibility. In particular, the Court obscures and evades elements of First Amendment jurisprudence that *should have* controlled its decision.[18] The doctrinal framework governing cases that involve alleged conflicts between the application of antidiscrimination laws and a discriminator's right of expressive association appears in a trilogy of cases beginning with *Roberts v. United States Jaycees*.[19] In these cases, the Court rigorously analyzed the organization's expressive association defenses, requiring solid evidence to establish that an institution's discrimination related to a clearly defined and articulable speech interest.[20] In *Dale*, however, the Court cites to, yet departs from, the careful *Roberts* doctrine and announces a "deference" standard for discriminators.[21] The closeting of *Roberts* in *Dale* leaves the Court's analysis incomplete and unprincipled and also signals the inevitable defeat of James Dale's complaint.[22]

Additionally, *Dale* fails to examine the particularities of gay, lesbian, bisexual, and transgender identities and of social identity generally. Specifically, *Dale* ignores the expressive nature of these identity categories.[23] Consideration of the expressive quality of social identity would have complicated the Court's conclusion that Dale's outness, rather than his gay status, legitimizes the Boy Scouts' expressive association defense. Under a proper understanding of the socially constructed nature of identity, speech and identity are not as neatly separable as the Court's simplistic analysis presumes.[24] On the

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18. *See infra* Part II.C.

19. 468 U.S. 609, 623 (1984) (denying defendants' expressive association defense to application of public accommodations law); *see also* Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548-49 (1987) (same); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13-14 (1988) (rejecting plaintiff's claim that public accommodations law on its face infringed upon right of expressive association).

20. *See infra* Part II.B.

21. *See infra* Part II.C.

22. *See infra* notes 230-232 and accompanying text.

23. *See infra* Part III.A-B. For a sampling of scholarship on social constructivist and expressive theories of identity, see generally JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 503-68 (1994); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 4-17 (2000); Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 116-23 (1998); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 54-62 (1994).

24. *See* Hunter, *supra* note 23, at 1-2 ("In our political life, identity politics is interwoven with dissent—is understood *as* dissent.... By expressive identity, I mean those

contrary, speech, expression, and action shape and build social identity, and social identity is active and expressive, rather than static and clinical.[25]

Finally, *Dale* conceals the Court's disagreement with the *Roberts* doctrine, which established an "equality-sensitive," yet balanced, framework for determining whether civil rights enforcement unconstitutionally impedes the speech interests of discriminating membership organizations and places of public accommodation.[26] *Dale* also masks judicial animosity toward, and intolerance of, gay, lesbian, bisexual, and transgender equality efforts.[27] Several members of the *Dale* majority, in particular Chief Justice Rehnquist and Justices Scalia and Thomas, have fervently voiced their disapproval of even minimal constitutional protection for gays and lesbians.[28] Yet, the *Dale* majority asserts that the legal, social, and political contest over gay and lesbian equality does not influence its decision.[29] Furthermore, *Dale* joins *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[30] as recent cases that imply a withering of the *Roberts* standard.[31] In those cases, both of which involve the litigation of gay, lesbian, and bisexual equality claims, the Court has neither honestly applied nor expressly overruled the central components of *Roberts*. Although *Hurley* is somewhat distinct from *Dale* because the former involves pure "free speech," rather than expressive association, the *Hurley* court, nevertheless, attempts to place its lenient analysis within the *Roberts* line of cases.[32] Thus, the Court has seemingly reworked

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situations of particularly strong intersection, where an identity characteristic itself is understood to convey a message.").

25. *Id.*; *see also* Hutchinson, *supra* note 23, at 116-23; *infra* Part III.B.

26. *See infra* Part IV.A.

27. *See infra* Part IV.B.

28. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality is evil. I vigorously dissent.") (internal citation omitted); Equal. Found. v. City of Cincinnati, 518 U.S. 1001, 1001 (1996) (Scalia, J., dissenting) ("Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals [is] concerned, be permitted to do what they please."). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia in both opinions.

29. *Dale*, 530 U.S. at 661 ("We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong. . . .").

30. 515 U.S. 557 (1995).

31. Hutchinson, *supra* note 23, at 102-103 (analyzing the doctrinal distinctions between *Hurley* and *Roberts*).

32. *See infra* note 222 and accompanying text.

the *Roberts* doctrine but has not done so explicitly and openly.[33] Alternatively, the Court might be carving out a separate expressive association doctrine in the context of gay, lesbian, bisexual, and transgender litigation. Even if the latter explanation were correct, the Court still has not articulated a principle to justify such a reworking of *Roberts* in the particular context of homophobic discrimination. Furthermore, if the Court is in fact developing a deferential standard for reviewing expressive association defenses exclusively in the context of heterosexist discrimination cases, then its doctrine clearly subordinates gay, lesbian, bisexual, and transgender people because it unjustifiably expands the scope of permissible homophobic discrimination.

This Article proceeds in four parts. Part II discusses the evolution of the right of expressive association and examines the constitutional test, developed in the *Roberts* line of cases, used to analyze purported conflicts between associational freedoms and governmental civil rights enforcement. Part II then uncovers the Court's closeting of *Roberts* in *Dale* by examining how *Dale* materially, yet quietly, departs from the *Roberts* framework. Part III criticizes the Court's failure to acknowledge the expressive nature of gay, lesbian, bisexual, and transgender identity specifically, and, more broadly, the expressive and active components of all forms of social identity. Part III also demonstrates how the Court's dichotomizing of speech and identity constricts the reach of equality doctrine. Part IV analyzes the Court's obfuscation of its apparent disagreement with the fundamentals of the *Roberts* doctrine and its insensitivity toward antiheterosexist equality efforts. Part V makes suggestions for redirecting First Amendment jurisprudence away from conditioning gay, lesbian, bisexual, and transgender equality upon the invisibility of sexual minorities and toward a jurisprudence that "accommodates outness."[34] Specifically, Part V argues that the *Roberts* doctrine provides a more balanced treatment of the sometimes competing interests of equality and speech. Accordingly, only a return to the more "substantial" analysis of the expressive association defenses that the Court used in *Roberts* can ensure that equality is only sacrificed in order to protect true speech goals. Part V then considers how the outcome of *Dale* would have differed under a more substantial—and honest—evidentiary analysis. Finally, Part V urges the Court to recognize the speech dimensions of

33. *See infra* Part IV.A.

34. *See* Hutchinson, *supra* note 23, at 123-25 (advocating development of a First Amendment and equality jurisprudence that "accommodates outness").

gay, lesbian, bisexual, and transgender identity and to discard its archaic understanding of identity as a fixed or clinical quantity—a conceptualization that contradictorily conditions "equality" on the silencing of sexually oppressed classes.

II. THE CLOSETING OF THE *ROBERTS* DOCTRINE

A. *Who Is James Dale?*

James Dale joined the Monmouth, New Jersey, branch of the Boy Scouts as a youth member and maintained his membership throughout his childhood and as a young adult.[35] Dale was a dedicated member of the Boy Scouts, and he achieved several honors, including the group's highest recognition, the award of Eagle Scout.[36] In 1989, the Boy Scouts invited Dale to serve as an adult leader in the organization, and he accepted a position as an Assistant Scoutmaster.[37]

Shortly thereafter, Dale enrolled in Rutgers University.[38] At Rutgers, Dale began to acknowledge to himself and to others that he was a gay male; he subsequently joined and became copresident of a campus group for gay, lesbian, and bisexual students.[39] In 1990, Dale attended a campus panel on gay and lesbian youth issues.[40] A local newspaper published a story on the panel and printed a photograph of Dale; the caption identified Dale as copresident of the gay and lesbian student group.[41] Days later, Dale received a letter from his local troop that revoked his membership in the Boy Scouts[42] and instructed him to

35. *Dale*, 530 U.S. at 644.

36. *Id.* ("By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.").

37. *Id.* ("Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73.").

38. *Id.* ("Around the same time [that he accepted the Assistant Scoutmaster position], Dale left home to attend Rutgers University.").

39. *Id.* at 644-45 ("After arriving at Rutgers, Dale first acknowledged to himself and others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance.").

40. *Id.* at 645 ("In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers.").

41. *Id.* ("A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.").

42. *Id.* ("Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership.").

"sever any relations [he] may have with Boy Scouts of America."[43] After Dale inquired as to the basis for his expulsion from the Boy Scouts, the organization explained by letter that it "specifically forbid[s] membership to homosexuals."[44] In 1992, Dale filed a lawsuit against the Boy Scouts that alleged several state law causes of action, including a claim that the Boy Scouts' revocation of his membership violated the NJLAD, which expressly prohibits discrimination on the basis of sexual orientation in places of public accommodation.[45]

The Boy Scouts did not contest the material facts alleged in Dale's complaint.[46] Instead, the organization argued that application of the NJLAD would infringe upon its First Amendment right of "expressive association" because the association disapproves of "homosexuality" and because the forced admission of an "avowed homosexual" would impair its purportedly heterosexist expression.[47] The expressive association defense ultimately proved central to the

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43. *See* Respondent's Brief, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699), *available at* 2000 WL 340276, at *6-*7 (Mar. 29, 2000) [hereinafter Respondent's Brief].

44. *Dale*, 530 U.S. at 645.

45. *Id.* (describing causes of action Dale brought against the Boy Scouts).

46. Dale v. Boy Scouts of Am., 706 A.2d 270, 277 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 734 A.2d 1196 (N.J. 1999), *rev'd* 530 U.S. 640 (2000) (noting that both parties filed motions for summary judgment in the trial court and that the parties concede that there are "no genuine issues of material facts").

47. The Petitioner's Brief, submitted to the United States Supreme Court, argues:

> [The] Boy Scouts believes that homosexual conduct is not 'morally straight' under the Scout Oath and not 'clean' under Scout Law. Consequently, *known or avowed homosexual persons* or any persons who advocate to Scouting youth that homosexual conduct is 'morally straight' under the Scout Oath, or 'clean' under the Scout Law will not be registered as adult leaders.

Petitioner's Brief, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699), *available at* 2000 WL 228616, at *27 (Feb. 28, 2000) (emphasis added) [hereinafter Petitioner's Brief]. The evidence in the record indicates that the Boy Scouts was not truthful with respect to its allegation that "any persons" who advocate the morality of "homosexual conduct" will not be registered as adult leaders. As Dale, in his Supreme Court brief, argued:

> Indeed, perhaps the clearest indication that identity-based discrimination, rather than a burden on any actual Scouting message, is at issue here is that non-gay members are not expelled or even asked to refrain openly from sharing their views that the policy [condemning or excluding homosexuals] is wrong or that gay people are appropriate moral role models.

See Respondent's Brief, *supra* note 43, at *29. The record contained no evidence that any heterosexual had been expelled from the Boy Scouts despite taking public positions supportive of gays and lesbians. *See infra* notes 210-214 and accompanying text. The Boy Scouts raised other defenses that are not relevant to this Article or to the *Dale* decision.

litigation.[48] The state trial court granted summary judgment to the Boy Scouts on statutory grounds as the trial court found that the Boy Scouts was not a "place of public accommodation."[49] The court held, alternatively, that the First Amendment precluded application of the NJLAD to the Boy Scouts so as to prevent reinstatement of James Dale's membership.[50] An appellate panel reversed this decision and rejected the Boy Scouts' expressive association defense,[51] and the New Jersey Supreme Court affirmed the decision of that panel.[52] Because the New Jersey Supreme Court construed the state civil rights statute as applicable to the Boy Scouts,[53] the only legal question the United States Supreme Court could resolve upon certiorari was the Boy Scouts' First Amendment defense.[54] Thus, the scope of the constitutional right of expressive association became the critical issue in the case.

B. The Evolution of the Roberts *Doctrine*

When the Court set out to examine the Boy Scouts' expressive association defense, it could have drawn readily from a significant body of instructive case law. Specifically, the following trilogy of Supreme Court precedent provides a workable framework for deciding whether the enforcement of civil rights statutes, like the NJLAD, would infringe upon a discriminator's right of expressive association:

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48. *Dale*, 530 U.S. at 644 ("This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association.").

49. *See Dale*, 706 A.2d at 277 (describing opinion of the trial court).

50. *See id.*

51. *See id.* at 293.

52. *See* Boy Scouts of Am. v. Dale, 734 A.2d 1196, 1196 (N.J. 1999), *rev'd* 530 U.S. 640 (2000).

53. *See id.* at 1211 ("[The] Boy Scouts is a 'public accommodation,' not simply because of its solicitation activities, but also because it maintains close relationships with federal and state governmental bodies and with other recognized public accommodations.").

54. Normally, the Supreme Court lacks the jurisdiction to disturb state court interpretations of state law because Article III of the United States Constitution limits its review to "cases or controversies" arising under federal law. *See* U.S. CONST. art. III; *see generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 521-65 (4th ed. 1996) (discussing the relationship between state and federal law). Supreme Court precedent, however, has recognized the authority of the Court to conduct an independent review of state courts' factual findings in First Amendment cases. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'").

Roberts v. United States Jaycees,[55] *Board of Directors of Rotary International v. Rotary Club*,[56] and *New York State Club Ass'n v. City of New York*.[57]

In *Roberts*, the United States Jaycees (Jaycees) filed a federal lawsuit seeking an injunction to forbid application of the Minnesota Human Rights Act, which banned gender discrimination in places of public accommodation.[58] The Jaycees excluded women from "full membership."[59] Two local chapters of the organization refused to comply with the discriminatory policy and instituted an action before the Minnesota Human Rights Commission to challenge the Jaycees' exclusion of women as full members.[60] In the federal action, the Jaycees sought to stop the proceedings that were before the Minnesota Human Rights Commission.[61]

The Jaycees defended its discrimination, as did the Boy Scouts, by invoking the right of expressive association.[62] Specifically, the organization alleged that the admission of women to the Jaycees on terms equal to men would infringe upon its speech and associational interests.[63] The United States District Court for the District of Minnesota ruled against the Jaycees, but the United States Court of

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55. 468 U.S. 609 (1984).
56. 481 U.S. 537 (1987).
57. 487 U.S. 1 (1988).
58. 468 U.S. at 615-618.
59. The *Roberts* opinion details the Jaycees' discriminatory membership practices:

> The organization's bylaws establish seven classes of membership, including individual or regular members, associate individual members, and local chapters. Regular membership is limited to young men between the ages of 18 and 35, while associate membership is available to individuals or groups ineligible for regular membership, principally women and older men. An associate member, whose dues are somewhat lower than those charged regular members, may not vote, hold local or national office, or participate in certain leadership training and awards programs.

Id. at 613.

60. *Id.* at 614. The national organization had threatened to revoke the charters of the local chapters unless they ceased admitting women as full members. *Id.*

61. *Id.* at 615. The trial court, however, dismissed the Jaycees' complaint without prejudice; the court held that the Jaycees' could renew its action in the event that the Minnesota Department of Human Rights issued a decision adverse to the Jaycees. *See id.* at 616. Subsequently, the Minnesota Department of Human Rights issued a decision finding that the Jaycees violated the state's civil rights law and ordering the Jaycees to end its policy of sex-based discrimination. *Id.* at 615-16. The Jaycees then renewed its federal action. *Id.* at 616.

62. *Id.* at 615-17.

63. *Id.* at 615 ("The complaint alleged that, by requiring the organization to accept women as regular members, application of the Act would violate the male members' constitutional rights of free speech and association.").

Appeals for the Eighth Circuit reversed, holding that application of the civil rights statute would in fact impair the Jaycees' expressive goals.[64] The Eighth Circuit held that a "substantial part" of the Jaycees' activities included the "expression of social and political beliefs and the advocacy of legislation and constitutional change" and that the organization had a First Amendment "right of association."[65] Although the court acknowledged that many of the Jaycees' expressive activities did not relate to gender, it nevertheless held that the inclusion of women in the organization would likely change the group's "philosophical cast."[66] The court reasoned that "[i]t is not hard to imagine" that the inclusion of women as "full-fledged members" in the organization would result in attempts to change the Jaycees' creed.[67] The group's creed contained the following declarations: "the *brotherhood of man* transcends the sovereignty of nations . . . [and] economic justice can best be won by free *men* through free enterprise."[68] The appellate court held that the goal of eradicating sex discrimination in places of public accommodation was indeed a "compelling interest" but that less-restrictive means were available for the state to pursue this interest.[69]

Thus, to support its conclusion that the admission of women as full members in the Jaycees would impair the group's expression, the court of appeals relied on four observations: (1) that the Jaycees engaged in some expressive activities; (2) that it is easy to "imagine" that women would attempt to dismantle the sex-specific components of the group's creed; (3) that the Jaycees had established a policy excluding women as full members; and (4) that the gender-based exclusion was essential to maintain the group's autonomy.[70] Although the assumption that women and men might have distinct views on certain issues is amply supportable,[71] the court did not closely examine

64. United States Jaycees v. McClure, 709 F.2d 1560, 1561 (8th Cir. 1983), *rev'd sub nom.* Roberts v. United States Jaycees, 468 U.S. 609 (1984).

65. *Id.* at 1561.

66. *See id.* at 1571.

67. *Id.*

68. *Id.* at 1562 (emphasis added).

69. *Id.* at 1576 ("The interest of the state, though compelling in the general sense, will be less seriously impaired than at first appears if this challenged interference is prevented, for reasons we have already explained. And the state has other ways, perhaps less effective, but still powerful, to vindicate its interest.").

70. *Id.* at 1569-72.

71. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 149 (1994) (O'Connor J., concurring) ("[T]o say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.").

whether women—*or men*—had in fact sought to, or were seeking to, alter the Jaycees' creed or whether there was even a demonstrable nexus between the organization's numerous expressive activities and its discriminatory practices.[72] As a result, the appellate court failed to consider sufficiently whether the group's discrimination was simply a policy of invidious discrimination or whether, though invidious, it related to some protectible speech interest.

1. *Roberts* and the Importance of Speech

The United States Supreme Court reversed the court of appeals decision in an opinion that articulated what would become the governing framework for analyzing apparent conflicts between "free speech" and "equality."[73] The Court first identified and described the expressive interest implicated by the dispute.[74] The *Roberts* decision defined the right of "expressive association" as "a right [of individuals] to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[75] The Court's well-established jurisprudence treats expressive association as both a derivative right implied by the enumerated freedoms in the First Amendment and as a collective right held by individuals who associate in order to engage in First Amendment activities.[76] The *Roberts* Court, respecting the

72. *See McClure*, 709 F.2d at 1570-72. The fact that at least two chapters of the Jaycees disagreed with the discriminatory policy suggests that many men wanted the organization to become gender inclusive.

73. *See Roberts*, 468 U.S. at 609.

74. *Id.* at 617-18.

75. *Id.* at 618. The Court also defined another strand of associational liberty—the right of "intimate association." *Id.* at 617-18. The Court describes "intimate association" as the right "to enter into and maintain certain intimate human relationships." *Id.* The types of relationships that have received protection under this liberty interest include "marriage, the raising and education of children, and cohabitation with one's relatives." Hutchinson, *supra* note 23, at 94 (citations omitted). Given the large size and unselective nature of the Jaycees, the Court readily disposed of any argument that the right of intimate association shielded the organization's discrimination based on gender. *Roberts*, 468 U.S. at 621.

76. *Roberts*, 468 U.S. at 622 ("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." (citing Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 294 (1981)); Griswold v. Connecticut, 381 U.S. 479, 482-84 (1965) (describing freedom of association as a right implied by the First Amendment); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("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."); *see also* Hutchinson, *supra* note 23, at 94-95; Douglas O. Linder, *Freedom of Association After* Roberts v. United States Jaycees, 82

historical value of individual liberty, described expressive association as an "*indispensable means* of preserving other individual liberties."[77]

2. *Roberts* and the Importance of Equality

The *Roberts* Court, however, also recognized the compelling goal of equality, accomplished through the enforcement of constitutional and statutory civil rights, and held that the right of expressive association is not absolute.[78] Rather than treating expressive liberty as an unqualified constitutional interest, the Court held that governmental restrictions on the right of expressive association are permissible if they pursue "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[79] The *Roberts* decision further held that state public accommodations laws generally serve compelling governmental interests.[80] Thus, the *Roberts* Court considered not only the value of expressive association and liberty, but also recognized the constitutional and social imperative of equality.[81]

Cases such as *Roberts* and *Dale* place speech and equality in conflict, reflecting a tension between the legal achievement of an "egalitarian, rights-oriented liberalism" and a concomitant social distrust for state intrusion into community and individual autonomy.[82] The relationship between speech and equality, however, often has a far more complicated and shifting existence. In subjugated communities, for example, individuals might actually welcome governmental power as a method for ensuring individual liberty, community autonomy, *and* equal access to societal resources.[83] Furthermore, many of the

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MICH. L. REV. 1878, 1887 (1984) ("Although the word 'association' appears nowhere in the first amendment . . . a right to associate has long been recognized as necessary to safeguard those activities specifically protected by the first amendment . . . ." (footnote omitted)).

77. *Roberts*, 468 U.S. at 618 (emphasis added).

78. *Id.* at 623.

79. *Id.*

80. *Id.* at 624 (holding that the state civil rights law "serves compelling state interests of the highest order").

81. *See* William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 92 (1986) ("The validity of the state interest in promoting equal access is not controversial. The government's interest in eliminating discriminatory exclusions is compelling when the discrimination adversely affects minority access to publicly available opportunities.").

82. Hutchinson, *supra* note 23, at 95-96; Linder, *supra* note 76, at 1881-82.

83. *See* Hutchinson, *supra* note 23, at 96. *See also* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 153 (1991) ("For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status

precedential settings for the evolution and development of the contemporary right of expressive association involves cases brought by blacks and civil rights organizations in the South.[84] In these cases, plaintiffs invoked expressive liberties to contest racial subjugation and inequality and to challenge racist governmental efforts to impair their political organizing.[85] Thus, scholars and jurists should resist automatically treating liberty and equality as oppositional goals; their relationship is far more intricate and complicated than this reductionist approach recognizes.[86]

Together, the complex relationship between liberty and equality and the historically important function of both of these fundamental legal interests mean that courts must engage in thoughtful analyses of both equality and expressive freedom and not treat either goal in absolute terms or as trivial.[87] The *Roberts* doctrine provides such a framework because it respects both speech and equality and seeks to make certain that only *actual* speech activities prevail over civil rights enforcement when the two collide.[88]

3. *Roberts* as an Evidentiary Standard Securing Equality and Speech

Thus far, this Article has focused on the constitutional interests and obligations implicated by the *Roberts* doctrine. In *Roberts*, however, both constitutional and evidentiary concerns shaped the Court's analysis. The Court closely analyzed the Jaycees' asserted speech interests and based its conclusions regarding the content of the

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from human body to social being."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988) ("[L]iberal legal ideology ... perform[s] an important function in combating the experience of being excluded and oppressed.").

84. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428-29, 437 (1963) (invalidating a statute that interfered with the speech and associational interests of a civil rights organization); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (same).

85. *See supra* note 84 and accompanying text.

86. Professor William Marshall argues:

> [Professor] Linder is inaccurate only in perceiving rights-oriented liberalism to be solely on one side of the equation. Protecting individual choice also protects the choice to discriminate. This, however, only makes the dilemma more complex. Not only are competing values present, but the same values compete on both sides of the issue.

See Marshall, *supra* note 81, at 69-70 (responding to Linder, *supra* note 76).

87. *See* Hutchinson, *supra* note 23, at 96 (arguing that courts should apply a "multilayered approach to expressive freedoms").

88. *Id.* (describing the *Roberts* test as a "useful model" for resolving conflicts between speech and equality).

organization's speech and concerning those actions that would impair its speech upon a careful examination of the evidence contained in the record.[89] After its careful scrutiny of the evidence, the Court concluded that application of the Minnesota civil rights statute to the Jaycees would not suppress the group's expressive interests.[90] The Court examined the actual expressive activities of the organization in order to determine whether its discriminatory policy furthered an actual expressive purpose or whether its sex-based exclusion was merely invidious discrimination, unrelated to the advancement of any ideas.[91]

The Supreme Court, unlike the court of appeals, did not take the Jaycees' assertions at face value, nor did it simply "imagine" that the organization's speech might be altered by the mere inclusion of women.[92] Instead, the *Roberts* Court closely canvassed the factual record before concluding that no evidence could support the defendant's proposition that the forced inclusion of women into the organization would disturb the group's ability to pursue its political advocacy.[93] The Court observed that the Jaycees had expressed "public positions" on a number of issues and that its members "regularly engage" in expressive activities that are "worthy of constitutional protection under the First Amendment."[94] The Court, however, concluded that the record contained no proof that the inclusion of women as full members of the organization would impede its expressive activities and the dissemination of its "preferred views."[95] The Court also held that the admission of women would not force the organization to admit any individuals whose political and ideological commitments diverged from those of the group.[96] In addition, the Court criticized the court of appeals for basing its ruling on the mere "supposition" that women would interfere with the group's actual speech activities.[97]

Under the doctrine that emerged in *Roberts*, the Court required much more than an argument constructed around the imagined impact

89. *See* Roberts v. United States Jaycees, 468 U.S. 609, 626-29 (1984) (examining the factual predicate for the Jaycees' expressive association defense).

90. *Id.* at 628-29 (holding that application of the civil rights law would not impede the Jaycees' expression, but holding, in the alternative, that any abridgement of the Jaycees' speech or association satisfies a compelling governmental interest).

91. *Id.* at 626-29 (examining Jaycees' specific expressive activities).

92. *See id.*

93. *See id.*

94. *Id.* at 626-27.

95. *Id.* at 627.

96. *Id.*

97. *Id.* at 627-28.

of civil rights enforcement; the Court demanded clear evidence that the antidiscrimination law would interfere with a group's expression.[98] While *Roberts* likely undervalued the potential ideological differences between men and women,[99] the ultimate decision was justifiable due to the lack of a nexus between the defendant's discrimination and its expression and the fact that the organization already admitted women (but as nonvoting members).[100] Because the Jaycees already included women, albeit on an unequal footing, its claim that the inclusion of women as full members would undermine its speech lost credibility.[101]

The Court applied the *Roberts* doctrine in two subsequent cases, making this test the governing framework in litigation challenging civil rights enforcement through expressive association defenses.[102] In each of these cases, the Court carefully examined the facts in the record to ascertain whether they supported the associations' characterizations of their expressive activities and their claims that application of the challenged civil rights statutes would frustrate these asserted speech interests.[103] The *Roberts* doctrine resolves these conflicts over speech

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98. *Id.* at 628 (rejecting the Jaycees' expressive association defense because the organization "relies solely on unsupported generalizations about the relative interests and perspectives of men and women").

99. *Id.* (rejecting the Jaycees' contention that women and men have different philosophies as resting on "unsupported generalizations"). For a criticism of this analysis, see Hunter, *supra* note 23, at 21 (arguing that "*Roberts* simply steam-rolled the defendant's claims that admission of women would affect the expressive culture of a previously male-only organization.... [Because the] defendants could not prove a male/female difference in viewpoint defined in issue specific terms, ... Brennan dismissed the defendant's expressive association defense as mere stereotyping").

100. Justice Brennan reasons that because

> the Jaycees already invites women to share the group's views and philosophy and to participate in much of its training and community activities.... any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best.

Roberts, 468 U.S. at 627.

101. *Id.*; *cf.* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (finding that policy permitting men to audit classes at state university "fatally undermines" state's argument that single-sex education protected women from the harmful presence of men in the classroom).

102. *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 10-15 (1988); Bd. of Dirs. of Rotary Club Int'l v. Rotary Club, 481 U.S. 537, 544-49 (1987).

103. In *Rotary Club*, for example, the Court recognized that the organization "engage[d] in a variety of commendable service activities that are protected by the First Amendment." 481 U.S. at 548. This fact alone, however, did not prove the organization's expressive association defense. Instead, the Court searched for evidence linking the organization's discrimination to one of its specific expressive goals; the Court found such evidence lacking. *See id.* at 548-49 (finding that the enforcement of the state civil rights law would not force the group to abandon or alter any of its protected activities); *see also N.Y.*

and equality by paying strict attention to both constitutional and evidentiary concerns: the *Roberts* standard recognizes the vital right of free expression, but it places the burden with parties asserting expressive association defenses to prove, with clear evidence, how their expression would suffer from the enforcement of civil rights laws.[104] Accordingly, the *Roberts* framework protects another important interest in addition to liberty and equality: judicial integrity. The *Roberts* evidentiary analysis ensures that courts will not unfairly advance equality over liberty or liberty over equality, but that courts would make decisions in these delicate cases only after an exhaustive and honest analysis of the evidence underlying the factual claims relevant to the expressive association defense.[105]

State Club Ass'n, 487 U.S. at 13-14 (rejecting facial challenge to civil rights statutes because clubs failed to demonstrate how the statute impairs any expressive activities).

104. *See Roberts*, 468 U.S. at 627-28.

105. One might criticize the *Roberts* evidentiary standard as placing too much emphasis on equality and as requiring too much of discriminators. This contention, however, is misplaced because the equality strand in *Dale* (and in the *Roberts* line of cases) is also fact-intensive. James Dale, for example, conducted an extensive factual investigation of the types of activities in which Boy Scouts engaged and sponsored. *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1211 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000); Respondents Brief, *supra* note 43, at *24-*29. This inquiry not only bolstered Dale's rebuttal of the Boy Scouts' expressive association defense, but it also demonstrated that the Boy Scouts was a "place of public accommodation" under New Jersey law and, thus, bound by the antidiscrimination statute. *See Dale*, 734 A.2d at 1208-18 (analyzing extensive facts that support finding that Boy Scouts fits within the reach of the NJLAD). Similarly, in *Roberts*, a related decision by the Minnesota Supreme Court affirmatively answered the sole question of whether the Jaycees was a place of public accommodation subject to the state civil rights statute. *See* United States Jaycees v. McClure, 305 N.W.2d 764, 765-71 (Minn. 1981). The Court engaged in a fact-driven analysis of the central equality claim in this dispute. *See id.* at 768-74.

Often, the expressive association defense might inevitably involve a more fact-intensive analysis than the equality component in these cases. For example, *Dale* (and each case in the *Roberts* trilogy) involved an explicit policy of discrimination on the basis of a prohibited category. Boy Scouts of Am. v. Dale, 530 U.S. 640, 645, 651-53 (2000) (describing Boy Scouts' exclusionary policy on "avowed homosexuality"); *see also Roberts*, 468 U.S. at 613-14 (describing the Jaycees' policy by which women were not permitted to be full, voting members); *Rotary Club*, 481 U.S. at 541 (describing the Rotary Club practice of excluding women). The Boy Scouts' facially discriminatory actions diminished the factual inquiry required of the plaintiff in this narrow respect. *See Dale*, 734 A.2d at 1218 ("Because we hold that an assistant scoutmaster position is a 'privilege' and an 'advantage' of Boy Scout membership, and because Boy Scouts has 'revoked' Dale's registration based on his 'avowed' homosexuality, a prohibited form of discrimination under the statute, we conclude that Boy Scouts has violated the [antidiscrimination law].").

C. *The Closeting of* Roberts *in* Dale

1. Deference to Discriminators

While the *Roberts* doctrine establishes a careful evidentiary and constitutional framework, the *Dale* decision abandons this test and holds that courts adjudicating cases in the public accommodations context must "give deference to an association's assertions regarding the nature of its expression" and to "an association's view of what would impair its expression."[106] Under this new deference "standard," the Boy Scouts' mere depiction of its expression in its legal brief seemingly satisfies the evidentiary requirements for proving the content of its speech. For example, the Court cites language in the Boy Scouts' brief which states that the organization "'teach[es] that homosexual conduct is not morally straight,' and that it does 'not want to promote homosexual conduct as a legitimate form of behavior.'"[107] The Court intimates that this litigation position *alone* establishes the substance of the Boy Scouts' speech; relying solely on these statements, the Court concludes that it "need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality."[108]

The Court's new deference standard clearly requires far less from discriminating defendants than the evidentiary test deployed in the *Roberts* line of cases. Instead of mandating that courts conduct a careful examination of the factual submissions concerning the association's speech, the Court implies that the organization's description of its speech in a legal brief can alone prove the content of that expression, and it explicitly directs courts to give deference to discriminating organizations.[109]

The Court's deferential evidentiary approach unduly erodes the sensitivity toward social equality that the *Roberts* doctrine endeavored to protect. If a discriminator's description of its speech in a legal brief alone establishes the content of its expression, then victims of discrimination will not have the ability to disprove this element of the expressive association defense. Every discriminator that advances a defense of expressive association will argue that its exclusionary policies pursue a particular expressive goal; such an allegation is, in

106. *Dale*, 530 U.S. at 653.
107. *Id.* at 651 (alteration in original) (citation omitted).
108. *Id.*
109. *See id.* at 651-53.

fact, an element of the defense.[110] The Court's deference standard, as stated in *Dale*, requires absolutely no objective proof of the content of the association's speech and, if followed literally, would allow defendants to rest on their legal submissions.[111]

2. Deferential Evidentiary Review

Perhaps realizing that its deference analysis departs from prior precedent in this context, or at least cognizant of the sweeping implications of this test, the Court actually examines the factual predicate for the Boy Scouts' claim, rather than resting its decision solely on the Boy Scouts' brief.[112] The Court's analysis, however, simply reinforces and implements its newly announced deferential standard because the evidence the Boy Scouts presents fails to establish that the condemnation of homosexuality is in fact one of its expressive goals.[113] Under the *Roberts* doctrine, finding a clear expressive interest in discrimination is an essential element of a successful expressive association defense.[114] *Dale* obscures this important dimension of the *Roberts* test because it purports to discover the substance of the Boy Scouts' expression after conducting an extremely passive review of ambiguous, conflicting, and, perhaps, contrived evidence.[115] The new deferential evidentiary test employed in *Dale* permits the Court to overlook the deficiencies of the Boy Scouts' evidence and to credit the organization's own questionable representation of its expressive activities.

For instance, the Court concludes that the Boy Scouts' "Law" and "Oath," which require youth members to remain "morally straight" and "clean,"[116] embody the association's heterosexism.[117] The New Jersey

110. *See Roberts*, 468 U.S. at 627-28 (examining, in the context of an expressive association defense, whether inclusion of a protected class in the organization would impair the dissemination of the group's "preferred views").

111. *See Dale*, 530 U.S. at 651-53 (applying deferential analysis).

112. *Id.* at 648-55 (conducting evidentiary review of the Boy Scouts' expressive association defense).

113. *Id.*; *see infra* notes 116-143 and accompanying text.

114. *See Roberts*, 468 U.S. at 626-29 (rejecting an association's claim that it engaged in gender-based expression because none of its activities was gender specific).

115. *See Dale*, 530 U.S. at 648-54 (conducting an evidentiary review of the Boy Scouts' expressive association defense).

116. The "Scout Oath" provides that "On my honor I will do my best; To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and *morally straight*." *Dale*, 540 U.S. at 649 (emphasis added) (internal quotations omitted). The "Scout Law" provides that "A Scout is: Trustworthy, Obedient, Loyal, Cheerful, Helpful, Thrifty, Friendly, Brave, Courteous, *Clean*, Kind, Reverent." *Id.* (emphasis added) (quotations omitted).

Supreme Court,[118] the New Jersey Appellate Division,[119] and the dissenting justices in *Dale*[120] applied an evidentiary analysis more consistent with *Roberts* and found that these ambiguous slogans do not prove that members of the Boy Scouts assemble to express a heterosexist viewpoint. Given the amorphous nature of this evidence, the Court's conclusion that it expresses a heterosexist viewpoint is "reasonable" only when understood as a product of its new deference formula.

The Court also finds a 1978 memorandum from the Boy Scouts' President and its Chief Scout Executive to the members of the Executive Committee of the national organization probative of the group's heterosexist expression.[121] In this memorandum, the two officers of the organization state that they "do not believe that homosexuality and leadership in Scouting are appropriate."[122] As the *Dale* dissenters observe, however, this statement does not itself pertain to any of the organization's activities; instead, it simply constitutes an invidious discriminatory statement.[123] *Roberts*, however, requires that an association demonstrate that its discrimination relates to a clear expressive activity;[124] because the 1978 memorandum fails to establish this nexus, it is insufficient under the *Roberts* framework. Additionally, the memorandum was never circulated beyond the Executive Committee of the Boy Scouts; it remained, instead, a "private statement" of the position of certain scouting executives.[125] The *Roberts* Court, by contrast, considered whether members of the organization came "together" to engage in a certain activity protected

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117. *Id.* at 649-50 (accepting Boy Scouts' argument that the statements "morally straight" and "clean" embody an antigay message).

118. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1224 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000) ("The words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral. We doubt that young boys would ascribe any meaning to these terms other than a commitment to be good.").

119. *See Dale*, 706 A.2d at 289-90 (rejecting the Boy Scouts' contention that the statements "morally straight" and "clean" embody an antigay bias).

120. *See Dale*, 530 U.S. at 668-69 (Stevens, J., dissenting) (after extensively reviewing Boy Scouts' literature, concluding that "[i]t is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality" and that "neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters").

121. *Id.* at 651-52.

122. *Id.* at 652.

123. *Id.* at 673 (Stevens, J., dissenting) ("[T]he 1978 statement simply says that homosexuality is not 'appropriate.' It makes no effort to connect that statement to a shared goal or expressive activity of the Boy Scouts.").

124. *See supra* Part II.B.3.

125. *Dale*, 530 U.S. at 673 (Stevens, J., dissenting).

by the First Amendment.[126] Such an approach is consistent with the traditional definition of the right of expressive association as a "collective" right to engage in First Amendment activities.[127] Rather than protecting *any* view held by members of the organization, the right of expressive association protects the views for which members of the organization associate to express.[128] Given the private nature of the memorandum, the Court's ruling that it embodies the collective viewpoint of the Boy Scouts' members is highly problematic.[129] The Court, however, does not even attempt to explain how the memorandum reflects the collective views of the Boy Scouts. The Court's failure to address the weaknesses of this evidence likely results from its application of the deference standard that it constructs in *Dale*.[130] Because the Court holds that it must defer to a discriminator's description of its speech interests, evidentiary ambiguities and insufficiencies do not necessarily defeat an expressive association defense. The *Roberts* framework, by contrast, required clearer and more consistent evidence from the discriminating organizations.[131]

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126. *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (holding that the Court recognizes a freedom of expressive association because forcing an organization to admit an unwanted individual "may impair the ability of the original members to express only those views that *brought them together*") (emphasis added); *id.* at 622 ("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.") (emphasis added).

127. *See supra* notes 73-75 and accompanying text.

128. *See* Churchill v. Waters, 977 F.2d 1114, 1120 n.6 (7th Cir. 1992), *rev'd on other grounds*, 513 U.S. 804 (1994) (holding that "the right to expressive association 'is not implicated when two persons simply hold common beliefs or even when those different person[s] express those common beliefs—they must join together "for the purpose of" expressing those shared views'" (alteration in original)); *see also Dale*, 530 U.S. at 682-85 (Stevens, J., dissenting).

129. Ironically, the memorandum states that a member of the Boy Scouts "who openly declares himself to be a homosexual" should only be terminated "in the absence of any law to the contrary." *Dale*, 530 U.S. at 672 (Stevens, J., dissenting) (emphasis omitted). The memorandum indicates that the president was not aware of any such laws, but stated that if such laws were eventually passed, the Boy Scouts would have to abide by them. *Id.* at 671-73 (Stevens, J., dissenting). Thus, if the memorandum actually represents the "collective" views of the Boy Scouts, then it suggests a preference for civil rights compliance.

130. *Id.* at 651-54 (developing deferential evidentiary analysis); *see supra* notes 106-111 and accompanying text.

131. *See Roberts*, 468 U.S. at 617-22, 626-28. Nancy Knauer offers a very important antiheterosexist argument that *supports* the Court's finding that the Boy Scouts' collective expression includes the condemnation of homosexuality. *See* Nancy J. Knauer, *"Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After* Boy Scouts of America v. Dale, 89 KY. L.J. 997, 1020-31 (2001). Knauer argues that the absence of any "clear" evidence proving the Boy Scouts' heterosexism should not defeat the organization's defense because in a heterosexist society, the "default position" is heteronormative (i.e., antigay). *Id.* While Knauer correctly observes the ubiquitous nature of

The remaining evidence that the Court cites as evincing the Boy Scouts' heterosexism all emerged in the context of litigation surrounding the organization's antigay discrimination.[132] Specifically, the Court finds the following pieces of evidence probative of the Boy Scouts' antigay views: a 1991 document that the Boy Scouts drafted after it revoked Dale's membership in scouting[133] and during the pendency of a similar lawsuit in California state courts, which challenged the group's antigay discrimination,[134] as well as a 1993 document that the Boy Scouts wrote after Dale filed his lawsuit that challenged the organization's policy of discrimination.[135] The 1991 memorandum states, "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts."[136] The 1993 statement makes a similar declaration, proclaiming that "[t]he Boy Scouts ... has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the [Boy Scouts]."[137] For at least two important reasons, the Court's conclusion that these

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heterosexism, a First Amendment doctrine that requires less than clear evidence would constitutionalize invidious discrimination and pretextual speech claims in a host of settings. American society certainly contains oppressive class, racial, sexual, and gender hierarchies. Yet, a doctrine that allows places of public accommodation to prove the content of their expression by pointing to social strata alone (and not offering other clear evidence) would have sweeping implications for antidiscrimination law. Such an approach could virtually immunize discriminating organizations from civil rights enforcement.

132. *See Dale*, 530 U.S. at 654-56 (reviewing the Boy Scout's post-litigation statements concerning homosexuality).

133. *See Dale*, 530 U.S. at 652; *see also id.* at 673-74 (Stevens, J., dissenting) (noting that the memoranda relied upon by the Court were drafted after Dale was expelled from the Boy Scouts).

134. *See* Curran v. Mount Diablo Council of the Boy Scouts of Am., 195 Cal. Rptr. 325, 328 (Cal. Ct. App. 1983), *aff'd*, 952 P.2d 218 (Cal. 1998) (finding that the civil rights complaint by a gay male against the Boy Scouts stated a cause of action under the state civil rights statute). The first reported decision in this matter is the 1983 appellate court decision cited above, and the final adjudication in this case took place in 1998. *See* Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218, 220-22 (Cal. 1998) (declining to apply the civil rights statute to the Boy Scouts). Thus, the 1991 memorandum the Boy Scouts relies upon in *Dale* was drafted in the context of an ongoing litigation challenging its sexual orientation discrimination.

135. Dale filed his lawsuit against the Boy Scouts in 1992. *See Dale*, 530 U.S. at 645, 652.

136. *Id.* at 652.

137. *Id.*

documents embody a collective will to engage in heterosexist expression results from its application of an exceedingly deferential evidentiary review.[138]

First, these documents do not link the heterosexism the Boy Scouts supposedly advocates to any of the organization's activities. The 1993 document refers to the undocumented "expectations" of families with children in the Boy Scouts, while the 1991 document refers to the ambiguous Boy Scouts slogans that do not state a clear heterosexist position.[139] The unsubstantiated desires of parents of the Boy Scouts' members and a reference to ambiguous slogans of the organization cannot establish a clear linkage between the institution's policy of discrimination and an expressive viewpoint.[140] Most importantly, however, the post-litigation nature of these documents detract from their credibility. Each of these statements contends that the Boy Scouts believes that homosexuality conflicts with the viewpoints of the association, which is precisely the issue that Dale's civil rights lawsuit raises.[141] While post-litigation statements are not inadmissible or entirely nonprobative, courts do consider whether such statements are simply self-serving or whether they are indisputable statements of truth.[142] The Court's failure to address the credibility of these documents is understandable only as a product of its extremely deferential evidentiary analysis.[143]

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138. *Id.* at 651-54 (developing deferential evidentiary standard).

139. *See id.* at 671-78 (Stevens J., dissenting) (rejecting the Boy Scouts' arguments that its post-litigation memoranda prove its expressive association defense).

140. *See id.* (Stevens, J., dissenting).

141. *See id.* at 645.

142. *See, e.g.*, FTC v. Atl. Richfield Co., 549 F.2d 289, 298 (4th Cir. 1977) ("Basically, resort to subjective evidence raises problems of credibility made acute by the self-serving nature of statements made after litigation has ensued."); United Telecomm., Inc. v. Am. Television & Comm. Corp., 536 F.2d 1310, 1318 (10th Cir. 1976) ("[L]etters written after a breach [of contract] and after a party has become aware that litigation is imminent are seldom received. They are characterized as self-serving and inadmissible."); Farris v. Sturner, 264 F.2d 537, 539 (10th Cir. 1959) (rejecting letter proffered as evidence on the grounds that "[a] man cannot make evidence for himself by writing a letter containing the statements he wishes to prove"); Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943) (rejecting memorandum prepared while litigation imminent because the document was "dripping with motivations to misrepresent"); Puliafico v. County of San Bernardino, 42 F. Supp. 2d. 1000, 1004 n.5 (C.D. Cal. 1999) ("Plaintiff's general objection that self-serving litigation-generated declarations should be stricken goes to weight and credibility . . . .").

143. Surprisingly, the dissenting justices do not address the credibility of these documents. The New Jersey Supreme Court, however, summarily dismissed these documents as "self-serving." *See* Dale v. Boy Scouts of Am., 734 A.2d 1196, 1224 n.12 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000) (finding that the "self-serving nature" of the post-litigation position statements upon which the Boy Scouts relies "is apparent").

From an equality standpoint, the most sweeping and potentially dangerous aspect of the deferential evidentiary review arises when the Court seemingly rejects the requirement that a discriminating defendant needs to prove that its policy of discrimination furthers a defined collective speech interest.[144] The Court holds that a defendant "do[es] not have to associate for the 'purpose' of disseminating a *certain message* in order to be entitled to the protections of the First Amendment. [Instead, an] association must merely engage in expressive activity that *could* be impaired in order to be entitled to protection."[145] This standard severely undervalues the compelling governmental interest in equality. Although it is unclear to what extent and in what manner courts will apply this language, strict adherence to this seamless standard would allow any organization that engages in "some" expression to prove an expressive association defense without demonstrating how civil rights enforcement would impede a clear expressive and collective interest.

The deferential evidentiary standard announced in *Dale* is additionally troubling because there is no precedential support for according deference to private civil rights defendants, especially to admitted discriminators who exclude statutorily protected classes. On the contrary, the preexisting precedent rigorously analyzed expressive association defenses raised in opposition to the enforcement of antidiscrimination laws.[146] In addition, while the Court has given Congress deference to discriminate in the context of national security,[147] this doctrine is not without controversy, as many

144. *See Dale*, 530 U.S. at 655.

145. *Id.* (emphasis added).

146. *See supra* Part II.B.3; *see also Dale*, 530 U.S. at 686 (Stevens, J., dissenting) ("I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further."). The only precedent the Court "finds" to support its deference analysis is *Democratic Party of United States v. Wisconsin* ex rel. *La Follette*, 450 U.S. 107 (1981). *See Dale*, 530 U.S. at 651. This case, however, is readily distinguishable from *Dale* because it involves a challenge to a state statute that interfered with association and speech in the context of political parties. *La Follette*, 450 U.S. at 109, 121-24. Unlike the Boy Scouts—a place of public accommodation—political parties have pronounced, rather than ambiguous, speech interests. Furthermore, political speech is accorded the highest level of constitutional protection. *See* Meyer v. Grant, 486 U.S. 414, 425 (1988) (holding that in the context of core political speech, First Amendment protection is "at its zenith"). Accordingly, *La Follette* cannot reasonably serve as a justification for the deferential standard applied in *Dale*.

147. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."); Rostker v. Goldberg, 453 U.S. 57, 66 (1981) ("The operation of a healthy deference to

commentators consider it a mask for legitimating discrimination and deprivations of liberty or as an abdication of judicial review.[148] Furthermore, no one could reasonably argue that the interests the Court identifies to justify extending deference to Congress, such as separation of powers and judicial incompetence in military affairs,[149] actually exist in the context of private civil rights litigation. Thus, the *Dale* evidentiary standard is inconsistent with established maxims in antidiscrimination law, both in the narrow setting of public accommodations litigation and in the general context of civil rights jurisprudence. Consequently, *Dale* greatly undermines the enforcement of antidiscrimination laws.

III. *DALE* AND THE REINFORCEMENT OF GAY, LESBIAN, BISEXUAL, AND TRANSGENDER INVISIBILITY

A. *Outness—Not Mere Gay Status—Frustrates the Boy Scouts' Expressive Goals*

After concluding that the Boy Scouts' expressive goals include a desire not to "promote homosexual conduct as a legitimate form of

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legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court."); Parker v. Levy, 417 U.S. 733, 756 (1974) ("For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.").

148. *See* Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1, 17-38, 44 (1992) (arguing that "judicial deference to the military ignores the wisdom and cautions of the nation's founders and the civic-republican ideals that influenced them, and undermines the nation's ability to maintain and strengthen democratic self-government in our modern, heterogeneous social and political culture"); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 572 (1991) (critiquing the conferring of deference to the military and arguing that "[a] doctrine that immunizes harmful governmental discrimination from serious judicial inquiry deserves more justification than a figure of speech" and that the deference doctrine involves a mechanical "recital that judges are incompetent to second-guess the expert judgment of military authorities or the better-informed judgment of Congress in military matters"); *see also Goldman*, 475 U.S. at 515 (Brennan, J., dissenting) ("Today the Court eschews its constitutionally mandated role. It adopts for review of military decisions affecting First Amendment rights a subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities'"); *Rostker*, 453 U.S. at 112 (Marshall, J., dissenting) ("[T]he Court substitutes hollow shibboleths about 'deference to legislative decisions' for constitutional analysis. It is as if the majority has lost sight of the fact that 'it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.'"(citing Powell v. McCormack, 395 U.S. 486, 549 (1969))).

149. *See, e.g.*, *Goldman*, 475 U.S. at 507-08 (linking judicial deference to military judgment to separation of powers principles and to judicial incompetence in matters of national security); *Rostker*, 453 U.S. at 64-69 (same).

behavior," the Court considers whether Dale's presence in the group would unconstitutionally impair this goal.[150] The Court deploys a deferential evidentiary analysis in this context as well, holding that it must give "deference to an association's view of what would impair its expression."[151]

Adhering to its deference standard, the Court finds that the forced inclusion of James Dale within the Boy Scouts would compel the organization to "send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[152] The Court's reasoning on this issue reinforces the invisibility of gay, lesbian, bisexual, and transgender identity. Although the Court finds that it must defer to a discriminator's view of what would impede its speech, the Court cautions that its ruling does not mean "that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a *particular group* would impair its message."[153] Hence, the Court purports to reject a simple status-based form of discrimination. The Boy Scouts could not exclude Dale merely because he is gay and evade application of the NJLAD. The Court, nevertheless, concludes that Dale's actions and speech relating to his sexuality demonstrate that his inclusion in the Boy Scouts would unconstitutionally frustrate the organization's speech goals.[154] Thus, the Court legitimizes the Boy Scouts' discrimination against Dale on account of his "outness," which the Court treats as distinct from his mere "membership" in a "particular group" (gay males) or from his gay-male "status" alone.[155] The Court's reasoning constructs a false and destructive dichotomy between speech and sexual identity.

Under the Court's analysis, the Boy Scouts can only prove its defense by excluding gays as speakers—but not as *gays qua gays*.[156] The Court then points to the following speech-related facts as establishing that the Boy Scouts only intends to exclude Dale's destructive message. First, Dale is openly gay.[157] The Court observes that "Dale, by his own admission, is one of a group of gay Scouts who

150. *Dale*, 530 U.S. at 653 (quotations omitted) (considering whether Dale's presence in Boy Scouts would "significantly burden" the organization's expression).
151. *Id.*
152. *Id.*
153. *Id.* (emphasis added).
154. *Id.* at 653-65 (discussing Dale's expression).
155. *See id.* at 644-56.
156. *See id.*
157. *Id.* at 653.

have 'become leaders in their community and are *open and honest* about their sexual orientation.'"[158] The Court also discusses Dale's involvement in gay and lesbian politics and social support groups.[159] The Court notes that "Dale was the copresident of a gay and lesbian organization at college and remains a *gay rights activist*."[160] The Court, following the Boy Scouts' lead, also repeatedly describes Dale as an "*avowed* homosexual,"[161] a person who would undoubtedly complicate the Boy Scouts' allegedly heterosexist speech interests.[162] By pointing to Dale's speech and activities, the Court attempts to rest its decision that the Boy Scouts can lawfully exclude Dale from the organization upon his actions and words, not on his status alone.

B. The Reality of Expressive Identity

1. Outness and Identity

The *Dale* Court's disaggregation of outness and gay status marks a further retreat from the commitment to equality secured by the *Roberts* line of cases because this reasoning conditions civil rights protection on the silencing of gay, lesbian, bisexual, and transgender people. The Court plainly holds that Dale's mere gay "status" would not legitimate his exclusion.[163] The Court, nevertheless, locates certain activities and speech attributable to Dale that supposedly render the Boy Scouts' discrimination a separate species than status-based discrimination. Rather than finding that the Boy Scouts has discriminated against Dale on the basis of his gay status, the Court concludes that the organization has lawfully excluded him on account of his outness and political commitment to gay and lesbian equality.[164] Outness, however, is a critical component of gay, lesbian, bisexual, and transgender identities. Numerous studies, for example, have

158. *Id.* (emphasis added).

159. *Id.* at 645, 653.

160. *Id.* at 653 (emphasis added).

161. *See, e.g.*, *id.* at 644 ("Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist."); *id.* at 655-56 ("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."). *See also Petitioner's Brief*, *supra* note 43, at *20 ("Requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster unconstitutionally abridges First Amendment rights of freedom of speech and freedom of association") (capitalization omitted).

162. *See Dale*, 530 U.S. at 653-55.

163. *Id.* at 653.

164. *Id.* at 653-54.

demonstrated the importance of "coming out" in fostering the psychological health of gay, lesbian, bisexual, and transgender individuals.[165] The process of public self-identification, however, is not a uniformly positive experience for gay, lesbian, bisexual, and transgender individuals due to racial, class, gender, nationality, and other social divisions within oppressed communities.[166] Nevertheless, outness remains a critical component of queer identity formation. "Coming out" also allows gay, lesbian, bisexual, and transgender individuals to organize socially and politically and to confront heterosexist hierarchies.[167] Furthermore, because identity categories and systems of oppression are interrelated and synergistic

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165. *See, e.g.*, William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2442 (1997) ("The closet diminishes not only the integrity of its denizens, but also their mental health. . . . A wide variety of psychologists have found that . . . the best-adjusted gay individuals have gone through a process of 'acceptance and appreciation' of their sexual identity."); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 596-97 (1992) (discussing the mental health costs of gay people concealing their sexual identity); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 145-46 (1991) (arguing that "lesbians and gay men probably maintain self esteem most effectively when they identify with and are integrated into the larger lesbian and gay community").

166. *See* Combahee River Collective, *A Black Feminist Statement*, *in* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 210, 214 (Cherríe Moraga & Gloria Anzaldúa eds., 2d ed. 1983) (questioning "whether lesbian separatism is an adequate and progressive political analysis and strategy . . . since it so completely denies any but the sexual sources of women's oppression, negating the facts of class and race"); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-90) (arguing that homophobia in feminist communities divides women); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 603 (1997) ("The coming out process . . . does not necessarily or automatically 'liberate' people of color, who, by revealing their sexual orientation and attempting to integrate themselves within white gay and lesbian communities, may encounter racial hierarchy."); *see also* A LOTUS OF ANOTHER COLOR: AN UNFOLDING OF THE SOUTH ASIAN GAY AND LESBIAN EXPERIENCE 12-17 (Rakesh Ratti ed., 1993) ("Once some of us entered the lesbian and gay subculture of the West, our feeling of isolation did not fade .... None of our newly found gay or lesbian friends and acquaintances spoke our languages, shared our history, or really understood our culture."); SHANE PHELAN, IDENTITY POLITICS: LESBIAN FEMINISM AND THE LIMITS OF COMMUNITY 161-66 (1989) (discussing racial and class critiques of lesbian separatism).

167. *See* Eskridge, *supra* note 165, at 2443; Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (justifying the application of heightened scrutiny to antigay discrimination on grounds that homophobia and gay and lesbian invisibility render gays and lesbians politically powerless); Hutchinson, *supra* note 23, at 121 ("The closet harms gay communities because it hinders the ability of gays and lesbians to engage in collective political action to achieve equality."); Knauer, *supra* note 131, at 1035 ("From the standpoint of the individual homosexual, coming out is a necessary prerequisite to claiming identity as a homosexual citizen.").

phenomena,[168] gay and lesbian visibility permits a more honest portrayal of identity within a host of marginalized communities and fosters the development of more multidimensional antisubordination theories and advocacy.[169]

The Court's separation of outness and gay status fails to recognize the compelling linkages among outness, identity, and equality. Under the Court's constricted analysis, sexual identity exists apart from any expressive and associational activities. The Court's reasoning treats sexual identity as a static and, presumably, quiet "trait." By failing to recognize the expressive components of sexual identity, the Court legitimizes homophobic discrimination on the basis of outness, constricts the scope of legal protection for gays, lesbians, bisexuals, and transgendered people, and reinforces and constructs gay and lesbian invisibility.[170]

2. Expressive Identity and Contemporary Social Theory

The Court's separation of outness from queer status conflicts with recent understandings of social identity. Contemporary social and legal theorists have persuasively dispelled traditional notions that identity categories such as race, gender, and sexual orientation are creatures of biology; instead, these categories are socially constructed, owing their existence to an intricate web of politics, history,

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168. Many scholars have addressed the relationship among the various forms of subordination and among the numerous social identity categories. *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing the "intersectionality" of racism and sexism); Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1361-82 (2000) [hereinafter Hutchinson, *"Gay Rights" for "Gay Whites"*] (criticizing white normative content of pro-gay and antigay discourse); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) [hereinafter Hutchinson, *Ignoring the Sexualization of Race*] (exploring the significance of sexuality to racial domination); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) ("As we look at . . . patterns of oppression, we may come to learn, finally and most importantly, that all forms of subordination are interlocking and mutually reinforcing.").

169. *See* Hutchinson, *supra* note 23, at 121 (arguing that coming out helps challenge essentialism in oppressed communities). *See generally* Hutchinson, *supra* note 166; Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293, 1311-19 (1997).

170. On the law's role in constructing "the closet," see William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1102-06 (1997) (concluding, after reviewing a number of regulatory contexts, that the law has had a significant role in constructing the closet).

economics, and social relations.[171] These identity categories also have expressive dimensions. Because identity often forms the basis for social marginalization, statements and expressions of identity become methods of contesting oppression and reconstructing identity in a more positive light.[172] For example, the Black Power Movement of the 1960s attempted to redepict "blackness" as a source of pride, rather than stigmatization. Blackness thus became a political quantity, one that served as a source of identity construction, political organization, and resistance.[173] The expression "Black Is Beautiful" thus served as a tool to build identity, rather than as a mere verbal acknowledgment of some preexisting, innate, clinical status.[174] Expression, as scholars such as Nan Hunter have demonstrated, constitutes and constructs identity.[175]

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171. *See, e.g.*, Halley, *supra* note 23 (criticizing biological essentialism in sexuality social theory and equal protection analysis); Jayne Chong-Soon Lee, Review Essay, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 777 (1994) ("Race cannot be self-evident on the basis of skin color, for skin color alone has no inherent meaning."); Haney López, *supra* note 23, at 27 ("Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization." (footnote omitted)); john a. powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 102 (1997) ("[R]ace is an experiential truth and it is a categorical error to attempt to reduce the meanings and functions of race to scientifically verifiable measurements.").

172. Nan Hunter's work illuminates this critical dimension of social identity:

> Identity cannot exist without representation. Speech and other expressive activity associated with identity is also a form of dissent. Individuals can often communicate certain kinds of identity, such as race, without conscious action. Other kinds of identity, such as religion, are typically invisible. But even individuals with visible identities can communicate consciously chosen messages of group pride and dissent from negative assumptions or stereotypes. Claims of equality based on identities of difference are intrinsically a kind of protest.

Hunter, *supra* note 23, at 5.

173. As Kimberlé Crenshaw has argued,

> [T]he process of categorizing—or, in identity terms, naming—is not unilateral. Subordinated people can and do participate, sometimes even subverting the naming process in empowering ways. One need only think about the historical subversion of the category "Black" or the current transformation of "queer" to understand that categorization is not a one-way street. Clearly, there is unequal power, but there is nonetheless some degree of agency that people can and do exert in the politics of naming. And it is important to note that identity continues to be a site of resistance for members of different subordinated groups.

Crenshaw, *supra* note 168, at 1297.

174. Kimberlé Crenshaw makes a similar argument about the important role of language and expression in "black" identity formation. She observes that:

> We all can recognize the distinction between the claims "I am Black" and the claim "I am a person who happens to be Black." "I am Black" takes the socially imposed identity and empowers it as an anchor of subjectivity. "I am Black" becomes not simply a statement of resistance but also *a positive discourse of self-identification*, intimately linked to celebratory statements like the Black nationalist "Black is

In *Dale*, however, the Court treats identity as a fixed, clinical phenomenon. The *Dale* decision is not the first occasion for judicial misconstruction of gay and lesbian identity. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,[176] the Court unanimously held that the First Amendment precluded enforcement of the Massachusetts public accommodations law to force defendants to include a group of gay, lesbian, and bisexual marchers in the Boston St. Patrick's Day Parade.[177] The Court concluded that the parade organizers were not attempting to exclude "homosexuals *as such*," but had simply decided not to include gays, lesbians, and bisexuals who wished to march in the parade with a banner identifying themselves as gay, lesbian, and bisexual Irish-Americans.[178] The Court held that the parade organizers merely excluded unwanted speech from the parade, not persons with a disfavored status.[179] Even assuming a separability of speech and identity, the *Hurley* decision ignored the factual record that

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> beautiful." "I am a person who happens to be Black," on the other hand, achieves self-identification by straining for a certain universality (in effect, "I am first a person") and for a concommitant dismissal of the imposed category ("Black") as contingent, circumstantial, nondeterminant. There is truth in both characterizations, of course, but they function quite differently depending on the political context. *At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it.*

Id. (emphasis added). The processes that construct "queer" and "black" identities do not exist in separate spheres. *See* Darren Lenard Hutchinson, *"Claiming" and "Speaking" Who We Are: Black Gays and Lesbians, Racial Politics, and the Million Man March, in* BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 28 (Devon W. Carbado ed., 1999) (discussing the construction of black gay identity).

175. Nan Hunter argues that:

> Expression is the crucible in which identity is formed. Identity cannot exist subjectively without the constitutive impact of complex discursive systems, one of which is expression. Discourses shape individual experiences of self-identification, in part by a process of normalization that makes particular differences matter. Ideas shape identity, and culture creates the self, at least as much as the reverse. Identity is not a prediscursive, biological given.

Hunter, *supra* note 23, at 9.

176. 515 U.S. 557 (1995).

177. *See id.* at 559.

178. *Id.* at 572 (emphasis added). Specifically, the Court held that the parade organizers

> disclaim[ed] an intent to exclude homosexuals as such, and no individual member of [the gay, lesbian, and bisexual Irish-American group (GLIB)] claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.

Id.

179. *Id.*

strongly indicated that the parade organizers were in fact reacting to the plaintiffs' sexual identity, rather than their speech.[180] More importantly, in both *Dale* and *Hurley*, the Court fails to recognize that self-proclamations of gay, lesbian, bisexual, and transgender identity are fundamental to the construction and survival of these identities.[181] The Court, instead, understands sexual identity as a clinical status, rather than a product of expression and human interaction.[182]

The *Dale* dissenters do not prove more knowledgeable than the majority on this point. Justice Stevens, joined by Justices Breyer, Ginsburg, and Souter, explicitly embraces a distinction between gay and lesbian "conduct" and "status."[183] According to Justice Stevens, the Boy Scouts' evidence only demonstrates, at most, that the organization disapproves of homosexual "conduct" rather than homosexual "status" and that the group expelled James Dale based on his "sexual orientation" alone.[184] The dissenting justices also focus on the narrow and remote nature of Dale's expression, rather than linking his speech and identity.[185] Justice Stevens, for example, argues that the record does not support a finding that Dale "ever advocated a view on homosexuality to his troop before his membership was revoked"[186] or that he "would advocate any views on homosexuality to his troop"[187] if his membership were reinstated. While these facts might ultimately bear on whether Dale's membership in the Boy Scouts would impair the group's purported expression,[188] the dissenting opinion missed a

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180. *See* Hutchinson, *supra* note 23, at 103 (arguing that the record in *Hurley* contained ample evidence of the parade organizer's discriminatory intent).

181. *Id.* at 122 ("Public self-identification plays an important role in the formation of complex social identities.").

182. *See* PHELAN, *supra* note 166, at 19-35 (criticizing the "medicalization" of homosexuality by conservative and liberal thinkers); David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1303-21, 1350-61 (1999) (discussing the oppression of gays and lesbians through the medical pathologizing of homosexuality).

183. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 676 (2000) (Stevens, J., dissenting) (arguing that Dale was excluded because of his sexual "orientation," not because of his sexual "conduct").

184. *See id.* (Stevens, J., dissenting) (arguing that the Boy Scouts' memoranda can only possibly indicate that "'homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed,'" that "New Jersey's law prohibits discrimination on the basis of sexual orientation" and that "when Dale was expelled from the Boy Scouts, [the organization] said it did so because of his sexual orientation, not because of his sexual conduct").

185. *See id.* at 688-92 (Stevens, J., dissenting).

186. *Id.* at 689 (Stevens, J., dissenting).

187. *Id.* at 690 (Stevens, J., dissenting).

188. *See infra* notes 312-318 and accompanying text. During the completion of this Article, the District of Columbia Commission on Human Rights ruled that the First

vital opportunity to correct the Court's artificial separation of identity and expression in both *Dale* and *Hurley*.[189]

The work of Shane Phelan, a theorist in lesbian studies, contests essentialist, clinical understandings of sexual identity.[190] Phelan urges scholars to conceive of identity as a "process."[191] Phelan views public declarations of a marginalized sexual identity not as the simple acknowledgment of a fixed status, but as part of an intricate process of identity construction.[192] Under Phelan's persuasive framework,

> [t]he closet changes. Leaving the closet is not a matter of simple visibility, but is a reconfiguration of the self. It is a project rather than an event. Becoming lesbian is indeed a process of resistance to patriarchal heterosexuality. It is not the discovery or revelation of one's resistance but is the resistance itself. Furthermore, this project is never complete. One is never "finally," "truly" a lesbian, but becomes lesbian or not with the choices one makes.[193]

Phelan's conceptualization of identity as an expressive and deliberative process, rather than as a biological imposition, provides a richer lens for understanding the facts underlying the dispute in *Dale*, particularly those facts that relate to James Dale's expression of his sexuality. Dale admits that he

> lived a double life while in high school, pretending to be straight while attending a military academy.
>
> He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.
>
> I was looking for a role model, someone who was gay and accepting of me . . . a community that would take [me] in and provide [me] . . . with a support network and friends.[194]

Amendment does not shield the Boy Scouts' discriminatory discharge of two gay male leaders. *See* Pool v. Boy Scouts of Am., Nos. 93-030, 93-031 (D.C. Comm'n on Human Rights June 18, 2001), *available at* http://www.rdblaw.com/boyscouts.pdf. The Commission distinguished the *Dale* decision on the grounds that the two complainants did not advocate any viewpoints concerning homosexuality within the Boy Scouts. *See id.* at 61-62.

189. Because *Hurley* was unanimously decided, the *Dale* dissent's failure to address the relationship between speech and expression is not entirely surprising.

190. *See* SHANE PHELAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS 41-56 (1994).

191. *Id.* at 52.

192. *Id.* at 51 (criticizing the traditional view that sees coming out simply as an act of "revelation, an acknowledgment of a previously hidden truth").

193. *Id.* at 52.

194. Boy Scouts of Am. v. Dale, 530 U.S. 640, 689-90 (2000) (Stevens, J., dissenting) (quotations omitted).

Dale's "narrative" illustrates Phelan's processual theory of identity: Dale's openness and expression, including antiheterosexist political participation, allowed him to shed the oppression of the closet and invisibility and to find a community of peers to provide a stable environment in which to "become" gay. Hence, Dale's outness and political activities were not mere disclosures of a hidden status. Instead, these activities allowed him to "fashion[] a self . . . that did not exist before coming out began."[195] Dale's expression and association thus constituted the mechanics of identity formation; Dale's expression and his gayness were inseparable.[196]

C. Dale, *Closeted Identity, and the Perpetuation of Social Inequality*

The Court fails to treat Dale's sexuality-related expression as connected to his sexual identity. Instead, the expressive dimensions of Dale's identity *bolstered* the Boy Scouts' expressive association defense, rather than providing him the intended protection of the New Jersey civil rights law.[197] The Court thus conditions equality on the silencing of subjugated classes[198]—which directly contradicts gay and lesbian equality efforts and the scope of equality defined by the statute at issue in the litigation.[199] Because Dale's expression constituted and

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195. PHELAN, *supra* note 190, at 52.

196. There are several works on the social construction of sexual identity. *See, e.g.*, FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY (Edward Stein ed., 1990); PHELAN, *supra* note 190; Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, *in* HOMOSEXUALITY, WHICH HOMOSEXUALITY? ESSAYS FROM THE INTERNATIONAL CONFERENCE ON LESBIAN AND GAY STUDIES 13 (Dennis Altman et al. eds., 1988); Larry Catà Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996); Chesire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 VA. L. REV. 1859 (1993); William N. Eskridge, Jr., Review Essay: *A Social Constructionist Critique of Posner's* Sex and Reason*: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992); Halley, *supra* note 23; Morris B. Kaplan, *Constructing Lesbian and Gay Rights and Liberation*, 79 VA. L. REV. 1877 (1993); Knauer, *supra* note 131, at 1031-49 (discussing the expressive nature of nonheterosexual identity); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993); Milton C. Regan, Jr., *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515 (1993);.

197. *See Dale*, 530 U.S. at 653-54, 661.

198. *See* Hutchinson, *supra* note 23, at 123-24 (arguing that a constitutional theory that permits outness discrimination legitimates class-based discrimination against gay, lesbian, bisexual, and transgender individuals).

199. The NJLAD prohibits discrimination on the basis of "affectional or sexual orientation" in places of public accommodation. N.J. STAT. ANN. § 10:5-4 (West Supp. 2001). The statute defines affectional or sexual orientation as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, *identity or expression*, having a history thereof or being perceived, presumed or identified by others as having such an orientation."

constructed his identity, it warranted protection under the antidiscrimination statute.

The recognition of expressive identity, however, does not mean that forms of identity expression will necessarily supplant an organization's right of expressive association.[200] The *Roberts* framework makes clear that the right of expressive association allows an organization to exclude persons whose political commitments would impair the group's ability to conduct effectively its expressive activities.[201] Thus, the *Roberts* doctrine compels judicial consideration of Dale's expressive activities. *Dale*, however, remains flawed because its dichotomization of speech and identity could unduly restrict equality in the broader civil rights context and in the specific realm of public accommodations litigation.

1. *Dale* Limits Equality in the Broader Civil Rights Context

The Court's disaggregation of expression and speech has troubling implications for the broader context of equality litigation. If the Court adheres strictly to its clinical conception of identity and its legitimization of outness discrimination, discriminators in lawsuits that do not implicate a First Amendment defense, such as public and private employment discrimination and equal protection cases, could disclaim any intention to exclude gays, lesbians, bisexuals, and transgender people based on status alone. Relying on *Dale*'s severing of speech and identity, these defendants could potentially shield their discrimination by framing it as the "permissible" exclusion of an individual's conduct or speech, rather than discrimination on account of their constitutionally or statutorily protected status.[202] Because a

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Id. § 10:5-5hh (emphasis added). Although the statute lists identity and expression as separate categories, it provides a remedy for discrimination on the basis of outness.

200. *See* Hunter, *supra* note 23, at 20 (arguing that the recognition of speech as identity does not answer the question of whether a defendant can successfully advance an expressive association defense).

201. *See supra* Part II.B.3.

202. *See* Hutchinson, *supra* note 23, at 124 ("The doctrinal treatment of outness discrimination as a permissible form of discrimination, one distinct from gay and lesbian discrimination, would severely complicate gay rights efforts and provide discriminators with a convenient route to avoid compliance with civil rights regulations."). Many scholars have criticized antidiscrimination jurisprudence for often failing to recognize the cultural and expressive dimensions of identity and thus legitimating a host of discriminatory practices. *See, e.g.*, Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 839 (1987) (arguing that "[i]ndividuals ... conceive their special identities through a wide amalgam of acts" and, consequently, "we must criticize the cavalier fashion with which courts dismiss individuals' claims that employers' racially, sexually, or ethnically premised rules unjustly restrict personal integrity

heteronormative social structure views expressions of gay and lesbian sexuality as departures from "correct" or "normal" culture, ideology, and politics,[203] antidiscrimination jurisprudence that legitimizes the subordination of such expression will simply reinforce heterosexism and limit the achievement of social equality.

2. *Dale* Limits Equality in the Public Accommodations Context

The Court's separation of outness and identity also restricts the achievement of equality in the context of public accommodations litigation, where an association might have a more credible First Amendment defense. The *Roberts* doctrine allows associations to justify a policy of discrimination against a protected class of individuals by linking such discrimination to the pursuit of a clear expressive goal.[204] This test recognizes that the inclusion of certain undesired individuals may impede the group's ability to express the very ideas that its members associate to express.[205] The *Dale* decision

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and expression"); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 366-67, 371-81, 385-88 (criticizing courts for not treating employers' regulation of black women's physical appearance in the workplace as a form of racial, gender, and cultural domination); Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1367-72 (1997) (arguing that courts fail to treat employers' Spanish language discrimination as a manifestation of national origin discrimination because they do not appreciate the centrality of Spanish language in constructing Latino/a identity); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2008 (2000) (arguing that the doctrinal treatment of "race as an immutable trait means that merely 'cultural' behaviors and practices do not receive legal protection unless they can be strongly linked back to the 'immutable' characteristics of race or national origin" and that "[t]he separation of 'race' from 'culture' ... gives employers and government agencies broad room to force employees marked as racially 'other' to assimilate to a socially 'white' standard").

203. Heterosexuality forms the hidden norm of cultural and political expression in heterosexist society. *See* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY, at xxi (Michael Warner ed., 1993) ("Het[erosexual] culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist."); Fajer, *supra* note 165, at 602 ("In everyday public life, we are bombarded with people asserting, directly and indirectly, their non-gay sexual orientation.... Given the strong non-gay presumptions that exist in our culture, most people assume that public allusions to sex, intimate association, and desire refer to non-gay interactions."). For a general discussion of heteronormativity in social theory, see FEAR OF A QUEER PLANET, *supra*, at xxi-xxv.

204. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984); *see supra* Part II.B.

205. In *Roberts*, the Court held that:

> 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

points to James Dale's identity-linked expression and finds that such expression justifies the Boy Scouts' concern that he will impede the organization's pursuit of an allegedly heterosexist agenda.[206] The opinion explains that Dale's outness would compel the Boy Scouts "to send a message, both to the youth members and the world, that [the organization] accepts homosexual conduct as a legitimate form of behavior."[207] The decision also distinguishes Dale's outness from mere membership in a class that the state civil rights statute protects.[208]

Yet, as the social constructionist theory demonstrates, Dale's gay identity and his expression are irreversibly intertwined. Accordingly, when the Court enshrines the Boy Scouts' outness discrimination with constitutional protection, it condones the exclusion of gays, lesbians, bisexuals, and transgender people, *as such*, from the organization,[209] despite holding that the expressive association defense would not shield such blanket discrimination.[210]

Furthermore, the Court openly embraces status-based discrimination when it rejects Dale's argument that the Boy Scouts does not really condemn homosexuality or need to exclude individuals who advocate antiheterosexist positions because the organization does not expel *heterosexuals* who oppose homophobic discrimination.[211] The Court dismisses this evidence, arguing that "[t]he 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."[212] Even assuming a possible separation of

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express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

468 U.S. at 623.

206. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653-56 (2000).

207. *Id.* at 653.

208. *Id.* at 653-54.

209. *See* Hunter, *supra* note 23, at 19-20 (discussing *Hurley*'s holding that parade organizers could exclude the "message" of the gay and lesbian group and arguing that "[t]o exclude that message is to exclude that identity, as it is the full identity claim that makes equality a meaningful concept"); Hutchinson, *supra* note 23, at 123-24 (arguing that the parade organizers' exclusion of the gay and lesbian group's "message" in *Hurley* "constituted an act of discrimination based on gay, lesbian and bisexual identity").

210. *Dale*, 530 U.S. at 653 ("That is not to say that an expressive association can erect a shield against discrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.").

211. *Id.* at 655 ("In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant.").

212. *Id.* at 655-56.

speech and identity, if the Boy Scouts' homophobic discrimination relates solely to speech or viewpoint, rather than to identity, then the Court's distinction between openly pro-gay heterosexuals and out gays is both unwarranted and unprincipled. The only difference between the gay and heterosexual "speakers" is their sexual identity, but the Court's own analysis purports to disapprove of mere class-based discrimination. Moreover, the *Dale* opinion does not contemplate *any* circumstances where an "avowed homosexual," like pro-gay heterosexuals, would not threaten the Boy Scouts' speech.[213] Thus, while the Court maintains that it has only legitimized a narrow band of discrimination based on viewpoint, it has in fact endorsed class-based discrimination, which frustrates the goal of social equality.[214]

3. The Combined Effect of *Dale*'s Deference to Discriminators and the Separation of Speech and Identity Seriously Threatens Social Equality

Dale's negative impact upon the achievement of social equality is most readily seen when one considers the combined effect of its novel, deferential evidentiary analysis and its disaggregation of speech and identity. The Court's newly minted deference standard lowers the evidentiary burden required of discriminators seeking to prove both the content of, and threats to, their expressive activities.[215] In addition, the Court has deemed outness discrimination a permissible basis for exclusion, if the discriminator engages in heterosexist expression.[216] As a result of these two holdings, organizations have much more room to engage in homophobic discrimination. Now, an association need only point to ambiguous evidence, a significant portion of which could involve post-litigation statements, to establish that it disapproves of nonheterosexual intimacy and then simply argue that the victims of its discrimination are openly gay and, thus, a threat to the effectuation of the group's amorphous heterosexist message. Even a narrow reading of *Dale* would substantiate an expressive association defense under this

213. *See id.* at 656; *see also* Hunter, *supra* note 23, at 21-22 (criticizing the Court for conflating identity with First Amendment advocacy).

214. The fact that expression constitutes identity does not mean that a place of public accommodation cannot exclude the individuals engaged in such expression. The *Dale* decision, however, finds that outness alone proves the Boy Scouts' expressive association defense. See *Dale*, 530 U.S. at 655-56. The dissent, by contrast, attempts to determine whether Dale's speech actually interferes with the Boy Scouts' mission. *Id.* at 683-98 (Stevens, J., dissenting).

215. *See supra* Part II.C.

216. *See supra* Part III.A.

hypothetical scenario, for an association that merely engages in "some" speech can prove an expressive association defense under the Court's deferential analysis.[217] *Dale*, if strictly followed, would permit almost any association that engages in some murky speech to exclude openly gay, lesbian, bisexual, and transgender individuals. The decision thus imperils the enforcement of laws that seek to protect gay, lesbian, bisexual, and transgender people from discrimination.[218]

IV. THE CLOSETING OF DISAGREEMENT WITH THE *ROBERTS* DOCTRINE AND INSENSITIVITY TO "GAY RIGHTS"

A. *The Closeting of Disagreement with the* Roberts *Doctrine*

The foregoing analysis has demonstrated that *Dale* significantly departs from the evidentiary and equality concerns pursued by the *Roberts* doctrine. In the *Roberts* line of cases, the Court engaged in a careful analysis of the organizations' claims that their discrimination furthered expressive interests and that the forced inclusion of protected classes of persons in the associations would frustrate their speech.[219] The *Roberts* standard required that courts closely examine the evidentiary record to determine the exact nature of the defendants' asserted expressive activities and to discover whether enforcement of a civil rights statute would complicate these interests.[220] In *Dale*, the Court greatly lessens the evidentiary burden on civil rights defendants, and it narrowly defines sexual identity as existing apart from expression or conduct, the latter of which associations could freely exclude under an expressive association rationale.[221] The Court employed a similarly lax evidentiary standard in *Hurley*, though perhaps with greater justification than *Dale*, holding that "a narrow,

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217. *See Dale*, 530 U.S. at 655 ("[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.").

218. *Id.* at 701-02 (Souter, J., dissenting) (arguing that "no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way" and that "[t]o require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, *would convert the right of expressive association into an easy trump of any antidiscrimination law*" (emphasis added)); *cf.* Gretchen Van Ness, *Parades and Prejudice: The Incredible True Story of Boston's St. Patrick's Day Parade and the United States Supreme Court*, 30 NEW ENG. L. REV. 625, 660 (1996) (arguing that the "implications" of a strict application of *Hurley* are "staggering").

219. *See supra* Part II.B.3.

220. *See id.*

221. *See supra* 106-163 and accompanying text.

succinctly articulable message is not a condition of constitutional protection."[222] The *Hurley* decision also severed sexual identity from expression and action, adopting a static and clinical conception of sexuality.[223] Thus, in two gay and lesbian equality cases, the Court has applied a more deferential evidentiary standard when considering First Amendment defenses against the application of state public accommodations statutes.

Despite the significant differences between the *Dale* and *Hurley* decisions and the *Roberts* trilogy, neither *Dale* nor *Hurley* attempted to isolate problems associated with the *Roberts* test, nor did the Court express any explicit disapproval of the *Roberts* line of cases.[224] In fact, the Court cites to *Roberts* as relevant precedent in *Dale*,[225] and it attempted to place its rulings in both cases within the *Roberts* framework despite the fact that *Hurley* was decided primarily as a "free speech" rather than an "expressive association" case.[226] Yet, a majority of the Court abandons the essential elements of the *Roberts* doctrine in *Dale*, and in *Hurley* a unanimous Court failed to apply the fundamentals of *Roberts*. In neither case did the Court analyze the more stringent evidentiary requirements of the *Roberts* doctrine, nor did the Court attempt to reconcile its new deferential analysis with the *Roberts* framework.[227] The fact that the Court has applied a different standard than *Roberts* in the two most recent cases raising speech defenses suggests that the Court has in fact "quietly" overruled the *Roberts* doctrine.

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222. Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995). *Hurley* may have had a stronger doctrinal footing to apply this more lenient standard. Once the Court concluded that the parade and its individual units were speakers, then it could logically conclude that the components of the parade's "message," however amorphous, were determined by which units were allowed to participate. *See id.* at 568-70. For a criticism of this view, see Hutchinson, *supra* note 23, at 110-13 (criticizing *Hurley*'s departure from *Roberts*' articulable message requirement).

223. *Hurley*, 515 U.S. at 572 (making a distinction between excluding gays and lesbians "as such" and excluding them from a parade as a "parade unit carrying [a] banner").

224. *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657-59 (discussing the appropriate standard of review); *Hurley*, 515 U.S. at 572, 580 (discussing *Roberts* and *N.Y. State Club Ass'n* decisions).

225. *See, e.g.*, *Dale*, 530 U.S. at 657-59 (discussing provisions of *Roberts*).

226. *See id.* (discussing provisions of *Roberts*); *Hurley*, 515 U.S. at 580 (holding that outcome of case would not differ under *Roberts* doctrine). Although *Hurley* abandoned the expressive association framework utilized in the lower courts, the Court nevertheless held, alternatively, that its decision would not differ under the *Roberts* doctrine. *Id.*

227. *See generally Dale*, 530 U.S. at 657-59 (discussing the appropriate standard of review); *Hurley*, 515 U.S. at 572, 580 (discussing *Roberts* and *N.Y. State Club Ass'n* decisions).

It is not immediately clear why the Court would not openly express its disagreement with the *Roberts* doctrine. One explanation, however, appears plausible: the Court may want to hide its disagreement with *Roberts* in order to embrace facially the principles of stare decisis and constitutional fidelity. As the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* demonstrates, the Court places, at least rhetorically, a premium on fidelity to precedent.[228] Accordingly, the Court might not want to overrule explicitly the *Roberts* line of cases absent a compelling justification.[229] The Court's closeting of its apparent disapproval of the *Roberts* doctrine, however, makes its own jurisprudence dishonest and creates confusion among the lower courts.[230] In both *Hurley* and *Dale*, for example, the state appellate and supreme courts issued opinions that conformed to *Roberts*' more stringent evidentiary analysis.[231] The Court ultimately reversed these decisions, but it never overruled the doctrinal framework employed by the lower courts. The Court's "new" expressive association doctrine, which cites to, yet departs from, governing precedent, simply clouds what was previously a fairly stable body of law.[232]

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228. 505 U.S. 833, 854 (1992) ("[W]e recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.") (citation omitted).

229. *Id.* (arguing that the necessity for stare decisis would cease to exist "if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed").

230. *Cf. id.* at 954 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that the *Casey* "joint opinion" claims to adhere to *Roe v. Wade*, 410 U.S. 113, 162-65 (1973), but it "instead revises [*Roe*]" and that as a result "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality"); *id.* at 966 (Rehnquist, C.J., concurring in part and dissenting in part) ("[*Roe*] stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis . . . is imported to decide the constitutionality of state laws regulating abortion.").

231. *See* Boy Scouts of Am. v. Dale, 734 A.2d 1196, 1219-29 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000) (applying *Roberts* and finding that the defendant's exclusion of openly gay individuals did not relate to any expressive activities of the association); Irish-American Gay, Lesbian & Bisexual Group v. City of Boston, 636 N.E.2d 1293, 1298-1300 (Mass. 1994), *rev'd sub nom.* Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 580 (1995) (applying *Roberts* and upholding the lower court's conclusion that the defendant's exclusion of gay, lesbian, and bisexual group from parade did not further a clear expressive purpose).

232. *Cf. Casey*, 505 U.S. at 987-88 (Scalia, J., concurring in part and dissenting in part) (criticizing "joint opinion" for creating confusion by purporting to uphold *Roe* but creating a new standard).

B. *The Closeting of Insensitivity to "Gay Rights"*

In addition to hiding its opposition to *Roberts*, the Court also obscures several of the justices' disagreement with efforts to attain equality for gay, lesbian, bisexual, and transgender individuals. A number of commentators have provided extensive documentation of the history of judicial hostility to gay, lesbian, bisexual, and transgender plaintiffs and to their claims for equality.[233] The work of Patricia Cain, for example, catalogues the role of courts in sustaining heterosexist domination.[234] Potentially, judicial intolerance toward, or misunderstanding of, gay, lesbian, bisexual, and transgender experiences can negatively affect queer plaintiffs in any type of litigation or criminal proceeding.[235]

The Supreme Court is not immune from displaying antigay hostility. Several justices, particularly members of the *Dale* majority, have expressed their strong disapproval of gay and lesbian equality and have disparaged claims that the Constitution stands as a bar to governmental discrimination on the basis of sexual orientation and to governmental infringement of gay, lesbian, bisexual, and transgender sexual autonomy.[236]

Justice Scalia, for example, wrote a stinging dissent in *Romer v. Evans* in which he passionately contested a construction of the Equal Protection Clause that would invalidate heterosexist state laws.[237] In *Romer*, a majority of the Court applied "rational basis review"[238] and

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233. *See generally* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993); Fajer, *supra* note 165; Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 805-37 (1979); Amy D. Ronner, Bottoms v. Bottoms*: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341 (1995); Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 147-78 (1992).

234. *See* Cain, *supra* note 233.

235. *See, e.g.*, Mison, *supra* note 233 (discussing criminal law jurisprudence that legitimates homophobic violence); Ronner, *supra* note 233 (discussing judicial biases against gay and lesbian parents).

236. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636-52 (1996) (Scalia, J., dissenting).

237. *Id.* (Scalia, J., dissenting).

238. Several commentators have argued that the Court applied a level of review that is "stronger" than traditional rationality analysis. *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 327 (1997) (including *Romer* on a list of cases representing "rational basis [review] with [a] bite" (citation omitted)); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 399 (1998) (same); John H. Turner, *Solid Waste Flow Control: The Commerce Clause and Beyond*, 19 MISS. C. L. REV. 53, 90 (1998) ("*Romer* is, therefore, not simply a victory for gay rights advocates—it is

invalidated a Colorado constitutional amendment that repealed and banned the enactment of laws that prohibited discrimination against gays, lesbians, and bisexuals.[239] Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, chastised the majority of the Court for treating, from his perspective, homophobic animus as strongly as "racial or religious bias."[240] Justice Scalia described "homosexuals" as a "politically powerful" and wealthy class that had aggressively utilized the political process to obtain full legal protection for its aberrant sexual practice.[241] Justice Scalia construed the state constitutional provision as a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[242]

Justice Scalia's arguments deny the existence of gay and lesbian subordination, and they invert the social reality of heterosexist domination. His analysis falsely describes gays, lesbians, and bisexuals as a socially privileged class with a dominant voice in state and local politics.[243] Justice Scalia's erasure and denial of homophobic subjugation allows him to misportray the heterosexist law as an

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an unequivocal and triumphant return to the 'rational basis with bite' approach."). For a general discussion of "rational basis with bite," see Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

239. The now-invalidated amendment provided that:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of *discrimination.*

See Romer, 517 U.S. at 624 (emphasis added).

240. *Id.* at 636 (Scalia, J., dissenting). Because the Court only applied rational basis review ("with a bite" or otherwise), it did not treat antigay discrimination as seriously as it does racial or religious bias.

241. Justice Scalia argued that

> because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.

Id. at 645-46 (Scalia, J., dissenting) (citations omitted).

242. *Id.* at 636 (Scalia, J., dissenting).

243. *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 291 (1994) (arguing that antigay rhetoric "depicts comfortable gay and lesbian lives").

innocent and constitutionally permissible attempt to restore balance in the democratic process. Justice Scalia's obfuscation of heterosexist domination also permits him to challenge generally the notion that gays and lesbians need judicial solicitude to guard against prejudice in the political process.[244] Justice Scalia's rejection of a constitutional basis for gay and lesbian equality rests firmly upon a patently untrue premise: the notion that gays and lesbians are a socially dominant group.[245]

In a passage that is, perhaps, most indicative of his hostility to gay and lesbian equality, Justice Scalia characterizes the Colorado amendment as the result of a presumably harmless Kulturkampf, rather than an attempt by Colorado voters to harm unilaterally gays, lesbians,

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244. *See* URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 250-52 (1995) (observing that antigay and lesbian political campaigns falsely advance the notion of gay wealth in order to disparage gay and lesbian civil rights efforts); Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 168, at 69 (arguing that antigay discourse claims that "gays, lesbians, bisexuals and the transgendered do not need civil rights protection because they lead comfortable lives, are wealthy and powerful, and have the ability to conceal their sexual identity and evade discrimination" (citations omitted)); Schacter, *supra* note 243, at 291-92 (arguing that "opponents of gay civil rights claim that gay men and lesbians are economically well-off and therefore do not need legal protection"). *See generally* Hutchinson, *"Gay Rights" for "Gay Whites,"* *supra* note 168, at 1368-82 (discussing the social construction of gays and lesbians as white and wealthy and analyzing the impact of this stereotype upon civil rights discourse).

245. *See supra* note 244 and accompanying text (discussing the false notion of gay and lesbian power). The false construction of subjugated classes as "powerful" by opponents of civil rights enforcement and perpetrators of oppressive violence has a long history. *See* HAROLD E. QUINLEY & CHARLES Y. GLOCK, ANTI-SEMITISM IN AMERICA 2-10 (2d ed. 1983) (describing stereotypes of Jews as "monied" and "power hungry"); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1258-59 (1993) (discussing stereotypes of Asian Americans as "hardworking, intelligent, and successful" and arguing that such stereotyping "permits the general public, government officials, and the judiciary to ignore or marginalize the contemporary needs of Asian Americans"); Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1931 & nn.37-38 (1993) (discussing anti-Asian American stereotypes and observing that "Asian Americans are seen as *unfair competitors* who pose an unwelcome economic threat"). As early as 1883, the Supreme Court described antiracist laws as "special" handouts to blacks. In *The Civil Rights Cases*, 109 U.S. 3 (1883), the Court invalidated a federal public accommodations law as exceeding the scope of congressional power. *Id.* at 23-25. Justice Bradley's opinion in the *Civil Rights Cases* questions the need for civil rights protection for blacks:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .

Id. at 25.

or bisexuals.[246] He also contends that this Kulturkampf does not trigger constitutional concerns.[247] The term Kulturkampf refers broadly to "any struggle between groups over a common national culture. It presupposes both the existence of social groups with distinct identities and conflicts between them over values, status, power, and authority."[248] Originally, Kulturkampf described the attempt by German nationalists, led by Otto von Bismarck, to quash the growing political power of the Catholic Church in the late-nineteenth century.[249] Both definitions of a Kulturkampf implicate human rights concerns, Justice Scalia's statements notwithstanding.[250] Justice Scalia demonizes and marginalizes gay and lesbian equality efforts by dismissing heterosexism as harmless and beyond a constitutional remedy.

Justice Scalia, again with Chief Justice Rehnquist and Justice Thomas, also dissented from the Court's grant of certiorari in *Equality Foundation v. City of Cincinnati*, a case involving a city ordinance that, like the Colorado amendment, bans the enactment of laws or policies prohibiting discrimination against gays and lesbians.[251] A majority of the Court vacated a court of appeals decision upholding the statute and remanded the case for a decision in light of *Romer*, which was decided

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246. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a 'bare . . . desire to harm' homosexuals . . . ." (quotations omitted)).

247. *See id.* (Scalia, J., dissenting) (arguing that Colorado's opposition to gay and lesbian equality "and the means chosen to achieve it, are . . . unimpeachable under any constitutional doctrine hitherto pronounced.").

248. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2319 (1997).

249. *See id.* at 2318-19 & n.17.

250. As Professor Balkin has argued,

> Scalia was right to see *Romer* as part of a larger struggle over morality and culture. But he was wrong to think that the Constitution is necessarily silent in such a struggle. Just as the original Kulturkampf in Germany implicated human rights questions, so too group conflict over social status and moral authority is one of the deep concerns of the Constitution. The question is not whether the Constitution is implicated in cultural struggles, but how it is implicated.

Id. at 2319. *See also* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 208-21 (1996) (arguing that the constitutional prohibition of "bills of attainder" provides a constitutional tradition for legitimating *Romer* decision).

251. 518 U.S. 1001, 1001 (1996) (Scalia, J., dissenting). The ordinance provides that

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

Equal. Foundation v. City of Cincinnati, 128 F.3d 289, 291 (6th Cir. 1997).

during the pendency of the petition for certiorari.[252] Justice Scalia dissented and argued against any construction of the Equal Protection Clause that would void laws, like those in *Romer* and *Equality Foundation*, that strip and deprive gays and lesbians of statutory civil rights protection.[253] Justice Scalia framed the issue as one of democratic theory and, siding with the heterosexist majority, concluded that "[u]nelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are [sic] concerned, *be permitted to do what they please*."[254] Justice Scalia's analysis in *Equality Foundation*, together with his position in *Romer*, clearly indicates that he will not support a construction of the Equal Protection Clause (or Fifth Amendment Due Process Clause) as prohibiting homophobic discrimination. Chief Justice Rehnquist and Justices Scalia and Thomas' general opposition to antiheterosexist legal reform efforts likely informs their analysis in *Dale*.[255]

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252. *See Equal. Foundation*, 518 U.S. at 1001 (Scalia, J., dissenting). On remand, the court of appeals sustained the ordinance. *See Equal. Foundation*, 128 F.3d at 301.

253. *See Equal. Foundation*, 518 U.S. at 1001 (Scalia, J., dissenting).

254. *Id.* (Scalia, J., dissenting) (emphasis added). Justice Scalia argued that the notion that the homophobic ordinance violated the constitution was "an absurd proposition." *Id.* (Scalia, J., dissenting).

255. Several commentators have argued that the *Romer* decision is a "gay rights victory." *See, e.g.*, Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271, 272 (1999) (observing that "[c]ommentators heralded [*Romer*] as a victory for gay rights"); Andrew M. Jacobs, Romer *Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893, 951-69 (praising *Romer* as a decision that marks a break from judicial homophobia and which could signal the demise of a variety of heterosexist laws). On the surface, these arguments seemingly complicate my claim that members of the Court are insensitive to gay and lesbian equality. For the following reasons, however, this assertion is unsound. First, this Article has carefully identified specific justices who have expressed hostility to gay and lesbian equality. Second, *Romer* itself only applied "rational basis review"; thus, it does not implicate broader homophobic discrimination. *See* Dodson, *supra*, at 285 (arguing that the Court "side stepped" the issue of heightened scrutiny in *Romer*). Third, *Romer* involved discrimination on the basis of an abstract "homosexual" status. *See* Romer v. Evans, 517 U.S. 620, 629-35 (1996). Although the infirm amendment in *Romer* focuses on "sexual orientation" and "conduct, practices, or relationships," the decision does not address a cause of action by a plaintiff who has "expressed" his or her identity, and the opinion focuses on "traits" rather than activity. *See id.* at 624, 633 (arguing that the state constitutional amendment violates equal protection in part because "[i]t identifies persons by a *single trait* and then denies them protection across the board (emphasis added)). *Dale* and *Hurley* demonstrate that the Court does not recognize queerness in practice or as a lived quantity. *See supra* notes 149-188 and accompanying text. *Romer*'s focus on sexual "traits" could reflect and reinforce this flawed jurisprudence. *See* Janet E. Halley, Romer *v.* Hardwick, 68 U. COLO. L. REV. 429, 438-45 (1997) (arguing that *Romer* focused on gay and lesbian "status" but not "conduct").

In the privacy context, *Bowers v. Hardwick*, which constitutionalizes governmental proscriptions of "homosexual sodomy,"[256] remains a much disparaged case among legal commentators.[257] In *Hardwick*, the Court held that gay and lesbian sexuality is unconnected to substantive due process precedent that recognizes individual autonomy in areas of sexuality, reproduction, family planning, and marriage.[258] The decision legitimizes heteronormative familial and sexual structures in its conclusion that nonheterosexual intimacy, at least "homosexual sodomy," falls outside the scope of fundamental personal liberty and is, therefore, subject to state suppression.[259] Two members of the *Dale* majority—Chief Justice Rehnquist and Justice O'Connor—joined the majority in *Hardwick*.[260] Furthermore, Justice Scalia's dissent in *Romer* cites *Hardwick* approvingly and argues that the latter decision precludes judicial invalidation of heterosexist legislation under an equal protection analysis.[261] Justice Scalia's invocation of *Hardwick* in

256. 478 U.S. 186, 191-92 (1986) (holding that the Constitution does not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy").

257. *See, e.g.*, Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of* Bowers v. Hardwick, 24 GOLDEN GATE U. L. REV. 1, 10 (1994) ("The inescapable conclusion is that the result in *Hardwick* is about homophobia . . . ."); Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1750-68 (1993) (criticizing as flawed the Court's historical analysis in *Hardwick*); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 799-802 (1989) (arguing that *Hardwick* denies gays and lesbians the ability to define their "personhood"); Thomas B. Stoddard, Bowers v. Hardwick*: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655 (1987) (criticizing the "utter lack of reasoning" in *Hardwick* and arguing that the "explanation" for the opinion "lies in the emotional response of five justices to the subject matter underlying the case as they perceived it, or rather, as they reconstituted it: the subject of homosexuality"); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1828 (1993) (arguing that the *Hardwick* decision "does not calmly reason about homosexuality, but rather rages irrationally against it" and that the decision "discursively makes and marks the sexual difference between heterosexuality and homosexuality that makes homophobia possible . . . [and] does not merely reflect the constitutional legitimacy of the politics of homophobia but, more importantly, is itself an instance of the paranoid juridical forms that politics sometimes takes").

258. *Hardwick*, 478 U.S. at 190-91 (holding that "none of the rights announced in [the Court's privacy jurisprudence] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case" because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated").

259. *See* Dunlap, *supra* note 257, at 10 (describing *Hardwick* as judicial homophobia); Stoddard, *supra* note 257, at 655 (same); Thomas, *supra* note 257, at 1828 (same).

260. *See Hardwick*, 478 U.S. at 187. Although Justice O'Conner would later join the *Romer* majority, *see Romer*, 517 U.S. at 621, this case is not necessarily a "gay rights victory." *See* sources cited *supra* note 255. This observation also applies to Justice Kennedy, who authored *Romer*, but joined the *Dale* majority.

261. Romer v. Evans, 517 U.S. 630, 640-41 (Scalia, J., dissenting) (arguing that the *Hardwick* decision is "unassailable, except by those who think that the Constitution changes

majority maintains that its own personal position with respect to the morality of "homosexual conduct" does not impact its decision.[267] The majority discusses political debates over the social status of gay, lesbian, bisexual, and transgender individuals in response to Justice Stevens' observation in his dissenting opinion that traditional ways of thinking about sexual minorities "have modified" over time.[268] Justice Stevens examines "modifications" in attitudes toward gays and lesbians to argue that the Court has a duty to guard against the "harm" caused by prejudice.[269] The majority contests the relevance of social and judicial attitudes concerning homosexuality, arguing:

> We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[270]

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

268. *See id.* at 699-700 (Stevens, J., dissenting); *id.* at 660-61 (responding to Justice Stevens' arguments).

269. Justice Stevens observes:

> That [heterosexist] prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, "we must be ever on our guard, lest we erect our prejudices into legal principles."
>
> If we would guide by the light of reason, we must let our minds be bold.

Id. at 700 (Stevens, J., dissenting).

270. *Id.* at 661 (quoting *Hurley*, 515 U.S. at 579). Justice Souter, in his dissent, also questions the relevance of social attitudes toward gays and lesbians. After he acknowledges Justice Stevens' observations concerning social stereotyping, Justice Souter argues:

> The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.
>
> . . . .
>
> The right of expressive association does not, of course, turn on the popularity of the views advanced by a group that claims protection. Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group's rights.

Id. at 701 (Souter, J., dissenting). Justice Souter, however, concludes that the Boy Scouts has not substantiated its expressive association defense because the organization has failed "to

the equal protection context implicates an ongoing debate among legal scholars and jurists concerning the relevance of *Hardwick* to gay and lesbian equal protection claims and regarding the precise boundaries of the interplay between due process and equal protection.[262] Justice Scalia, however, has taken a clear position against gay and lesbian equality in his unequivocal approval of *Hardwick* and in his insistence that the decision stands as a bar to judicial invalidation of heterosexist enactments on equal protection grounds.[263]

Finally, the Court's decision in *Hurley*, as in *Dale*, contradicts contemporary understandings of social identity and gay and lesbian experience in its separation of outness and status.[264] Although *Hurley* might have greater legitimacy than *Dale* on narrow, free speech grounds,[265] the Court's flawed construction of sexual identity could legitimize (as it does in *Dale*) outness discrimination in a host of settings.[266] *Hurley*, therefore, could reflect a judicial view that gay and lesbian equality should exist in a limited fashion—if at all.

Despite the reality that the judicial process often perpetuates and legitimizes heterosexist domination and the fact that several justices on the Court openly oppose gay and lesbian civil rights efforts, the *Dale*

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to suit current fashions" and that the decision is "most relevant" to deciding the equal protection question in *Romer*).

262. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170-78 (1988) (criticizing the argument that *Hardwick* precludes the application of equal protection principles to invalidate antigay laws because due process legitimates traditional norms, while equal protection marks a departure from such norms); *see also infra* notes 325-327 and accompanying text. *Compare* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (invoking *Hardwick* to reject the argument that gays and lesbians constitute a quasi-suspect or suspect class and holding that "[i]f the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious") *with* Watkins v. United States Army, 847 F.2d 1329, 1340 (9th Cir. 1988), *vacated on other grounds*, 875 F.2d 699 (9th Cir. 1989) (rejecting argument that *Hardwick* precludes a finding that gays and lesbians constitute a quasi-suspect class because *Hardwick* never "suggests that the state may penalize gays for their sexual orientation" or "holds that the state may make invidious distinctions when regulating sexual conduct").

263. *See, e.g.*, *Romer*, 517 U.S. at 636, 640-41 (Scalia, J., dissenting).

264. *See supra* Part III.A-B.

265. Eskridge, *supra* note 165, at 2463 (arguing that courts should "cautiously" apply *Hurley*); Hunter, *supra* note 23, at 18 ("If one accepts, as the Court did, that the issue [in *Hurley*] was whether parade organizers could be required 'to include among the marchers a group imparting a message the organizers do not want to convey,' then the First Amendment trumping of the equality claim is almost self-evident." (quoting *Hurley*, 515 U.S. at 559)); Hutchinson, *supra* note 23, at 113 (arguing that courts should limit *Hurley* to its facts and that the case should not control the outcome of litigation such as *Dale*); *see also supra* note 222 and accompanying text (distinguishing *Hurley* from *Dale*).

266. *See supra* Part III.C.

The majority's assertion that it must assess the Boy Scouts' speech claim without considering the "rightfulness" of the organization's viewpoints is generally legitimate.[271] The majority, however, does not establish that it, in fact, has not allowed judicial biases to dictate the outcome of the decision. While the Court admonishes the dissenters not to evaluate the Boy Scouts' defense through the lense of personal bias, the majority does not convincingly demonstrate its own purported "neutrality" with respect to gay and lesbian equality. Indeed, several factors suggest that members of the majority were motivated by an opposition to gay and lesbian equality. These factors include: the long history of judicial hostility to gay, lesbian, bisexual, and transgender plaintiffs, judicial insensitivity to gay and lesbian equality efforts, the sudden—yet quiet—doctrinal shift in *Dale* away from existing precedent that is more favorable to James Dale's claim, and the previous, oppositional positions that several justices in the majority have taken in cases litigating gay and lesbian equality and sexual autonomy.[272] It is reasonable, if not likely, that *Dale* hides the Court's insensitivity toward, and misunderstanding of, gay, lesbian, bisexual, and transgender existence behind a "neutral" mantra of "liberty" and "free speech." As jurists and scholars as diverse as Justice Holmes,[273] Judge Learned Hand,[274] Justice Scalia,[275] Justice

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make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message." *Id.*

271. *See id.* (Souter, J., dissenting) (arguing that courts cannot determine an association's rights based on judges' own personal views of the association's viewpoints). While courts cannot penalize an organization that endorses prejudice, the fact that an organization discriminates against socially subordinate groups that have historically endured "irrelevant" exclusion might have some bearing on the credibility of the organization's speech defense. *See infra* notes 295-299 and accompanying text.

272. *See supra* notes 233-266 and accompanying text.

273. *See* Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (criticizing the members of the majority for employing their own beliefs in laissez-faire economic theory to invalidate state economic regulation under a due process analysis).

274. Judge Learned Hand eloquently unveils the reality of judicial subjectivity:

> [J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as "arbitrary," "artificial," "normal," "reasonable," "inherent," "fundamental," or "essential," whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.

LEARNED HAND, THE BILL OF RIGHTS 70 (1958).

275. *See* Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (plurality) (criticizing the "general" concept of liberty advanced by Justice Brennan and arguing instead that in a substantive due process analysis judges must define tradition at its "most specific"

Brennan,[276] legal realists,[277] feminists,[278] critical race theorists,[279] and critical legal studies scholars[280] have argued, in whole or in part,

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level because "general traditions . . . permit judges to dictate rather than discern the society's views").

276. Justice Brennan responds to Justice Scalia's arguments in *Michael H.* concerning the process for defining rights. Justice Brennan argues that a strict, specific construction of liberty simply ratifies biases:

> In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.
>
> The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

Id. at 141 (Brennan, J., dissenting).

277. *See* John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 89 (1995) (arguing that the legal realist indeterminacy thesis "implied that the rules of law could not constrain judges' choices since it was the judges who chose which rules to apply and how to apply them" and that "since such choices were necessarily based on the judges' beliefs about what was right, it was the judges' personal value judgments that consciously or unconsciously formed the basis of their decisions").

278. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237 (1989) ("In male supremacist societies, the male standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all."); Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 316-17 (1993) ("[T]he law's incorporation of a male normative standard may be invisible but it is not inconsequential." (footnote omitted)); Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989) ("The body of law about gender discrimination is widely understood to involve 'women's issues'—thus reinforcing the understanding that 'man' is a genderless, standard creature who does not have to concern himself with gender issues."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 60 (1988) (arguing that one "project" of feminist legal theory is "the unmasking and critiquing of the patriarchy behind purportedly ungendered law and theory").

279. Richard Delgado, Review Essay: *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1152-53 (1993) ("Facially neutral laws cannot redress most racism, because of the cultural background against which such laws operate. But even if we could somehow control for this, formally neutral rules would still fail to redress racism because of certain structural features of the phenomenon itself." (quotations omitted)); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (examining the impact upon the doctrine of the "*transparency* phenomenon" or the "tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-56, 1102-18 (1978) (arguing that the Court has embraced a "perpetrator perspective" in its antidiscrimination jurisprudence because it fails to examine critically the

"neutral" legal doctrine often masks a judge's own personal biases and can reinforce subordination. The argument that judicial opposition to gay, lesbian, bisexual, and transgender equality likely influences some members of the Court in *Dale*, however, does not imply that every legal decision, and even all of those involving issues of sexuality, turn on judicial subjectivity.[281] Instead, to acknowledge the likely operation of judicial bias in *Dale* simply recognizes the explosive social and political context in which civil rights litigation takes place,[282] the limits of law as a vehicle for determinate social change,[283] the ideological

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negative effects of "neutral" laws upon the victims of oppression); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 3 (1991) (examining how color-blind constitutionalism legitimates racial inequality and domination); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 72 (1995) (arguing that the "diversion of resources from racial minorities to whites [effectuated by color-blind jurisprudence] is good, old-fashioned racial discrimination, pure and simple").

280. Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 373, 382 (David Kairys ed., rev. ed. 1990) ("The central point to understand . . . is that contract law today constitutes in large part an elaborate attempt to conceal what is going on in the world."); David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 247 (1984) (arguing that the "results" in legal disputes "come from those same political, social, moral, and religious value judgments from which the law purports to be independent"); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 210 (1979) (arguing that Blackstone's Commentaries are "an instrument of apology—an attempt to mystify both dominators and dominated by convincing them of the 'naturalness,' the 'freedom' and the 'rationality' of a condition of bondage"); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5 (1984) ("Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral.").

281. *See* CHARLES LEMERT, POSTMODERNISM IS NOT WHAT YOU THINK 36-53 (1997) (distinguishing various forms of critical theory and finding a middle-ground in "strategic postmodernism" that works within "modernity," but recognizes the complexity and subjectivity of reason).

282. In *NAACP v. Button*, the Supreme Court characterized racial civil rights litigation as "political expression":

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.

371 U.S. 415, 429 (1963).

283. One commentator has examined the limits of litigating equality in the context of feminism:

> Feminism today, like the broader civil rights movement, is facing up to the limits of the law as a vehicle of social change. Many institutions of private power have proved effectively beyond the reach of the law, and even those rights successfully established often do little to actually better women's lives because of barriers to effective remedy, including the reluctance of conservative courts to

dimensions of juridical analysis,[284] and the prior arguments by several justices that unequivocally and fervently contest constitutional theories of gay, lesbian, bisexual, and transgender equality.[285] Viewed in this broad context, a conclusion that judicial insensitivity to gay, lesbian, bisexual, and transgender equality efforts influences the *Dale* decision is neither implausible nor unreasonable.[286]

V. CREATING AN EXPRESSIVE ASSOCIATION JURISPRUDENCE THAT RESPECTS LIBERTY *AND* EQUALITY

The foregoing analysis unveils how *Dale* diminishes judicial sensitivity toward equality and makes an artificial and destructive distinction between outness and sexual identity. This Article now offers some suggestions for creating an expressive association jurisprudence that does not disparage equality or liberty and for constructing an equality discourse that does not bifurcate sexual

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> enforce the law. After the first flush of legal victories for sex equality in the 1970s, feminist lawyers and advocates suddenly found themselves in the 1980s struggling in the courts and legislatures simply to retain baseline rights for women. In the hostile political climate of the past decade, visionary efforts to transform society through law began to appear increasingly—and perhaps foolishly—naive.

Jane E. Larson, *Introduction: Third Wave–Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252, 1253 (1993) (footnote omitted); *see also* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 3 (1993) ("The inevitability of Supreme Court review is likely to have an adverse effect on minority interests because the Supreme Court has been structured to operate in a manner that is inherently conservative .... [T]he Court's inherent conservatism impairs minority efforts to achieve racial equality."); Richard Delgado & Jean Stefancic, *The Social Construction of* Brown v. Board of Education*: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 568 (1995) ("[R]eformers should hesitate to place much faith in the legal system as the primary instrument for their agendas. Law is relatively powerless to effect social revolutions as both theory and history ... demonstrate."); Linda S. Greene, *Race in the 21st Century: Equality through Law?*, 64 TUL. L. REV. 1515, 1540-41 (1990) (arguing that "it may be necessary to ask whether the confinement of the movement for racial equality to civil rights litigation exposes the movement to great risk" and that such a strategy might not only compromise the achievement of "meaningful equality" but could also diminish "the very legitimacy of alternate avenues to racial justice").

284. *See supra* notes 272-281 and accompanying text.

285. *See supra* notes 234-266 and accompanying text.

286. The trial court was far more open in expressing its hostility to gays and lesbians. For example, to determine that the Boy Scouts in fact had an expressive interest in condemning homosexuality, the court discusses the (irrelevant) biblical story of "Sodom and Gomorrah" and finds that "[i]n the Judeo-Christian tradition the act of sodomy has always been considered a *gravely serious moral wrong*." Dale v. Boy Scouts of Am., No. MON-C-330-92, slip op. at 193A (N.J. Super. Ct. Ch. Div. Nov. 3, 1995) (emphasis added) (on file with *Tulane Law Review*). The court also described Dale as an "active sodomist," and held, citing to the Bible and criminal proscriptions of sodomy, that the suggestion that the Boy Scouts "had no policy against active homosexuality is nonsense." *Id.* at 194A-195A.

identity and expression. This Section first argues that the Court should apply reasonable evidentiary requirements for discriminators in litigation challenging application of civil rights laws by returning to the spirit of the *Roberts* methodology and conducting a more "substantial," rather than deferential, review of the record in these cases. This Section closes by encouraging the Court to consider the role of speech in the formation and maintenance of identity and the negative impact that its disaggregation of expression and identity has upon the attainment of equality.

A. Redeploying the Spirit of the Roberts *Framework*

The *Roberts* doctrine treated equality and expression as important goals. To achieve a balance between these compelling institutional and individual interests, *Roberts* created only a narrow avenue for state interference with associational rights, but the decision also demanded clear evidence from discriminating associations to substantiate the content of their expressive purposes and to prove that admitting an unwanted member into the organization would impede these protected speech interests.[287] The *Dale* decision silently backs away from this doctrine, formally applying the *Roberts* framework, but also holding that it must defer to discriminators in their efforts to prove an expressive association defense against civil rights enforcement.[288] This deference doctrine has severe implications for civil rights enforcement. Unless courts carefully investigate and actively review the evidentiary record, expressive association jurisprudence will ultimately permit invidious discrimination in places of public accommodation even when such discrimination does not realistically further any speech interests of the members of the organization. Accordingly, the deferential standard will make it easier for defendants to "constitutionalize" their invidious discrimination through pretextual First Amendment claims. Furthermore, according deference to private civil rights defendants, especially admitted discriminators, has no precedential analogue. While the Court has given Congress deference to discriminate in certain contexts, it has never explicitly afforded other discriminators such dramatic leeway to discriminate on the basis of prohibited classifications or against protected classes unless clear, countervailing constitutional interests warrant such latitude.[289]

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287. *See supra* Part II.B.3.
288. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000); *see supra* Part II.C.
289. *See supra* notes 145-148 and accompanying text.

1. Courts Should "Substantially" Review Evidence in Antidiscrimination Cases

In order to pay sufficient attention to the compelling goal of equality, to accord respect to actual and legitimate expressive interests, and to adhere to traditional equality precedent, the Court should redeploy the constitutional and evidentiary standards of the *Roberts* line of cases. The *Roberts* standard requires both plaintiffs and defendants in discrimination cases to prove that liberty and equality clearly matter in antidiscrimination cases.[290] Furthermore, while the actual analysis in *Roberts* may have gone too far in not recognizing the potential socially constructed differences between men and women, the ultimate reasoning of the decision was quite sound because the overwhelming evidence demonstrated that the Jaycees' speech and activities were not gender-based. Hence, the group's expression did not relate to its sex discrimination.[291]

In order to guard against the erosion of equality that *Dale* portends, this Article suggests the following standard: if, after a substantial, rather than deferential, review of the evidentiary record, the facts in antidiscrimination cases demonstrate that a nexus exists between an association's discrimination and its clear speech interest, then the group will have satisfied the requirements of *Roberts*.[292] This standard is consistent with the *Roberts* doctrine's careful evidentiary analysis and, therefore, offers a legitimate alternative to the unfounded, passive framework adopted in *Dale*. In order to conduct a substantial review of the evidence pertaining to an expressive association defense in antidiscrimination cases, the Court should actively, rather than slothfully, consider the credibility and sufficiency of such evidence, particularly when it consists entirely of post-litigation statements, ambiguous and conflicting documents and testimony, and when the party experiencing discrimination has historically suffered from discrimination that is unrelated to any particular social or policy goal.

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290. *See* Roberts v. United States Jaycees, 468 U.S. 609, 622-24 (1984); *see supra* Part II.B.

291. *See supra* notes 73-101 and accompanying text.

292. This Article uses "substantial" to denote a significant, full, whole, and active—rather than passive, deferential, and fleeting—evidentiary analysis. The term is not meant to implicate the "substantial evidence" test utilized in administrative proceedings. *See* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962) (finding that an administrative agency "must make findings that support its decision, and those findings must be supported by substantial evidence").

2. The *Substantial Review* of Evidence in *Dale* Fails to Justify Discrimination

In *Dale*, the Court credits the Boy Scouts' expressive association defense by finding that post-litigation statements, conflicting data, and amorphous slogans embody a heterosexist viewpoint.[293] While post-litigation statements are not necessarily inadmissible or irrelevant, the Court should have considered, given the compelling legal and social goal of equality, whether such statements advanced by the Boy Scouts actually served as a post hoc construction of ideology, rather than an expression of the organization's actual expressive purposes.

In addition, the evidence in the record is conflicting. While the Boy Scouts fervently argues that its exclusion of Dale relates to the organization's "heterosexist" expression, the group had made no effort to exclude heterosexuals who disagree with heterosexism.[294] The disparate treatment of *openly* pro-gay heterosexuals on the one hand and out gay males on the other suggests that the Boy Scouts' speech defense is pretextual. If the organization truly disapproves of nonheterosexual intimacy, then it would exclude anyone who openly expresses approval of gay and lesbian equality. The organization's failure to censor consistently pro-gay "speech" suggests that its discrimination simply furthers invidious discrimination, rather than a constitutionally protected expressive interest.[295]

Furthermore, Dale's membership in a socially subordinate class gives rise to the logical suspicion that his inclusion in the Boy Scouts would not actually impair the organization's mission. Given the legacy of historical and present-day discrimination, an organization will probably have a greater tendency to invent an "expressive" purpose for its discrimination when its exclusion targets socially subordinate classes. The history of irrelevant discrimination on the basis of race, gender, sexual identity, religion, and disabled statuses counsels against a deferential and passive analysis of defenses in public accommodations litigation.[296] Instead, the Court should engage in a more

293. *See supra* Part II.C.

294. *See Dale*, 530 U.S. at 655-56; *supra* notes 210-214 and accompanying text.

295. *See supra* text accompanying notes 210-214.

296. This argument is drawn from the often-neglected concern for applying heightened scrutiny to gender classifications expressed in Justice Brennan's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion). Justice Brennan justified heightened scrutiny in the context of gender discrimination because gender is often irrelevant to social policy:

> [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex

substantial analysis that "smokes out" illegitimate discrimination,[297] such as discrimination in places of public accommodation that does not relate to or pursue a clear expressive purpose of the organizations. While the Court should not require organizations to document *every* expressive goal in writing—for example, a group may sincerely want to exclude or disassociate from serial murderers even if it does not inscribe this position in its bylaws—the Court has the obligation to ensure that its analysis does not legitimize invidious discrimination that is unconnected to expression.[298] Of course, the history of oppression and prejudice may actually serve as an organizing point for some institutions, both supportive of, and opposed to, such practices.[299] Requiring associations in those situations to express openly and clearly their speech does not injure freedom of expression. Instead, a substantial evidentiary review simply ensures that the organization does not perpetuate social inequality absent some actual constitutional basis for doing so.

Applying these standards to the facts in *Dale* complicates the Boy Scouts' expressive association defense. The organization relies solely on ambiguous, conflicting, and post-litigation evidence, and it does not demonstrate that heterosexuality and heterosexism relate to its educational and recreational activities.[300] Furthermore, the organization actually permits the participation of heterosexuals who speak out against heterosexism, but it excludes gays and lesbians who are merely open about their sexual identity.[301] This disparate treatment strongly suggests that the Boy Scouts' heterosexist stance does not relate to any "message" but is instead a mere discriminatory practice. Additionally, the historical subordination of sexual minorities on grounds that are

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> characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Id. at 686-87 (footnote omitted). *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1980) (arguing that the plurality of the Court embraces relevance but not the immutability rationale in *Frontiero*).

297. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226 (1995) (arguing that the "purpose of strict scrutiny is to 'smoke out' illegitimate uses of race").

298. *See Dale*, 530 U.S. at 700 (Stevens, J., dissenting) (arguing that the Court must guard against the harm of social prejudice).

299. This is the critical difference between governments and "private" entities in my analysis; many forms of prejudice cannot serve as the basis for governmental policy without sufficient justification.

300. *See Dale*, 530 U.S. at 649-50; *supra* Part II.C.

301. *See Dale*, 530 U.S. at 655-56; *supra* notes 211-214 and accompanying text.

irrelevant to the achievement of any legitimate social policy[302] suggests that the Boy Scouts' exclusion of gay males might not relate to any of the various activities of the organization. While groups can certainly associate to express their agreement with social subordination and can disassociate from the targets of such subordination to effectuate their prejudice, courts should carefully consider whether members of the organization actually unite for the purpose of promoting bigotry. Given the utter lack of any clear evidence in the record demonstrating antigay expression by the Boy Scouts or establishing a nexus between homophobic discrimination and the activities of scouting,[303] the Court should have rejected the Boy Scouts' expressive association defense. Instead, by developing a standard that accords extreme deference to discriminating organizations, the Court has widely expanded the body of constitutionally permissible discrimination against subordinate classes and has done so in the absence of any countervailing constitutional interest.

B. *Toward the "Accommodation of Outness" in Equality Jurisprudence*

The Court must also recognize the importance of expressive activities in the forming and sustaining of social identity. In *Dale* (and *Hurley*), the Court makes an inaccurate and damaging distinction between discrimination on the basis of "sexual identity" and on account of "outness"; the two categories are, in fact, inseparable due to the socially constructed nature of identity.[304] The Court, however, treats identity as a biological phenomenon that exists apart from any expression or conduct.[305] Because speech and identity are inherently connected, the Court's disaggregation of speech and identity legitimates class-based discrimination against gay, lesbian, bisexual, and transgender individuals. This outcome conflicts with the Court's

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302. As Elvia Rosales Arriola has argued in the context of equal protection jurisprudence:

> There are no convincing reasons why an evolving equal protection doctrine cannot include sexual orientation as a constitutionally irrelevant trait and protect gay men and lesbians as a "discrete and insular" minority. Under the current implications of the equal protection doctrine the claim of discrimination on the basis of sexual identity mandates suspect class inquiries on the part of reviewing courts.

Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 279 (1992) (footnote omitted).

303. *See supra* notes 103-148 and accompanying text.

304. *See supra* Part III.B.

305. *See Dale*, 530 U.S. at 644-50; *supra* Part III.A.

own conclusion that Dale's mere "membership in a particular class" would not prove the Boy Scouts' defense.[306] More importantly, the bifurcation of speech and identity has dramatic implications for the broader body of equality jurisprudence.

The Court's evolving doctrine on sexual identity offers a hollow version of equality that conditions civil rights protection on the silencing of gay, lesbian, bisexual, and transgender individuals. The Court's treatment of outness discrimination as a permissible form of discrimination, distinct from class-based discrimination, would allow defendants in a host of litigation contexts to escape the application of civil rights statutes or to evade constitutional equality guarantees by simply framing their policies as excluding "avowed homosexuals"[307] rather than as mistreating gays and lesbians "as such."[308] Furthermore, when viewed together with the new deference accorded to defendants in public accommodations cases, the Court's separation of identity and speech could provide discriminators with a virtual "green light" to discriminate. Once a gay, lesbian, bisexual, or transgender individual openly expresses his or her sexual identity, the discriminator need only point to an amorphous and previously "concealed" heterosexist viewpoint in order to raise a successful expressive association defense and prevail in civil rights litigation.[309] Thus, the Court's analysis severely erodes protection of gay, lesbian, bisexual, and transgender litigants and undermines the compelling social and legal goal of equality.

1. Accommodating Outness

In order to actualize the principles of civil and social equality, the Court must discard its artificial distinction between outness and sexual identity and treat outness discrimination as an impermissible form of status-based discrimination (unless, of course, it is justified by a clear, countervailing, constitutional interest, such as expressive association). The central role of expression in identity formation belies the Court's effort to dichotomize expression and status.

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306. *See supra* notes 149-162 and accompanying text.

307. *See Dale*, 530 U.S. at 655-56 (justifying the Boy Scouts' discrimination against Dale on the basis of his status as an "avowed homosexual").

308. Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572 (1995) (making the distinction between discrimination against "homosexuals as such" and discrimination on the basis of their expression).

309. *See supra* Part III.C.3.

A jurisprudence that "accommodates outness" does not insulate a discriminator's exclusion of a gay, lesbian, bisexual, or transgender individual on the sole ground that the victim has expressed openly his or her sexual (or gender) identity.[310] While a legitimate speech interest could certainly outweigh even an expressive identity equality claim, *Dale* and *Hurley*, if strictly construed, would leave no room for treating outness discrimination as a transgression from principles of equality, regardless of the doctrinal context in which the discrimination occurs. Instead, *Dale* and *Hurley* leave the impression that expression and identity are physically and doctrinally distinct.[311] As a result, the Court has begun to construct a jurisprudence that does not accommodate claims of outness discrimination; this embryonic jurisprudence threatens gay, lesbian, bisexual, and transgender equality and conditions civil rights protection on the silencing of sexual minorities.[312] The inextricable connection between outness and identity counsels against adherence to such a narrow equality doctrine.

2. Outness Discrimination and Expressive Association

The fact that expression constitutes and constructs identity does not preclude a finding that the forced inclusion of an "avowed" member of a class into an organization would complicate its expressive goals. Rather, an association may have a valid constitutional interest in excluding members of a class who would interfere with or impede its clear expressive activities.[313] Under this standard, however, the Boy Scouts should not have prevailed in *Dale* because the group did not establish a clear expressive interest in heterosexist discrimination.[314] If the Boy Scouts had in fact demonstrated, after a substantial review of the evidence, that the condemnation of homosexuality was a part of its mission, then the organization's expressive association defense would have been more compelling. Dale's exclusion under these circumstances would have still constituted class-based discrimination, but it would have been justified by a countervailing constitutional interest—the right of expressive association. Thus, this Article's primary dispute with *Dale*'s implication for speech-equality conflicts centers largely around the Court's lowering of the evidentiary

310. *See* Hutchinson, *supra* note 23, at 124 (arguing that courts should "accommodate outness" in equality jurisprudence).

311. *See supra* notes 149-189 and accompanying text.

312. *See supra* Part III.C.

313. *See supra* notes 88-104 and accompanying text.

314. *See supra* Part II.C.

requirements for antidiscrimination defendants and its mischaracterization of the nature of the Boy Scouts' exclusion as expression rather than identity. The evidentiary shift opens the door to pretextual speech defenses, while the separation of speech and identity distorts the reality of identity construction and, if strictly applied, expands permissible discrimination in cases that do not implicate First Amendment concerns.[315]

Even when organizations can demonstrate that they have a clear expressive interest in supporting heterosexism, courts should nevertheless, consider whether outness inevitably and perpetually communicates an unwanted message and whether an openly gay or lesbian individual causes actual harm to the organization's speech. In the normal situation, an organization that takes a clear, collective position supporting the subordination of, or prejudice against, a protected class would have little difficulty, even under a substantial evidentiary review, proving that inclusion of a member of that class would impair the group's expression.[316] The factual context of *Dale*, however, precludes such a summary result. The record indicates that the Boy Scouts does not expel heterosexuals who voice open disagreement with heterosexism. The openly pro-gay "viewpoint" of heterosexuals, like the "message" communicated by an out gay, lesbian, bisexual, or transgender person, conflicts with and impairs the effectuation of a heterosexist mission. The disparate treatment of pro-gay heterosexuals and openly gay individuals suggests that the organization does not actually exist to condemn homosexuality.[317] With respect to the question of viewpoint impairment, the inclusion of openly pro-gay heterosexuals in the Boy Scouts diminishes the credibility of the group's claim that openly gay individuals would harm its purportedly heterosexist expression. Once the organization knowingly includes some individuals who openly challenge its message within the organization, then its claim that the admission of others in the group who "speak" the same or a similar message will

315. *See supra* Part III.C.3.

316. *See* Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281, 290-91 (D. Md. 1988) (holding that the Ku Klux Klan's decision to exclude nonwhites and non-Christians from its parade is protected by the freedom of expressive association). *See also* Neal E. Devins, *The Trouble with* Jaycees, 34 CATH. U. L. REV. 901, 911-12 (1985) (arguing that "the Ku Klux Klan could invoke the first amendment in refusing to admit blacks or Jews since much of the Klan's protected speech is directed at blacks or Jews").

317. *See supra* notes 211-214 and accompanying text.

impede its expression loses credibility.[318] A substantial review of the evidence would treat these claims as suspicious and incredulous.

3. Recognizing Expression as Identity Does Not Harm Gay Rights Efforts

This Article has argued that courts must recognize the expressive dimensions of identity in order to preserve and enhance equality. Acknowledging the active dimensions of identity, however, runs the risk of legitimizing the subordination of gay, lesbian, bisexual, and transgender individuals, for a harmful discourse that conflates sexual identity and behavior has justified the exclusion of queer individuals from the promises of equality. This dangerous conflation of identity and behavior has occurred in equal protection cases challenging heterosexist governmental discrimination. Specifically, several courts and litigants have invoked the *Hardwick* decision in equal protection cases, arguing that "sodomy" defines the class of "homosexuals" and because governments can constitutionally criminalize "homosexual sodomy," then no one could reasonably contend that heterosexist discrimination violates the Constitution.[319] In response to the juridical conflation of sexual conduct and sexual identity, many antiheterosexist commentators and jurists have endeavored to distinguish homosexual "status" and "conduct," conceding that governments can penalize and regulate the latter and arguing that they should not discriminate on the basis of the former.[320] This Article seemingly contradicts this pro-gay

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318. *See* Roberts v. United States Jaycees, 468 U.S. 609, 627 (1984) (discounting association's claim that the full membership of women would impair its speech because the association already included women).

319. *See, e.g.*, Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (invoking *Hardwick* to reject the argument that gays and lesbians constitute a quasi-suspect or suspect class and holding, "[I]f the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious"); *see also* Romer v. Evans, 517 U.S. 600, 640-41 (1996) (Scalia, J., dissenting) (arguing that *Hardwick* is "most relevant" to deciding the equal protection question in *Romer*). *But see* Watkins v. United States Army, 847 F.2d 1329, 1340 (9th Cir. 1988), *rev'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (rejecting argument that *Hardwick* precludes a finding that gays and lesbians constitute a quasi-suspect class because "nothing in *Hardwick* suggests that the state may penalize gays for their sexual orientation" or "holds that the state may make invidious distinctions when regulating sexual conduct"); Sunstein, *supra* note 262, at 1171-78 (criticizing the argument that *Hardwick* precludes application of equal protection principles to invalidate antigay laws because due process legitimates traditional norms, while equal protection marks a departure from such norms).

320. *See, e.g.*, Cain, *supra* note 233, at 1617 (observing that gay and lesbian civil rights litigants have developed a strategy of "litigat[ing] around" *Hardwick* by making a distinction between status and conduct); Taylor Flynn, *Of Communism, Treason, and*

effort to construct a tight boundary between status and conduct because it conceives of identity as a nonclinical, active, and expressive phenomenon. Thus, this Article may invite and reinforce arguments that conflate sexual identity and sexual conduct in order to contest equal protection for sexual minorities. For the following reasons, however, this Article does not legitimize the doctrinal invocation of *Hardwick* and sexual conduct in the context of equal protection adjudication to justify heterosexist discrimination.

First, *Hardwick* was wrongly decided. Many commentators have criticized the narrow due process analysis applied in the case.[321] Moreover, the decision perpetuates and legitimizes homophobia and applies an extremely cramped vision of liberty.[322] Because *Hardwick* is doctrinally flawed and stands as an expression of judicial homophobia, it should not govern equal protection cases.

Furthermore, when courts conflate gay and lesbian identity with sodomy, they narrowly construct gays and lesbians as a class of "sodomites." While sexual identity certainly involves sexual intimacy and practice, there are other dimensions that define and construct sexuality.[323] Speech, association, politics, outness, and other "conduct" also define the class of gay, lesbian, bisexual, and transgender individuals.[324] Using this broader lens to define sexual identity complicates the reductionist equal protection jurisprudence that equates gayness with sodomy in order to constitutionalize heterosexist discrimination. Because queer identity consists of much more than sexual practice, the continued existence of *Hardwick* does not preclude heightened scrutiny of governmental heterosexism.

Addiction: An Evaluation of Novel Challenges to the Military's Anti-Gay Policy, 80 IOWA L. REV. 979, 979 (1995) (noting that some litigants challenging the military's antigay and lesbian discrimination have distinguished homosexual sexual conduct from gay and lesbian status); Jonathan Pickhardt, Note, *Choose or Loose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 931 (1998) (noting that gay and lesbian rights lawyers have embraced a distinction between status and conduct in equal protection litigation in order to overcome the *Hardwick* decision).

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

322. *See id.*

323. Nan D. Hunter, *Life after* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 543 (1992) (arguing that the conflation of gay and lesbian identity with sodomy "is premised on a radical imbalance" under which "[t]he act of homosexual sodomy 'defines the class' of gay men and lesbians"); Lori J. Rankin, Comment, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right's Campaign Against Lesbians and Gay Men*, 62 U. CIN. L. REV. 1055, 1070-71 (1994) (criticizing invocation of *Hardwick* in the equal protection context because "engaging in sexual activity is simply one aspect of humanity and is generally a means for expressing emotional affinity").

324. *See supra* Part III.B.2.

In addition, as several commentators have argued, the invocation of *Hardwick* in the equal protection context might confuse the constitutional roles of equal protection and substantive due process. Cass Sunstein, for example, argues that equal protection seeks to break away from tradition by eradicating subjugation and providing protection for historically oppressed classes, while substantive due process looks to tradition in order to construe what rights the Court should deem "fundamental."[325] While courts engaging in a "traditional" due process analysis should not constrain themselves solely to the past or to the narrowest definitions of history,[326] Sunstein's analysis provides a useful framework for understanding the constitutional roles of equal protection and due process and for responding to the judicial invocation of *Hardwick* in the context of equal protection litigation.[327]

Finally, the status/conduct distinction that many gay and lesbian rights advocates embrace is itself fundamentally flawed. On some level, the distinction is an understandable, if not a predictable, litigation strategy, given the usage of *Hardwick* to restrict gay and lesbian equality efforts and the history of conflating gays and lesbians with sex.[328] Yet, the status/conduct distinction harms gay and lesbian equality because it, as does *Dale*'s dissection of identity and speech, situates equality upon a narrow and artificial premise: the faulty notion that sexual identity is a fixed, sterile, clinical, and biological quantity that is separable from expression or action.[329] Gay and lesbian

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325. *See* Sunstein *supra* note 262, at 1171-78 (criticizing the argument that *Hardwick* precludes the application of equal protection principles to invalidate antigay laws because due process legitimates traditional norms, while equal protection marks a departure from such norms).

326. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848 (1992) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."); Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (criticizing the narrow reliance upon history and tradition in substantive due process jurisprudence); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (arguing that courts should rely on tradition in construing fundamental liberties but concluding that "tradition is a *living thing*" (emphasis added)); *see also* William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000) (advancing a more fluid approach to equal protection and due process than Sunstein).

327. *See* Sunstein, *supra* note 262, at 1171-78. *But see* Eskridge, *supra* note 326, at 1185-86 (criticizing Sunstein approach).

328. *See* Fajer, *supra* note 165, at 550 (arguing that social stereotypes imagine gays and lesbians as "empty and promiscuous, devoid of love, warmth, commitment, or stability").

329. *See* Halley *supra* note 255, at 438 ("Of course it is rational to say that homosexuals—real homosexuals, professed homosexuals, or people designated by others as

litigative acquiescence in the status/conduct distinction tacitly (and, at times, openly) legitimizes discrimination against gay and lesbian conduct, when such conduct actually defines and constructs sexual identity.[330] Equal protection of gay and lesbian "status" but not lived experiences (including sexual intimacy and outness) is an empty form of equality.

To the extent that this Article contradicts a gay rights litigation strategy grounded upon the cementing of boundaries between status and conduct, then this Article imagines a broader, more substantive form of equality than this well-intentioned, yet flawed, strategy implies. The concept of expressive and active identity portends a more protective equality doctrine, which does not insulate outness discrimination from civil rights enforcement (absent countervailing constitutional interests) or marginalize the critical role of speech (and other conduct) in the construction of gay, lesbian, bisexual, and transgender identities and in the pursuit of a society free of heterosexism.

VI. CONCLUSION: THE BOY SCOUTS "COMES OUT"

In the wake of the Court's decision in *Dale*, municipalities, private citizens, and nonprofit organizations around the country have started to rethink and renounce their relations with the Boy Scouts.[331]

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homosexuals for good conventional reasons—are more likely to engage in homosexual sodomy than everyone else."); Hunter, *supra* note 323, at 545 ("The weakness of the status-centered view is its erasure of all conduct and its focus solely on identity."); Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 237-38 (1996) (arguing that the status/conduct distinction is "demeaning" to gays and lesbians because it legitimates stigmatization of same-gender sexual intimacy); *id.* at 239-40 (arguing that the status-conduct distinction is "factually absurd" because it requires gays and lesbians to claim celibacy).

330. *See* Mazur, *supra* note 329, at 235-49 (criticizing the status/conduct distinction).

331. *See, e.g.*, Laurie Goodstein, *Jewish Group Recommends Cutting Ties to Boy Scouts: A Protest Against the Ban on Gay Members*, N.Y. TIMES, Jan. 10, 2001, at A12 (reporting that the Reform Jewish leadership has recommended that its congregants and synagogues sever ties with the Boy Scouts); Anemona Hartocollis, *Levy Limits Scout Events in the Schools: Says Bias Against Gays Violates Board Policy*, N.Y. TIMES, Dec. 2, 2000, at B1 (reporting that New York City schools have prohibited some of the Boy Scouts' usage of school facilities due to its antigay policies); *Interior Dept. Reviews Ties With Boy Scouts*, N.Y. TIMES, Sept. 1, 2000, at A18 (reporting that the Department of Interior is evaluating its ties with the Boy Scouts in light of *Dale*); Eric Lipton, *Local Scouting Board, Calling Gay Ban 'Stupid,' Urges End to National Policy*, N.Y. TIMES, Feb. 27, 2001, at B3 (reporting that chapters of New York City-area Boy Scouts are calling for an end to the organization's antigay policy); Richard Weizel, *In Hopes of Reviving Donations: A Pamphlet*, N.Y. TIMES, Feb. 11, 2001, at C3 (reporting institutional and individual opposition to the Boy Scouts' antigay ban); Kate Zernike, *Scouts' Successful Ban on Gays Is Followed by Loss in Support: Gifts are Cut and Public Property Use Limited*, N.Y. TIMES, Aug. 29, 2000, at A1 (reporting the national withdrawal of financial support from the Boy Scouts as a result of *Dale*).

Thus, the Boy Scouts' pressing of an associational right to engage in homophobic discrimination has, ironically, caused many individuals and institutions affiliated with the Boy Scouts to *disassociate* from the organization.[332] These post-*Dale* developments speak to the power of having one's speech placed in the market place of ideas. An *open* position that embraces homophobia may have negative consequences in a society that attaches some value to formal equality, inasmuch as outness subjects queer individuals to subjugation in heteronormative cultures. Yet, *Dale*'s negative impact upon the Boy Scouts says more about the illegitimacy of the organization's expressive association defense that it successfully advanced in the litigation. The *sudden* move by governments, institutions, and individuals to sever ties with the Boy Scouts proves that the organization really did not possess a "clear" (and certainly not a widely known) expressive interest in excluding gay males from the organization prior to the *Dale* decision. In postmodernist fashion, the *Dale* decision socially constructs the Boy Scouts as a heterosexist organization with a constitutional interest in prejudicial exclusion. Understandably, the Boy Scouts "true" philosophy has shocked and angered many of the sponsors and members of the organization.[333] Now, propelled out of the closet by the *Dale* litigation, the Boy Scouts is "flaunting" its new homophobic identity by *expressing* its disapproval of anyone, not just gays, who voices an opinion that contests heterosexist discrimination.[334] Thus, while *Dale* reinforces the closet for sexually transgressive individuals, it outs the Boy Scouts as a heterosexist speaker in a national discourse on sexual morality.

The Supreme Court, however, does not have a constitutional responsibility to construct the content of a discriminating association's speech. Instead, in cases such as *Dale*, the Court has the obligation to determine, after a careful review of the evidentiary record, whether the organization's preexisting philosophy and activities constitutionalize its exclusionary practices. In *Dale*, the Court abandons this mission and dramatically reduces the evidentiary requirements of an expressive association defense. The Court also dichotomizes sexual identity and expression, thus potentially justifying a wide range of heterosexist

332. *See, e.g.*, *supra* note 331 and accompanying text.

333. *See id.*

334. *See Scout Groups Rejected After Fighting Gay Policy*, N.Y. TIMES, Jan. 28, 2001, § 1, at 16 (reporting that the Boy Scouts has expelled seven sponsors who oppose antigay ban and that these groups "were believed to be among the first to lose their charters because of the policy").

discrimination. If the Court ever hopes to achieve a balance in the protection of speech and equality claims, which are at the same time related, conflicting, and intertwined, it must first dismantle its newly minted deference standard and conduct a substantial, rather than passive, review of the evidence in speech-equality litigation. Furthermore, the Court should discard its strained and artificial disaggregation of expression and identity in order to ensure that gay, lesbian, bisexual, and transgender individuals and other oppressed classes receive substantive equal protection. Adherence to the jurisprudence announced in *Dale* can only secure and deliver a shallow equality—an "equality" founded, contradictorily, upon silence and prejudice.