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Accommodating the Public Sphere: Beyond the Market Model

Nan D. Hunter[†]

In *Boy Scouts of America v. Dale*,¹ the Supreme Court faced one of the classic conflicts in constitutional law: the tension between equality and freedom, between the right to belong and the right to exclude. Previous cases had established that membership organizations had a right to expressive association protected by the First Amendment. By a five to four vote in *Dale*, the Court held for the first time that compliance with an anti-discrimination law would violate that right.

The extent to which the *Dale* decision will reach beyond its facts is uncertain. It may portend a substantial rewriting of previous expressive association law because the Court seemed to lower the bar for how clearly an organization had to demonstrate the tension between its ability to communicate its beliefs and compliance with a civil rights law. Or it may be cabined by the Court's subtextual reading of the sexuality and gender issues that lay just beneath the surface of the case. Indeed, the decision may be sub silentio contingent on those issues. At a minimum, it weakens the claim to open participation in our civic culture by lesbians and gay men.

This Essay has two major components. First, in Parts I and II, I describe and critique the Court's opinion in *Dale*, beginning with an examination of the social origins of scouting, then proceeding to an analysis of *Dale*. Second, in Parts III and

[†] Professor of Law, Brooklyn Law School. I wish to thank three groups for their feedback and suggestions: my co-participants in the University of Minnesota Law School Symposium on Expressive Association, the Cornell Law School Feminist Legal Theory Workshop, and the Brooklyn Law School Faculty Reading Group. Special thanks to Susan Herman and Steve Winter. Two of my students provided able research assistance: Anthony Brown and Chris Fowler. A summer research grant from the school provided financial support. In the interests of full disclosure, I should note that I filed a brief *amicus curiae* in *Boy Scouts of America v. Dale*, in support of James Dale, on behalf of the Society of American Law Teachers.

1. 120 S. Ct. 2446 (2000).

IV, I place the questions raised in *Dale* in another context in which they belong but are seldom analyzed, that of the jurisprudence of public accommodations laws.

In Part I, I describe how the Boy Scouts of America (BSA) has been focused since its origin on concepts of citizenship and specifically on an ethos of egalitarian masculinity as defining citizenship. I then analyze *Dale* both as a contest between the two fundamental principles of equality and freedom, and as a contest over whether egalitarian masculinity is a contradiction in terms. In Part II, I read *Dale* as an example of the Court's inability to conceptualize and provide adequate reasoning for its analysis of an expressive identity claim, an equality challenge in which the identity cannot easily be separated from a message.

Beginning in Part III, I situate *Dale* in a broader context of public accommodations laws. Public accommodations are those intrinsically hybrid entities that are private as against the state yet simultaneously open to the public. James Dale's claim to retain his membership in the Boy Scouts was premised on a New Jersey state civil rights law, which the New Jersey Supreme Court interpreted to include the Boy Scouts within its general definition of public accommodations.² Although that ruling was not reviewable by the United States Supreme Court, it is in many ways as meaningful as the expressive association defense that the Court did adjudicate.

Part III examines how the meanings of public accommodations have shifted in response to the differing demands of waves of civil rights movements. The result has been an extension of the definition of public accommodations to incorporate subordinated groups in civil society. This has been achieved by the adoption of an expansive concept of the market, including services as well as goods, and intangible as well as tangible aspects of economic life. Part IV argues that this expansive market model, which has become the new status quo, is incomplete. It perpetuates an outdated distinction between political and social rights, and thereby misses important aspects of a right to full participation in a democracy.

In conclusion, I join the two major themes by framing Dale's claim as the latest in a series of cases that have invoked an evolving understanding of citizenship. What is specifically

2. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1211 (N.J. 1999), *rev'd & remanded*, 530 U.S. 640 (2000).

at stake in *Dale* is the relationship between civic status and gender and sexuality. What it illustrates more broadly is the need for a contemporary social theory of citizenship that encompasses the discursive dynamics and power of the institutions of civil society.

I. THE BOY SCOUTS OF AMERICA AND THE MEANINGS OF MASCULINITY

It is impossible to understand the full meaning of *Dale* without an appreciation of the history and cultural significance of the Boy Scouts. What the Boy Scouts have always argued, not in the courts but in the culture, is that their code of masculine ethics virtually defines citizenship. The title of Lord Baden-Powell's first publication was "Scouting for Boys: A Handbook for Instruction in Good Citizenship."³ There is probably no private organization in the country which so promotes itself as an icon of citizenship as the Boy Scouts.

Today, public schools, government agencies, and military units operate hundreds of Boy Scout troops.⁴ Its sheer size is impressive: there are approximately one million adult men who serve as leaders in some capacity for a youth membership of between four and five million.⁵ In addition, its employees number approximately five hundred.⁶ With its slogan of "open to all boys," it has become a symbol of egalitarian masculinity.

3. ROBERT H. MACDONALD, *SONS OF THE EMPIRE: THE FRONTIER AND THE BOY SCOUT MOVEMENT, 1890-1918*, at 7 (1993).

4. Brief for Respondent at 2, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), available at 2000 WL 340276. The Boy Scouts of America (BSA) is intertwined with government agencies and the recipient of preferred treatment in many ways. See *id.* at 3. In addition to sponsoring troops, military units designate personnel to participate in scout activities and furnish facilities for use by the BSA. See *id.* Off-duty personnel are specifically granted the right to wear a Boy Scout uniform, the only civilian organization statutorily listed. 10 U.S.C. § 772(j)(1) (1994). Other federal agencies are also authorized to furnish supplies, services, and transportation for BSA use. 10 U.S.C. §§ 2544(a), (d) (1994). Involvement by state and local government is also extensive, resulting in numerous efforts to rescind such involvement since the Supreme Court's decision in *Dale*.

5. *Dale*, 734 A.2d at 1200.

6. BOY SCOUTS OF AMERICA, COMPANY CAPSULE, at <http://www.hoovers.com/co/capsule/2/0,2163,56152,00.html> (last visited Mar. 2, 2001).

A. THE HISTORY OF AMERICAN SCOUTING

The Boy Scouts began with an accidental tourist experience.⁷ William D. Boyce, a wealthy American newspaper publisher, visited England in 1909 and became lost on the streets of London.⁸ A boy came up to him and inquired if he could be of help and then guided the man to his destination.⁹ Surprised by the lad's generosity, Boyce offered him payment.¹⁰ The boy refused, saying that it was nothing more than his duty as a Boy Scout.¹¹

When Boyce inquired of British friends as to who and what the Boy Scouts were, he learned that Lord Robert Baden-Powell, a hero of the Boer War and the founder of the South African Constabulary, the police force established by the British after the war, had begun a boys organization that combined concepts of patriotism with the lure of adventure.¹² Baden-Powell had returned from the war disappointed with how unprepared his troops had been for the rigors of outdoor life and fascinated with the role of military scouts, those individuals who could venture ahead of a regular troop formation, survive by their own skills, and provide intelligence on the enemy.¹³

British scouting was an instant success.¹⁴ Boys joined because it offered camping and other outdoors activities, as well as a diversion from parents and school.¹⁵ Progressive reformers were attracted by Baden-Powell's emphasis on reaching out to lower-class boys to rescue them from slum life.¹⁶ Conservatives hailed the popularization of themes associated with imperial-

7. BOY SCOUTS OF AMERICA, SCOUTMASTER HANDBOOK 251-52 (1990) [hereinafter HANDBOOK]; FOUNDERS OF SCOUTING AND THE BOY SCOUTS OF AMERICA, at <http://www.bsa.society.org/factsheets/02-211.html> (last visited Mar. 5, 2001) [hereinafter FOUNDERS].

8. See HANDBOOK, *supra* note 7, at 251-52; FOUNDERS, *supra* note 7.

9. See HANDBOOK, *supra* note 7, at 251-52; FOUNDERS, *supra* note 7.

10. See HANDBOOK, *supra* note 7, at 251-52; FOUNDERS, *supra* note 7.

11. See HANDBOOK, *supra* note 7, at 251-52; FOUNDERS, *supra* note 7.

12. See generally TIM JEAL, THE LIFE OF LORD BADEN-POWELL (1990); MACDONALD, *supra* note 3; MICHAEL ROSENTHAL, THE CHARACTER FACTORY: BADEN-POWELL AND THE ORIGINS OF THE BOY SCOUT MOVEMENT (1986).

13. See MACDONALD, *supra* note 3, at 16-19; DAVID I. MACLEOD, BUILDING CHARACTER IN THE AMERICAN BOY: THE BOY SCOUTS, YMCA, AND THEIR FORERUNNERS, 1870-1920, at 133-34 (1983); ROSENTHAL, *supra* note 12, at 3.

14. MACDONALD, *supra* note 3, at 118-44.

15. *Id.*

16. *Id.* at 153-57.

ism, and the intervention to curb any further feminization of British boys, especially those in cities.¹⁷

Boyce brought the concept back to the United States, where it enjoyed similar success. The BSA was incorporated on February 8, 1910.¹⁸ Congress chartered the organization in 1916,¹⁹ and by 1920, it had over 462,000 active members.²⁰ More than 1,325,000 American men and boys had passed through the Boy Scouts during that first ten years.²¹ By the end of the century, more than 90 million Americans had been Boy Scouts.²²

The fundamental forces that powered the British Boy Scouts also fueled the BSA. Middle-class men feared that boys were "growing up weak," and "[m]anliness came . . . to signify less the opposite of childishness than the opposite of femininity."²³ The American context, however, led to a distinctive social discourse, one that stressed ethnic as well as class assimilation.

17. JEAL, *supra* note 12, at 372-73; MACDONALD, *supra* note 3, at 13, 26; MACLEOD, *supra* note 13, at 136-37; ROSENTHAL, *supra* note 12, at 197-200. Emblematic of concern about feminization and the effects of effete urban life was a popular reaction to the trial and conviction, a decade earlier, of Oscar Wilde for gross indecency. See MACDONALD, *supra* note 3, at 16.

Wilde and other 'decadent' *fin de siècle* poets and artists had seemed to threaten an entire culture with their self-indulgence and effeminacy. Their antithesis was the ideal soldier living simply, ignorant of art and intellectual matters, disciplining his mind and body and placing his love of country above all else. . . . And when such fears in Britain were at their height during the disastrous Boer War, no soldier epitomized that saving manly spirit more perfectly than R. S. S. Baden-Powell.

JEAL, *supra* note 12, at 570.

18. BOY SCOUTS OF AMERICA, HISTORICAL HIGHLIGHTS: 1910S, at <http://www.bsa.scouting.org/factsheets/02-511/1910.html> (last visited Mar. 2, 2001) [hereinafter HISTORICAL HIGHLIGHTS: 1910S].

19. 36 U.S.C. §§ 21-29 (1994). Its original charter stated that the purpose of the Boy Scouts was "to promote . . . the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." 36 U.S.C. § 23 (1994). Pursuant to this charter, the BSA files an annual report with Congress. 36 U.S.C. §§ 28, 1103 (1994). Among the rights granted under it is the right to bring or remove litigation to federal district courts, regardless of whether there is diversity of citizenship or a federal question in the claim. 36 U.S.C. § 22 (1994).

20. See HISTORICAL HIGHLIGHTS: 1910S, *supra* note 18.

21. See *id.*

22. See BOY SCOUTS OF AMERICA, HISTORICAL HIGHLIGHTS: 1990S, at <http://www.bsa.scouting.org/factsheets/02-511/1990.html> (last visited Mar. 5, 2001).

23. MACLEOD, *supra* note 13, at xv, 45 (internal quotation and citation omitted).

lation. The BSA took stronger early stands against racism and anti-semitism than the British Boy Scouts,²⁴ and so developed a philosophy of citizenship that simultaneously stressed equality and locked in gender.²⁵

A central goal of the early organizers was to “Americanize” immigrant and low-income boys. Although scouting is now associated primarily with suburban or small town youth, its earliest focus was distinctively urban. The migration of the BSA’s national office reflects the shift. From their founding in 1910 to 1954, the Boy Scouts were headquartered in New York City.²⁶ In 1954, they left the city and relocated the national office to New Brunswick, New Jersey.²⁷ Since 1979, the national headquarters has been in Irving, Texas, a suburb of Dallas.²⁸ The theme of national unity as a moral force suffuses the organization’s history of itself, published in 1937: “It is one of the few nation-wide agencies which tends to ‘pull us together’ as Americans,” author William D. Murray wrote.²⁹ Its focus was on the “needs of youth—such as Negro, American Indian, Mexican, . . . [and] ‘less-chance’ boys who are one-fourth of the total membership.”³⁰ From the beginning, the BSA rejected self-description as a Christian organization. “In the 12th Scout Law and its practice the young Protestant has become a part of

24. ROSENTHAL, *supra* note 12, at 253-63, 267-78.

25. As to equality based on gender, of course the Boy Scouts is, by definition, only for boys. Baden-Powell responded to the interest of girls in a parallel program, which he designed with home and family as the chief components of female citizenship, and to which he gave a different name, Girl Guides. JEAL, *supra* note 12, at 469-77. He tapped first his sister, and then his wife, to lead the Girl Guides. *Id.* The first executive director of the BSA, James W. West, strongly opposed formation of the Girl Scouts of America, although the Girl Scout program was also highly gendered. MACLEOD, *supra* note 13, at 50-51, 183-84. One point on which the organizations differ currently is their policy on discrimination based on sexual orientation: the Girl Scouts’ policy prohibits such discrimination. See SCOUTING FOR ALL, at <http://www.Scoutingforall.org/aaic/122601.shtml> (last visited Mar. 9, 2001) (“Other major youth organizations, such as Girl Scouts of America, . . . do not have policies against gays or lesbians.”).

26. HISTORICAL HIGHLIGHTS: 1910S, *supra* note 18.

27. BOY SCOUTS OF AMERICA, HISTORICAL HIGHLIGHTS: 1950S, at <http://www.bsa.scouting.org/factsheets/02-511/1950.html> (last visited Mar. 5, 2001).

28. BOY SCOUTS OF AMERICA, HISTORICAL HIGHLIGHTS: 1970S, at <http://www.bsa.scouting.org/factsheets/02-511/1970.html> (last visited Mar. 5, 2001).

29. WILLIAM D. MURRAY, THE HISTORY OF THE BOY SCOUTS OF AMERICA 206 (1937).

30. *Id.* at 203.

extending respect to the religious customs and dietary laws of his Catholic and Jewish friends and vice-versa. Here has been released a great force."³¹ This law—"A SCOUT IS REVERENT. He . . . respects the convictions of others in matters of custom and religion"—was not part of the British Boy Scout oath and law.³²

Murray is also explicit that the primary goal was assimilation:

We recognized that the Indian boys, the Mexican youth along the Rio Grande, the Negro lads in the South and in the northern industrial centers were somewhat out of the stream of American boy life and needed special aid. Also, there were foreign language and racial sections in our large industrial centers, which had imported their old-world customs into little Italy, little Poland, and similar sections.³³

In response, the Boy Scouts hired a full-time staff member to concentrate on this "missionary endeavor."³⁴

Murray's claims may have been exaggerated, but they were not delusions. The BSA had Jewish leadership from its beginning, including members on its board of directors.³⁵ Although small in number, there were synagogue-sponsored troops starting in the early years of the BSA. British scouting was also officially "indifferent to religious preference,"³⁶ but Baden-Powell himself endorsed anti-Semitic views and, as late as 1937, the Nazi Jugend program for youth.³⁷

As to race, the story is decidedly more mixed. The BSA national office encouraged as well as condoned segregation as the norm for troops. Gradually, however, the office began to contest the efforts of local councils in the South that attempted to limit the program entirely to whites by chartering only all-white troops; the office sought to organize at least some Afri-

31. *Id.* at 229.

32. *Id.* at 63. Part of the British Scout oath and law dropped by the Americans read, "A SCOUT IS A FRIEND TO ALL, AND A BROTHER TO EVERY OTHER SCOUT, NO MATTER TO WHAT SOCIAL CLASS THE OTHER BELONGS. . . . A Scout must never be a SNOB." *Id.* at 61; *see also* MACLEOD, *supra* note 13, at 137, 176.

33. MURRAY, *supra* note 29, at 388.

34. *Id.* "In negotiations with ethnic groups, Boy Scout officials showed little sympathy for immigrants' desires to preserve their culture." MACLEOD, *supra* note 13, at 215.

35. *See* MACLEOD, *supra* note 13, at 194-95, 198 (describing the relationship of the early BSA to the Jewish community).

36. ROSENTHAL, *supra* note 12, at 268.

37. *Id.* at 267-78.

can-American troops.³⁸ By 1927, there was one such “experimental Troop” in each of the southern states, and, in 1936, only one council—in Mississippi—continued to block Boy Scout programs among African-American youth.³⁹ The resistance to the Boy Scouts as an agent of racial toleration is graphically illustrated in a map showing the density of BSA members in 1932.⁴⁰ Mid to high levels of density cover every region of the United States with one exception: the solidly non-welcoming South.⁴¹

Scouting leaders in Britain during this period may have been most worried about class tensions and the portents of war in Europe. In the United States, the challenge of ethnic and racial assimilation in a culturally diverse nation loomed larger. The Boy Scouts in the United States became not merely a symbol of citizenship as they were in Britain, but an agent of citizenship as well.

B. *BOY SCOUTS OF AMERICA V. DALE*

Given the BSA’s organizational history, and specifically its tradition of tolerance, it is no surprise there are no reported cases involving claims of racial or religious discrimination. The earliest case filed under a civil rights law alleged sex discrimination, but was dismissed on the ground that the statute “was not intended by the Oregon legislature to include the Boy Scouts of America, at least to the extent of requiring it to accept applications by girls for membership.”⁴² Beginning in the 1980s, litigation based on sexual orientation claims began against the national organization.⁴³ Every anti-discrimination case except *Dale* led to rulings that the plaintiff lacked a viable claim, mostly on the ground that the BSA did not fit the particular statute’s definition of a public accommodation.⁴⁴

38. MACLEOD, *supra* note 13, at 212-14; MURRAY, *supra* note 29, at 388-89.

39. MURRAY, *supra* note 29, at 388-89.

40. *Id.* at 285.

41. *See id.*

42. *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465, 469 (Or. 1976).

43. Other than *Dale*, the primary challenge based on sexual orientation grounds was *Curran v. Mount Diablo Council of the Boy Scouts of America*, first filed in 1981 and decided on statutory grounds seventeen years later. 952 P.2d 218, 236 (Cal. 1998) (holding that the BSA is not a public accommodation).

44. Three additional cases raised sex discrimination claims. *See Yeaw v. Boy Scouts of Am.*, 64 Cal. Rptr. 2d 85, 88-89 (1997) (holding that the BSA is not a public accommodation); *Mankes v. Boy Scouts of Am.*, 137 F.R.D. 409,

In *Dale*,⁴⁵ the Supreme Court reached the constitutional questions, and ruled that New Jersey could not, through application of its public accommodations law, force the Boy Scouts to accept James Dale, a former Eagle Scout, as an assistant scoutmaster.⁴⁶ The Court ruled that the statute, as applied in that way, would violate the Boy Scouts' First Amendment right of expressive association.⁴⁷ The Boy Scouts had expelled Dale after an official of his local Boy Scouts council read a newspaper article in which Dale had identified himself as gay and as copresident of the Rutgers University Lesbian Gay Alliance.⁴⁸

The Court found that Dale's presence "as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints,"⁴⁹ specifically the "desire to not 'promote homosexual conduct as a legitimate form of behavior.'"⁵⁰ The Court found that there was sufficient evidence of the "sincerity" of the Boy Scouts' belief, despite a spotty record of its expression outside the context of litigation.⁵¹ It further held that the centrality of a group's affected viewpoint to its purposes or activities was not an important factor: "An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."⁵²

It is difficult to assess the likely importance of this decision. In part that is because both parties seem singular. In American cultural geography, the BSA occupies the intersection of childhood, citizenship, and masculinity; it is unique in its symbolic status as proxy for good citizenship. Invocations to

411-12 (S.D. Fla. 1991) (holding no subject matter jurisdiction); *Quinnipiac Council, Boy Scouts of Am. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352, 360 (Conn. 1987) (holding that the Boy Scout Council is not excluded from public accommodations law, but that not allowing a female scoutmaster is not a discriminatory practice). Three others were brought by atheists, alleging discrimination based on religion. See *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261, 266 (Cal. 1998) (holding that the BSA is not a public accommodation); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385, 406 (Kan. 1995) (same); *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1275 (7th Cir. 1993) (same).

45. 120 S. Ct. 2446 (2000).

46. *Id.* at 2458.

47. *Id.* at 2457.

48. *Id.* at 2449.

49. *Id.* at 2452.

50. *Id.* at 2453 (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699)).

51. *Id.*

52. *Id.* at 2454.

“be a good Scout” are part of the vernacular. Dale’s homosexuality transports him also into a category that courts repeatedly treat as resistant to analogy. As I shall argue later, the apparent singularity of each party is descriptive, and functions as one of the fundamental cultural dynamics driving the decision.

Assessing future importance is also made difficult by a certain duality in the opinion, which reads as both carefully limited and dangerously expansive. The text is fairly terse; the primary dissent is more than twice as long as the opinion of the Court. That terseness produces both an easy road map to the Court’s logic, and elisions and logical lapses at critical points. Overall, I would identify four principles as central to the decision, two with a narrowing effect and two with much broader ramifications. After discussing each of those principles, I will briefly describe the dissents.

First, in a series of questions and conclusions that lead up to its holding, the Court repeatedly specifies that it is ruling on the case presented by someone who would assume a leadership role in the organization: “the forced inclusion of Dale as *an assistant scoutmaster*”;⁵³ “Dale’s presence as *an assistant scoutmaster*”;⁵⁴ and, finally, “requir[ing] that the Boy Scouts retain Dale as *an assistant scoutmaster*.”⁵⁵ There is no declaration that membership alone (for example, that of a gay adolescent Boy Scout) would violate expressive association rights of an organization with several million members. The reasoning of the Court is grounded on the impairment to the Boy Scouts’ expressive activities caused by an adult leader, a person charged with “inculcating [boys with the] Boy Scouting’s values.”⁵⁶

The Court uses the term “member” infrequently in its legal reasoning, primarily in its discussion of precedent. Prior case law had concerned only adult membership groups, and had drawn no distinction as to leadership. The penultimate paragraph states that New Jersey cannot “compel the organization to accept members where such acceptance would derogate from the organization’s expressive message.”⁵⁷ That sentence provides that mere membership could be the question presented,

53. *Id.* at 2452 (emphasis added).

54. *Id.* at 2453 (emphasis added).

55. *Id.* at 2457 (emphasis added).

56. Brief for Petitioners at 3, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), available at 2000 WL 228616.

57. *Dale*, 120 S. Ct. at 2458.

as indeed it was in the three earlier club cases⁵⁸ that established this branch of expressive association doctrine. But it does not undo the specificity of the Court's reasoning in this case. The introductory paragraph refers to Dale's "adult membership,"⁵⁹ but that is a somewhat misleading term since the only way that an adult can be a member of the Boy Scouts is to be a troop leader.⁶⁰

In a carefully parsed decision in New Jersey's intermediate appellate court, Justice Landau reasoned that the Boy Scouts' expressive association rights entitled them to expel openly gay scoutmasters, but not openly gay Boy Scouts.⁶¹ The United States Supreme Court never addressed this possibility; its reasoning neither clearly accepted nor rejected this outcome. Consistent with its current minimalist jurisprudence, the Court appears to have left the second part of that question for another day.

A second limiting feature of the opinion is its bypass of a direct First Amendment holding. The Boy Scouts had argued that, in addition to its expressive association rights, it had a First Amendment speech right to exclude Dale, on the theory that accepting him as a scoutmaster would amount to forced speech.⁶² Direct infringement on speech was the basis of the holding of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,⁶³ the case in which the Court ruled that St. Patrick's Day Parade organizers could not be required to include a contingent of marchers carrying a banner identifying them as lesbian and gay Irish-Americans.⁶⁴ Although the Court in *Dale* cited *Hurley* as "similar" and "illustrative,"⁶⁵ it declined to rule that Dale's inclusion would violate the speech rights held by a

58. See *infra* note 76 and accompanying text.

59. *Dale*, 120 S. Ct. at 2449.

60. See BOY SCOUTS, at <http://www.scouting.org/boyscouts/index.html> (last visited Mar. 5, 2001) (indicating that only boys aged eleven through seventeen can be scout members).

61. *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 294-95 (1998) (Landau, J., concurring and dissenting), *aff'd*, 734 A.2d 1196 (N.J. Aug. 4, 1999), *rev'd & remanded*, 530 U.S. 640 (2000).

62. See Brief for Petitioners at 20-25, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), available at 2000 WL 228616.

63. 515 U.S. 557 (1995).

64. *Id.* at 580-81.

65. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2448, 2454 (2000).

much broader class of possible defendants than organizations which satisfy the criteria for expressive associations.⁶⁶

A third aspect of the decision, however, which is its linchpin, weakens, if not erases, the limitation formed by the Court's hesitancy to adopt a broader First Amendment holding. The Court ruled that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."⁶⁷ The Court essentially ruled that the Boy Scouts can selectively target the messenger, based on sexual orientation. Referring to evidence that the Boy Scouts do not expel heterosexual scoutmasters who openly endorse the legitimacy of homosexuality, the Court declared that "if this is true, it is irrelevant. The presence of an avowed homosexual and gay rights activist . . . sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."⁶⁸

This superficially simple reasoning works to hide more complex assumptions. One is the mispairing in the final sentence of the "avowed activist" whose message of presence is implicitly directed to the boys in the troop, contrasted with a straight scoutmaster "who is on record as disagreeing with . . . policy."⁶⁹ "Activist" implies direct and continuing advocacy, whereas "on record" does not. Both imagined speakers could be quite activist; alternatively, both could simply go "on record." In either case, the differential impact of the two messages becomes less clear.

There are other reasons why it is not self-evident that the gay speaker would always be the most likely to "derogate from the organization's . . . message."⁷⁰ For example, a statement made by a white person, during the 1950s in the South, opposing segregation or refuting supremacist mythology, may have carried more punch, in certain contexts, than the same statement by an African-American, simply because it would have been more surprising. It is true that acceptance of an openly

66. The *Dale* Court's citations to *Hurley* were similar to the way the Court in *Hurley* had cited the earlier expressive association cases as informing, but not determining its conclusion. *Hurley*, 515 U.S. at 580.

67. *Dale*, 120 S. Ct. at 2454.

68. *Id.* at 2455.

69. *Id.*

70. *Id.* at 2458.

gay or African-American scoutmaster creates dissonance with a belief in inequality. It does not follow, however, that no significant dissonance flows from allowing the same dissenting views to be endorsed by other spokespersons, especially when they function as role models.

The danger of the Court's easy assumption is that by according the Boy Scouts the "right to choose to send one message but not the other,"⁷¹ the Court invites other organizations to quietly adopt resolutions of disapproval of homosexuality and then use them, not to require adherence to a philosophy, but simply to rid themselves of certain individuals, while leaving others who disagree, perhaps in greater numbers, within the group. This flatly contradicts the Court's holding in *Runyon v. McCrary*,⁷² where it ruled that a private school had a right to teach racist beliefs but not to exclude African-American students.⁷³ The *Dale* majority simply ignores *Runyon*.

One must worry whether there is potential for leakage into other branches of First Amendment law, specifically cases where defendants assert that a belief in the immorality of homosexuality shields them from the requirements of civil rights laws that govern employment and housing. Similar defenses have been raised by landlords who refused, on religious grounds, to rent to unmarried heterosexual couples.⁷⁴ In those cases, the objectionable sexual conduct was, at least, directly linked to the commodity being offered by the defendant, since one could assume that it would occur on site. *Dale* raises the possibility that landlords or employers could assert that a gay man's or lesbian's mere presence violates their beliefs.

Lastly, the fourth principle that emerges from the decision is a distressing willingness to abdicate the role of assessing the bona fides of an organization's claim about the degree of harm that would be inflicted by an individual's presence. If the Court is willing to accept that as long as an organization is genuinely expressive, it can rely on any claimed belief as a basis for exclusion, it would appear to offer a carte blanche for groups to

71. *Id.* at 2455.

72. 427 U.S. 160 (1976).

73. *Id.* at 176-77.

74. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1137 (9th Cir. 2000), *cert. denied*, No. 00-499, 2001 WL 137665 (Feb. 20, 2001); *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909, 913 (Cal. 1996); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 276-77 (Ala. 1994); *McCready v. Hoffius*, 593 N.W.2d 545, 545 (Mich. 1999).

reinterpreted, if not invent, beliefs in such amorphous concepts as morality.

Writing for the *Dale* dissent, Justice Stevens focused primarily on the weakness of the evidence that the BSA had a clear policy regarding homosexuality, finding an expressive association defense had to be based on more than the group's assertion of the impact of an anti-discrimination law.⁷⁵ Justice Stevens argued that, given how little the BSA had chosen to say about homosexuality, it could not meet the standard set in the *United States Jaycees-Rotary Club-New York State Club Ass'n*⁷⁶ cases of demonstrating that retaining Dale would impose a significant burden or substantial restraint on its expressive activities, even if its position were to be characterized as the desire to remain silent.⁷⁷

Further, Justice Stevens criticized the majority for a conclusory assertion that Dale's mere presence would constitute advocacy of any position.⁷⁸ Justice Stevens noted that there was no evidence that Dale had spoken about homosexuality in his role as an assistant scoutmaster, nor was there any basis to assume that he would in the future, other than a stereotyped view of homosexuals as uncontrollable.⁷⁹ He found implausible the concern that the Boy Scouts would be perceived as endorsing the views of one of its approximately one million adult members.⁸⁰ In the most significant passage in the dissent, he found that the majority's holding could only be based on a belief that a gay man was uniquely "affixed with the label 'homosexual.' That . . . even though unseen, communicates a message that permits his exclusion wherever he goes. . . . Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority."⁸¹

75. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2459 (2000) (Stevens, J., dissenting).

76. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (holding that the club's reasons for its exclusion policy were not substantive enough); *Rotary Int'l v. Rotary Club*, 481 U.S. 537 (holding that the club had to admit women since it would not significantly burden the interests they presented); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (holding a law forbidding discrimination could be applied to the clubs because it did not significantly infringe on their associational rights).

77. *Dale*, 120 S. Ct. at 2470 (Stevens, J., dissenting).

78. *Id.* (Stevens, J., dissenting).

79. *Id.* at 2473 (Stevens, J., dissenting).

80. *Id.* at 2476 (Stevens, J., dissenting).

81. *Id.* (Stevens, J., dissenting).

Justice Souter wrote a brief additional dissent, emphasizing that the nature of the Boy Scouts' belief, whether reflective of bigotry or not, was not relevant to the standard that an expressive organization had to meet—that of a significant burden on expression—in order to secure an exemption from the anti-discrimination statute.⁸²

II. AN EXPRESSIVE IDENTITY CRITIQUE OF DALE

The clash between an openly gay scoutmaster and the Boy Scouts presents a particularly rich illustration of what I have called an expressive identity claim.⁸³ An expressive identity claim is one in which an equality claim incorporates a message in which the assertion of self-worth is inseparable from the equal treatment demand.⁸⁴ Because lesbian and gay rights cases center on an identity that is not visible, the separation of expression and identity is easiest in those cases. It is my contention, however, that virtually all equality cases consist of an expressive identity claim, either implicitly or explicitly.

In most race cases, for example, the factor of visibility itself functions to communicate both difference and, implicitly, self-worth. The expressive content of visible racial difference is powerfully demonstrated by the impulse to exclude. "I don't want blacks in this group" reveals two political stances: explicitly that of the speaker and implicitly that of the African-American person whose claim to a right of presence and inclusion inherently rejects the attempted imposition of a badge of inferiority. The impulse to exclude is always the signifier of a viewpoint entitled to protection under the First Amendment.

In most lesbian and gay cases, coming out speech serves the function of communicating both self-worth and self-identification. The fact that the self-worth message materializes in speech, rather than in physical presence, should not lead to a different constitutional standard for whether those who object to that belief in equality should be exempt from anti-discrimination laws. A belief in superiority in any form—racial, sexual, or other—cannot be completely silenced by the state.

82. *Id.* at 2479 (Souter, J., dissenting).

83. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 4-17 (2000).

84. *Id.* at 17.

The Boy Scouts' position is not entirely clear. Their first briefs refer to the condemnation or immorality of homosexual conduct.⁸⁵ In their reply brief, they assert the desire to remain silent about homosexuality, although apparently they do not intend their silence to indicate neutrality.⁸⁶ The Court's holding is phrased in terms of the BSA's right "to 'not promote homosexual conduct,'" quoting the reply brief.⁸⁷ In whatever form, the essence of their position is disapproval. Requiring that they state it more clearly, if only internally, does not seem an unfair prerequisite for a group seeking an expression-based exemption from a generally applicable law.

In *Dale*, however, the Court was unable to escape a cultural distortion chamber in its assessment of these competing interests. As a result, it over-read the expressive component of both Dale's identity as a gay man and the BSA's statements on homosexuality. I shall discuss each of these points in turn, and close this Part with some thoughts on the category of cases where group beliefs and exclusion of persons overlap.

A. THE DEMONIZATION OF DALE

Compared to the unabashedly homophobic language of the Court in *Bowers v. Hardwick*,⁸⁸ or of the dissent in *Romer v. Evans*,⁸⁹ the tone of the majority opinion in *Dale* is almost bland. There is a careful evenhandedness whenever the text trenches on the morality question itself. The Court rejects the Boy Scouts' argument that the terms "morally straight" and "clean" in the Boy Scout Oath and Law are on their face synonymous with condemnation of homosexuality: "Some people may believe that engaging in homosexual conduct is not at odds with being 'morally straight' and 'clean.' And others may believe that engaging in homosexual conduct is contrary to being 'morally straight' and 'clean.'"⁹⁰ The Court itself professes to give no weight to meanings of morality: "We are not, as we

85. See Brief for Petitioners at 27, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), available at 2000 WL 228616.

86. See Reply Brief for Petitioners at 3-4, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), available at 2000 WL 432367.

87. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2453 (2000) (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699)).

88. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

89. *Romer v. Evans*, 517 U.S. 620 (1996).

90. *Dale*, 120 S. Ct. at 2452.

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 [its abridgement]."⁹¹

Without making a direct statement, however, the Court's language invokes another canard: the intrinsic uncontrollability of gay male sexuality. In the text of *Dale*, that specter has been modernized. Sexuality has been merged into identity, but not tamed. Dale's coming out replaces sexual acts per se as the socially explosive moment. Once he had come out in any respect, his identity as "homosexual," like his sexuality, became impossible to control.

In the critical portion of the opinion in which the Court found that Dale's mere presence would force the Boy Scouts to send a message, the Court described him as "by his own admission, . . . one of a group of gay Scouts who have become leaders in their community and are open and honest about their sexual orientation."⁹² In the next sentence, the Court introduces a key word: "Dale was the copresident of a gay and lesbian organization at college and remains a gay rights *activist*."⁹³ The Court goes on to join these elements: "The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinct[t] . . . message."⁹⁴

As the dissent argues, these passages insinuate that Dale would attempt to use an assistant scoutmaster position for purposes of proclaiming the value of homosexuality.⁹⁵ In fact, Dale stated that he would agree to be bound by the organization's rules against that in his capacity as scoutmaster.⁹⁶ The initial newspaper article contained Dale's statements to a reporter covering a conference that he attended in which the Boy Scouts were not mentioned.⁹⁷ Nor, as the dissent notes, did anyone contend that Dale was a person so publicly identified with gay rights that he could be said to epitomize the issue,

91. *Id.* at 2458.

92. *Id.* at 2454 (internal quotation and citation omitted).

93. *Id.* (emphasis added).

94. *Id.* at 2455.

95. *Id.* at 2472 (Stevens, J., dissenting).

96. See Brief for the Respondent at 33, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), available at 2000 WL 340276.

97. See Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (NEWARK), July 8, 1990, at 11.

thus justifying his particular exclusion (rather than as a member of the class).⁹⁸

Instead, the Court impliedly finds that almost any openly gay or lesbian person is radioactive. Nothing in the record marks Dale as an "activist" other than his copresidency of a college student group,⁹⁹ yet "activist" carries the unmistakable whiff of extremism and zeal. It is difficult to imagine that the copresident of a student Spanish club or drama club or Catholic Youth Organization would be labeled, ten years later, an activist. Despite the rhetorical focus on his insinuated proclivity to proselytize, it is also difficult to imagine that the Court would have ruled differently if Dale had been a member rather than copresident; or indeed, if he had never joined any organization in his life except the Boy Scouts. Since there is no indication that Dale sought out the reporter or initiated the interview, the conclusion must be that nothing more than his willingness to self-identify as gay justifies his exclusion. As the dissent concludes, the result is that socially visible homosexuality creates a basis for exclusion to an extent that no other minority characteristic does.¹⁰⁰

Anthropologist Gayle S. Rubin would characterize this as an example of "the fallacy of misplaced scale":

Throughout much of European and American history, a single act of consensual anal penetration was grounds for execution. . . . Although people can be intolerant, silly, or pushy about what constitutes proper diet, differences in menu rarely provoke the kinds of rage, anxiety, and sheer terror that routinely accompany differences in erotic taste. Sexual acts are burdened with an excess of significance.¹⁰¹

98. *Dale*, 120 S. Ct. at 2473-74 (Stevens, J., dissenting).

99. The reference to "remain[ing]" an activist, *id.* at 2454, appears to refer to statements Dale made when interviewed by the press concerning this litigation. The Court does not cite to any evidence of activism after college, but the Boy Scouts' briefs refer to statements made by Dale to the press after filing the complaint in his lawsuit. Brief for Petitioners at 9-10, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), available at 2000 WL 228616; Reply Brief for Petitioners at 9, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), available at 2000 WL 432367. In a true catch-22, bringing the lawsuit seems to have weakened his case. In any event, the only factors properly to be considered are those upon which the Boy Scouts had based his expulsion in 1990.

100. *Dale*, 120 S. Ct. at 2478 (Stevens, J., dissenting).

101. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 278-79 (Carole S. Vance ed., 1984).

The Court attaches an excess of significance to Dale's homosexuality and then declares that as the self-evident import of his presence.

B. HETERO-NORMATIVITY BY JUDICIAL NOTICE

One factor that makes *Dale* such an extraordinary case is the intense signification value attached to both parties. For Dale, the suffusion of sexuality rendered him a type of vampire—seemingly normal, but dangerously destructive, driven by forces of nature beyond his control. For the Boy Scouts, the subtext is not primarily sex, but gender, and the relationship between the two.

In their petition for certiorari, the Boy Scouts asserted that their overarching purpose was to teach boys “what it means to be a man.”¹⁰² At some level, the entire case functioned as a contest over the meanings of masculinity. It raised the question of whether one should presume homosexuality to be within the range of those meanings unless an organization proved that it had adopted and wished to express a clear philosophy to the contrary; or whether one should presume homosexuality to be understood as outside the bounds of that concept. With weak evidence as to the exact nature of the BSA's philosophy, the Court had to be guided by a default mechanism. The majority saw condemnation as the default position. Under that logic, the slightest expression of disapproval could trigger the full force of the presumption of condemnation. The absence of widespread dissemination of the policy statements against homosexuality logically would be less important because, as a practical matter, everyone understood or at least expected that condemnation would be the Boy Scouts' position.

By contrast, the dissenters required specificity. They were operating from the opposite default position: unless the BSA demonstrated “a clear and unequivocal view” against homosexuality, one could not grant them the benefit of the doubt.¹⁰³ The dissenters' position makes sense only if one believes that there is nothing intrinsically contradictory between masculinity and homosexuality. Under that logic, one would have to articulate a clear philosophy to the contrary to gain the benefit of an

102. Petition for Writ of Certiorari at 18, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

103. *Dale*, 120 S. Ct. at 2465 (Stevens, J., dissenting).

expressive association defense and an exemption from an otherwise applicable statute.

If one compares *Dale* to *Roberts v. United States Jaycees*,¹⁰⁴ one can see the opposite default position in operation. There, the majority rejected the Jaycees' arguments that their exclusionary policy, which was abundantly clear to every member, was linked to the organization's public policy positions on a number of issues, such as national security policy, on which women tended to disagree.¹⁰⁵ The Court rejected that reasoning as mere stereotyping, seeing nothing intrinsically contradictory between that organization with its policy stance and the inclusion of women.¹⁰⁶

The majority's position in *Dale* accurately reflects the traditional and still widespread precept that condemnation of homosexuality is the (appropriate) norm, which is, like all norms, marked by silence. If there is one significant cultural message from *Dale*, it is the tenuousness of that traditional understanding of masculinity as the dominant one culture-wide. There are multiple markers of its fragility. First is simply the closeness of the decision itself, the fact that four Justices used neutrality as the default. Second, the litigation of the case and the public reaction to the decision have forced the Boy Scouts to much more loudly declare a policy that they had apparently wanted to keep below the social radar screen unless necessary to eject someone.¹⁰⁷ The very need to articulate the policy undercuts its claim to be the presumed cultural understanding.

Most importantly, the case illustrates that the rhetoric of egalitarian masculinity that is the hallmark of the Boy Scouts is no longer a satisfactory substitute for a fully inclusive concept of citizenship. The Boy Scouts' image as a paragon of good citizenship begins to fade when their strongest argument to the Court is the right to believe in inequality. *Dale* tells us that the assumption that conforming to gender norms is the price of admission to a shared civic culture is under severe challenge.

104. 468 U.S. 609 (1984).

105. *Id.* at 640.

106. *Id.* at 628.

107. See, e.g., Andrew Jacobs, *Victory Has Consequences of Its Own*, N.Y. TIMES, June 29, 2000, at A28; Darragh Johnson, *Scouts' Use of Schools Under Attack*, WASH. POST, Oct. 4, 2000, at A1; Eric Lipton, *Local Scouting Board, Calling Gay Ban 'Stupid,' Urges End to National Policy*, N.Y. TIMES, Feb. 27, 2001, at B3; Kate Zernike, *Scouts' Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1.

C. THE EXPRESSION-EXCLUSION CONTINUUM

The concept of expressive identity is an attempt to normalize equality claims in which expression is somehow required in order to make the identity characteristic socially visible. It is an argument that they should be treated the same as other equality claims, those based on immediately visible characteristics, because ultimately all equality claims are expressive. This, however, does not answer the question of when, if ever, identity *is* acceptable as a basis for exclusion.

The tension in the expressive association cases involving membership organizations arises from the prohibition of discrimination based on certain identity characteristics combined with the constitutional right to associate. In order to protect the group's right, we allow them to exclude persons "whose manifest views [a]re at odds" with a group policy,¹⁰⁸ whose presence would impede their ability to communicate their message "nearly as effectively."¹⁰⁹

Under this principle, the Boy Scouts unquestionably has a right to exclude persons with views contrary to its own. Granting them the deference shown by the majority and accepting as bona fide that the Boy Scouts command to be "morally straight" communicates disapproval of homosexuality, they have the right to exclude all who would communicate approval. In *Dale*, however, that dog did not bark: the Boy Scouts have not genuinely sought to exclude everyone communicating approval of homosexuality.¹¹⁰

108. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 581 (1995).

109. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

110. The record is considerably less than clear on this aspect of the Boy Scouts' policy. At oral argument, counsel for the Boy Scouts represented that the organization would exclude any adults, including heterosexuals, who communicated approval of homosexuality directly to troop members. See Transcript, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) [hereinafter Transcript], available at 2000 U.S. TRANS LEXIS 44, at *11-*12, *19. However, counsel also acknowledged that he had "no information" on whether a heterosexual who had spoken approvingly of homosexuality in a public forum such as the press, which was the only instance of Dale's having so spoken, would be excluded on that basis. *Id.* at *13. Nor, apparently, has any heterosexual man ever been excluded on the ground of living with a woman prior to marriage. *Id.* at *7-*8. The dissent focused on the fact that the Boy Scouts permitted religious groups that did not condemn homosexuality to act as troop sponsors (and presumably convey that view to troop members in a religious context). *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2462-63 (2000) (Stevens, J., dissenting). The majority pointedly stated that any difference in how heterosexuals expressing approval of homosexuality were treated was "irrelevant"

Dale is an example of a case that sits at the border between expression and discriminatory exclusion. The Court has not developed an adequate methodology for assessing when an organization has crossed that line. Although organizations can lawfully exclude persons for a number of reasons, cases such as *Dale* arise when an organization seeks an exemption from a statute that protects persons with certain characteristics from discrimination based on a legislative judgment that prejudice is frequently directed against members of this group.

I suggest thinking of this situation as a continuum. Seeking group unity based on shared *beliefs/goals* lies at one end of a continuum. Excluding persons solely because their *identity* renders them somehow undesirable is at the other end. In my view, a group's right to exclude should generally extend from that first starting point as far as reasonably necessary to achieve the goal of shared beliefs.

In some situations, applying that principle will allow a group to exclude for the full length of the continuum. For some groups, especially social clubs, celebration of the shared identity is itself the entire or primary purpose of the group. For other groups, the core organizing purpose is a belief in some form of superiority, such as the inevitable example of the Ku Klux Klan. The Klan meets this test: only believers in white supremacy may join. Given the overwhelming importance to the Klan of its beliefs in supremacy and segregation, I would argue that they should be permitted to extend their exclusions to include the far point on the continuum, in other words, to exclude all non-whites. The Klan is nothing if not consistent.

What a group drawn together by shared beliefs or goals should not be permitted to do is to start at the other end of the continuum, to use a protected characteristic as its only basis for seeking unity. In other words, although I recognize that an identity characteristic might function reasonably well as a proxy for certain beliefs, it can only be a partial proxy. I would require the organization to, in essence, have the courage of its convictions and accept only members or leaders who shared those beliefs, whatever they were. If a belief is important enough to serve as a basis for excluding a group of people specifically protected by law, then it should be important enough to define eligibility for membership. If it does define eligibility

to their holding. *Id.* at 2454. As Justice Ginsburg noted, the case was decided on cross-motions for summary judgment; there was never a trial as to the facts of how the Boy Scouts dealt with these situations. Transcript, *supra*, at *41.

for everyone seeking to join, then the organization has a much more genuine claim to reach the identity end of the continuum in its exclusions.

I acknowledge that this approach would lead to some intrusion in internal organization affairs, a disadvantage that must be acknowledged. That limited intrusions can be justified by a compelling interest in securing full civil rights for historically disadvantaged groups is, however, well established by the *United States Jaycees-Rotary Club-New York State Club Ass'n*¹¹¹ line of cases. This proposal for intrusion has the advantage that its effect will be to produce more, not less, expression of the organization's contrary beliefs.

The *Dale* Court rejected this approach, saying that the Boy Scouts were entitled to choose to send one message but not the other—to reject sending the message that Dale represented but to accept sending the message conveyed by heterosexual scoutmasters who believed there to be nothing wrong with homosexuality. This statement invites an organization engaged primarily in expressive activity on any topic to simply adopt a resolution barring gay members. It eliminates any basis upon which a court could assess whether the exclusion is necessary to the preservation of the group's shared beliefs. On this logic, there is dangerously little left of the anti-discrimination protection.

A more fundamental objection to my suggestion is that these doctrinal grids are simply inadequate to the task, that the project of reworking or fine-tuning the law of expressive association always raises more questions than it answers. The complexities and contradictions associated with sexuality exacerbate the problem. The rejoinder, of course, is that law nonetheless generates answers, often in an iterative series, because concrete claims must be adjudicated. Recognizing that, I closed this Part by proposing a standard based on a belief/identity continuum. In the remainder of this Essay, I will move away from doctrine, first to situate Dale's claim historically and then to reframe the questions as ones of social theory.

III. PUBLIC ACCOMMODATIONS LAW AND THE MEANINGS OF CITIZENSHIP

Dale is a genuinely difficult case, raising difficult questions. Chief Justice Rehnquist suggests strongly in his opinion

111. See *supra* note 76 and accompanying text.

for the Court that the conflict is unnecessary, that the Boy Scouts should never have been covered by the New Jersey statute in the first place, that public accommodations laws should stick to their traditional focus on inns, common carriers, and merchants.¹¹² Although that suggestion has a bright line appeal, I will argue that he is misreading the history of public accommodations laws and that a deeper reading of that history reveals a continuous, evolving dialectic with understandings of citizenship.

Today, principles of public accommodations also figure prominently in debates about civil society.¹¹³ Although there is no single definition of civil society, the term usually denotes voluntary associations that are neither familial nor state-run. The entities that comprise civil society encourage collective deliberation and action, while serving as a buffer between the individual and the state. Although public accommodations and civil society are not synonymous, some overlap between these concepts exists. Thus, in the broader discourse of whether law should be enlisted in the effort to strengthen civil society, issues of public accommodations and expressive association inevitably arise.

Given this degree of significance, it is especially unfortunate that the law has never developed a theory of public accommodations. As a 1968 article focused only on commercial entities concluded, "There is no underlying rationale which distinguishes private businesses from public businesses. Legislatures and courts have chosen to lump together whatever businesses they think ought to serve [a given group], without developing any clear-cut theory to justify such inclusions or exclusions."¹¹⁴ As a result, there is great variance in the definitions of what constitutes a public accommodation.

At the federal level, two statutes prohibit discrimination in public accommodations: Title II of the Civil Rights Act of 1964, which protects against discrimination based on race, color, religion, or national origin;¹¹⁵ and Title III of the Americans with

112. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2455-56 (2000).

113. There is a voluminous literature on the concept of civil society. For an excellent compilation of the legal ramifications of this discussion, see generally Symposium, *Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289 (2000).

114. Alfred Avins, *What Is A Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1, 68 (1968).

115. 42 U.S.C. § 2000a (1994).

Disabilities Act of 1990.¹¹⁶ The former reaches only four categories of accommodations: lodgings, eating establishments, gas stations, and places of exhibition or entertainment.¹¹⁷ The latter covers twelve categories, several of them quite broad, such as retail stores, "service establishment[s]," places of "exercise or recreation," and "social service center establishment[s]."¹¹⁸ Neither of the federal statutes offers a generic definition of the term public accommodation; the definition is coterminous with the list of included entities.

All fifty states plus the District of Columbia have an anti-discrimination statute that covers at least some public accommodations for some groups.¹¹⁹ They each define public accommodations differently, although in distinct patterns. Some limit the included entities to only those specified in the statute,¹²⁰ while most statutes include a list of entities but provide that other similar ones will also be covered.¹²¹

As to the scope of who is protected, state law prohibits three major bases for discrimination that federal law does not. The most common is sex discrimination, which is banned by forty-three state statutes, including the District of Columbia.¹²²

116. 42 U.S.C. § 12181 (1994).

117. 42 U.S.C. § 2000a(b) (1994).

118. 42 U.S.C. § 12181 (1994).

119. See Lisa Gabriella Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 290-91 (1978).

120. See *id.*

121. See *id.*

122. ALASKA STAT. § 18.80.210 (LEXIS 2000); ARK. CODE ANN. § 16-123-107(a) (LEXIS Supp. 1999); CAL. CIV. CODE § 51 (West 1982); COLO. REV. STAT. § 24-34-601(2) (2000); CONN. GEN. STAT. ANN. § 46a-64 (West Supp. 2000); DEL. CODE ANN. tit. 6, § 4504(a) (Michie 1993); D.C. CODE ANN. § 1-2519(a) (LEXIS 1999); FLA. STAT. ANN. § 509.092 (West 1997); HAW. REV. STAT. § 489-3 (1993); IDAHO CODE § 67-5901(2) (Michie 1995); 775 ILL. COMP. STAT. ANN. § 5/1-102 (West 1993); IND. CODE ANN. § 22-9-2 (Michie 1997); IOWA CODE ANN. § 216.7 (West 2000); KAN. STAT. ANN. § 44-1009(C)(1) (2000); KY. REV. STAT. ANN. § 344.145 (Michie 1997); LA. REV. STAT. ANN. § 51:2247 (West Supp. 2000); ME. REV. STAT. ANN. tit. 5, § 4592 (West 1989); MD. ANN. CODE art. 49B, § 5 (1998); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2000); MICH. COMP. LAWS ANN. § 37.2302 (West 1985); MINN. STAT. § 363.03 (2000); MO. ANN. STAT. § 213.065(1) (West 1996); MONT. CODE ANN. § 49-2-304 (1999); NEB. REV. STAT. § 20-134 (1997); N.H. REV. STAT. ANN. § 354-A:17 (1995); N.J. STAT. ANN. § 10:5-4 (West 1993); N.M. STAT. ANN. § 28-1-7 (Michie Supp. 2000) (to be repealed July 1, 2006); N.Y. EXEC. LAW § 296 (McKinney 1993); N.D. CENT. CODE § 14-02.4-14 (1997); OHIO REV. CODE ANN. § 4112.02(G) (Anderson 1998); OKLA. STAT. ANN. tit. 25, § 1402 (West 1987); OR. REV. STAT. § 30.670 (1988); 43 PA. CONS. STAT. ANN. § 953 (West 1991); R.I.

Of those forty-three laws, eleven also prohibit sexual orientation discrimination.¹²³ In addition, twenty-one state statutes, including the District of Columbia, cover marital status discrimination.¹²⁴ One federal law, the Equal Credit Opportunity Act, prohibits discrimination based on sex and marital status.¹²⁵

Thus, there is enormous variation in the fundamental concept of what is a public accommodation and on what bases such entities may exclude or differentiate as to certain groups of persons. It is a mistake, however, to treat public accommodations law as simply an arbitrary collection of lists. To understand how this body of law evolved, one must trace the history of successive waves of civil rights movements.

GEN. LAWS § 11-24-2 (1994); S.D. CODIFIED LAWS § 20-13-23 (Michie 1995); TENN. CODE ANN. § 4-21-501 (1998); UTAH CODE ANN. § 13-7-3 (1999); VT. STAT. ANN. tit. 9, § 4502 (1993); VA. CODE ANN. § 2.1-716 (Michie 1995); WASH. REV. CODE ANN. § 49.60.215 (West 1990); W. VA. CODE ANN. § 5-11-9(6) (Michie 1999); WIS. STAT. ANN. § 106.52 (West Supp. 2000); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

123. CAL. CIV. CODE § 51 (West 1982) (*Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998), interpreted separate public accommodations law to bar sexual orientation discrimination); CONN. GEN. STAT. ANN. § 46a-81c (West 1995); D.C. CODE ANN. § 1-2519(a) (LEXIS 1999); HAW. REV. STAT. § 368-1 (1993) (limiting the provision to entities receiving state financial assistance); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2000); MINN. STAT. § 363.03 (2000); N.H. REV. STAT. ANN. § 354-A:17 (LEXIS Supp. 2000); N.J. STAT. ANN. § 10:5-4 (West 1993); R.I. GEN. LAWS § 11-24-2 (2000); VT. STAT. ANN. tit. 9, § 4502 (1993); WIS. STAT. ANN. § 106.52 (West Supp. 2000).

124. ALASKA STAT. § 18.80.210 (LEXIS 2000); COLO. REV. STAT. § 24-34-601(2) (2000); CONN. GEN. STAT. ANN. § 46a-64 (West Supp. 2000); DEL. CODE ANN. tit. 6, § 4504(a) (Michie 1993); D.C. CODE ANN. § 1-2519(a) (LEXIS 1999); FLA. STAT. ANN. § 760.07 (West 1997); HAW. REV. STAT. § 368-1 (1993) (limiting the provision to entities receiving state financial assistance); 775 ILL. COMP. STAT. § 5/1-102 (2000); MD. ANN. CODE art. 49B, § 5 (1998); MICH. COMP. LAWS ANN. § 37.2302 (West 1985); MINN. STAT. § 363.03 (2000); MONT. CODE ANN. § 49-2-304 (1999); N.H. REV. STAT. ANN. § 354-A:17 (1995); N.J. STAT. ANN. § 10:5-4 (West 1993); N.Y. EXEC. LAW § 296 (McKinney 1993); N.D. CENT. CODE § 14-02.4-14 (1997); OR. REV. STAT. § 30.670 (1999); 43 PA. CONS. STAT. ANN. § 953 (West Supp. 2000); TENN. CODE ANN. § 68-14-602(b) (1996) (limiting the provision to innkeepers); VT. STAT. ANN. tit. 9, § 4502 (1993); VA. CODE ANN. § 2.1-716 (Michie 1995).

125. 15 U.S.C. § 1691(a) (West 2000). The Act states, "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)." *Id.*

B. RACE AND THE CIVIL RIGHTS/SOCIAL RIGHTS DISTINCTION

Although racial discrimination is considered the most settled of all the civil rights claims as to public accommodations both in legal doctrine and in social consensus, the deeply problematic questions that we face today echo from the race cases.

The accepted starting point in examining public accommodations law is the principle that under common law, business owners have a property right to refuse service unless they are innkeepers, common carriers, or public utilities.¹²⁶ In the single most comprehensive study of public accommodations law, however, Joseph Singer argues that under eighteenth and early nineteenth century principles of implied contract, owners of any commercial property that was held open to the public had a duty to serve all patrons.¹²⁷ According to Singer, race was the factor that led to a narrowing of that pre-classical concept such that the common law duty to serve was enforced only as to innkeepers and common carriers.¹²⁸ Regardless of whether one accepts Singer's argument about pre-classical law, race unquestionably dominated legal discourse from the mid-nineteenth to mid-twentieth century concerning the two most important questions related to public accommodations law: which physical spaces such law governed and whether there was a legal difference between exclusion and segregation.

The era in which public accommodations law began and became common, the second half of the nineteenth century, was dominated by an ideology of race according to which law was believed competent to adjudicate civil or political rights, but could not prescribe social rights or social equality.¹²⁹ The fram-

126. *Aaron v. Ward*, 96 N.E. 736, 737 (N.Y. 1911); *Bowlin v. Lyon*, 25 N.W. 766, 767-68 (Iowa 1885); see also Avins, *supra* note 114, at 7; Earl M. Maltz, "Separate but Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment, 17 RUTGERS L.J. 553, 554 (1986); Max W. Turner & Frank R. Kennedy, *Exclusion, Ejection, and Segregation of Theater Patrons*, 32 IOWA L. REV. 625, 626 (1947).

127. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1303-31, 1345-48 (1996).

128. *Id.* at 1372-73, 1390-1412.

129. *Bell v. Maryland*, 378 U.S. 226, 292-95 (1964) (Goldberg, J., concurring); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 231 (1988); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 147-49 (1950); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119-20 (1997); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. DuBois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886-

ers of the Reconstruction Amendments shared that ideology,¹³⁰ and it saturated and shaped judicial interpretations of public accommodations statutes. Like school segregation, limitations on the scope of public accommodations laws were necessary to its hegemony.

The question of whether a particular space was deemed a public accommodation, for example, determined the venues in which integration would occur. In Massachusetts, for example, the state's highest court ruled, in an 1858 case, that places of entertainment, such as theaters open to the public, were not in the same category, and thus not under the same legal obligation to serve the public, as inns and common carriers.¹³¹ The limitation was codified in the state's—and the nation's—first public accommodations statute, enacted in 1865.¹³² The specification of which physical spaces were affected became increasingly prominent as part of the codification process. Without losing its patina of neutrality, the enumeration component of public accommodations laws *sub silentio* regulated racial mixing.

From 1875 to 1883, federal law mandated fuller equality in a somewhat broader set of spaces. The Civil Rights Act of 1875 provided criminal and civil penalties for denying any citizen “the full and equal enjoyment” of “inns, public conveyances . . . theaters, and other places of public amusement” based on race.¹³³ In the *Civil Rights Cases*, the Supreme Court ruled that the statute was invalid because Congress lacked the constitutional authority under the Fourteenth Amendment to reach beyond state action to privately-owned entities, and it

90 (1987).

130. MILTON R. KONVITZ & THEODORE LESKES, *A CENTURY OF CIVIL RIGHTS* 94-98 (1961).

131. *McCrea v. Marsh*, 78 Mass. (12 Gray) 211, 212-13 (1858); *accord Buenzle v. Newport Amusement Ass'n*, 68 A. 721, 722 (R.I. 1908); *Taylor v. Cohn*, 84 P. 388, 389 (Or. 1906); *Greenberg v. W. Turf Ass'n*, 82 P. 684, 685 (Cal. 1905); *Horney v. Nixon*, 61 A. 1088, 1089 (Pa. 1905); *Aaron*, 96 N.E. at 737; *Bowlin*, 25 N.W. at 767-68.

132. 1865 Mass. Acts 277. In 1866, Massachusetts adopted a separate statute that in effect repealed the limitation by forbidding racial discrimination in “any . . . public place of amusement.” 1866 Mass. Acts 252. The two statutes were later replaced by a more comprehensive legislative scheme proscribing discrimination in public places. 1885 Mass. Acts 316. For a succinct summary of the Massachusetts code provisions, see *Bryant v. Rich's Grill*, 103 N.E. 925, 926-27 (Mass. 1914), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 571-72 (1995).

133. Act of March 1, 1875, 18 Stat. 335, 336.

lacked authority under the Thirteenth Amendment to prohibit discrimination in public accommodations because those acts did not amount to a "badge" or "incident" of slavery.¹³⁴

In its Thirteenth Amendment analysis, the Court in the *Civil Rights Cases* staked out the boundaries of the political and the social realms. The Court ruled that "the necessary incidents of slavery" burdened those "fundamental rights which are the essence of civil freedom": property rights and rights of access to the legal process.¹³⁵ The Court distinguished these from "the social rights of men and races in the community."¹³⁶ The Court ruled that denial of access to a given space by a private party did not amount to imposing a badge or incident of slavery but merely amounted to "an ordinary civil injury."¹³⁷ Indeed, on the Court's analysis, no private party *could* impose a badge or incident of slavery.

Justice Harlan, the sole dissenter in the *Civil Rights Cases*, articulated a much fuller meaning of the Thirteenth Amendment, arguing that it gave Congress authority to prohibit discrimination that reflected the ideology of racial superiority upon which slavery was based.¹³⁸ In his view, "Exemption from race discrimination in respect of the civil rights which are fundamental in *citizenship* in a republican government, is . . . a new [constitutional] right."¹³⁹ He too, however, drew a line between civil and social rights, although in a different place. "I agree that government has nothing to do with social . . . rights of individuals. . . . [N]o legal right of a citizen is violated by the refusal of others to maintain merely social relations with him."¹⁴⁰

The Court further embellished the political/social rights distinction in *Plessy v. Ferguson*, in which it upheld a Louisiana statute mandating segregation in railway cars.¹⁴¹ The Court categorized such segregation as "social," analogizing to school

134. The *Civil Rights Cases*, 109 U.S. 3, 20-26 (1883). Freed from federal law, southern states enacted Jim Crow laws, affirmatively requiring segregation, a downward spiral that reached its doctrinal nadir when the Court upheld a mandatory segregation statute in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

135. *The Civil Rights Cases*, 109 U.S. at 22.

136. *Id.*

137. *Id.* at 24.

138. *Id.* at 39-40 (Harlan, J., dissenting).

139. *Id.* at 56 (Harlan, J., dissenting).

140. *Id.* at 59 (Harlan, J., dissenting).

141. 163 U.S. 537, 552 (1896).

segregation and anti-miscegenation laws, which were then unchallenged.¹⁴² Justice Harlan again dissented, reading the Thirteenth and Fourteenth Amendments together as guaranteeing “personal liberty,”¹⁴³ including “exemptions from legal discriminations—implying inferiority in civil society.”¹⁴⁴ Justice Harlan’s “sense of liberty is not simply the freedom to do as one will; it is rather the freedom to participate equally in democratic self-governance.”¹⁴⁵

Under both Justice Harlan’s and the majority’s approaches, civil and social rights existed in separate zones. The Court’s majority saw the realm of civil rights as extremely small and the social rights zone as insulating virtually all social norms from regulation. Justice Harlan conceptualized the civil rights zone as synonymous with citizenship to which he gave a more generous interpretation, and the social zone as a smaller sphere of interpersonal relations. Justice Harlan’s support for African-Americans having right of access to a limited number of privately-owned spaces did not, for him, intrude on either privacy or the freedom to believe, as he did, in the inequality of the races.¹⁴⁶

In the aftermath of the *Civil Rights Cases*, eighteen states enacted their own public accommodations statutes, most copied verbatim from the text of the 1875 Act.¹⁴⁷ Thus, this core set of state public accommodations statutes literally grew out of debates over the scope of an individual’s civil rights as a citizen. There is a very particular and direct relationship between prohibitions on discrimination in public accommodations and the meaning of citizenship.

Although the language of civil versus social rights has disappeared, the central constitutional rulings in the *Civil Rights Cases* are still good law. In the specific context of public accommodations, the Court’s reasoning still controls federal law. The scope of Thirteenth Amendment protection has been extended beyond conditions of literal servitude to include the power to make contracts, but the Court has refused to extend it

142. *Id.* at 544.

143. *See id.* at 555 (Harlan, J., dissenting).

144. *Id.* at 556 (Harlan, J., dissenting).

145. T. Alexander Aleinikoff, *Re-Reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 976.

146. *See Plessy*, 163 U.S. at 559.

147. Turner & Kennedy, *supra* note 126, at 631 n.22.

much further.¹⁴⁸ The limitation of the Fourteenth Amendment to state action remains law.¹⁴⁹

In the *Civil Rights Cases*, the Court had hinted that Congress might have the requisite power under the Commerce Clause to require non-discriminatory access to private property.¹⁵⁰ In 1964, as part of the omnibus civil rights bill, Congress took the hint, specifically grounding Title II in its power over interstate commerce.¹⁵¹ The question of whether to base the Act on the Commerce Clause or the Fourteenth Amendment generated tremendous debate among supporters of the legislation.¹⁵² One Fourteenth Amendment theory was that Congressional authorization to regulate state action could support a provision that reached all public accommodations that states licensed.¹⁵³ The NAACP and Americans for Democratic Action (ADA) argued that the Court had dropped hints in recent cases that it was ready to reconsider its holding in the *Civil Rights Cases* that Congress could not reach private actors under the authority of the Fourteenth Amendment.¹⁵⁴

148. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 188 (1989).

149. See generally *Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001); *United States v. Morrison*, 529 U.S. 598 (2000). The exact boundaries of this limitation, however, remain in dispute. See generally Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

150. See *The Civil Rights Cases*, 109 U.S. 3, 18-19 (1883).

151. Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243.

152. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 90-93, 127-33 (1990); DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* 295, 297-98, 306-09 (1966); DENTON L. WATSON, *LION IN THE LOBBY: CLARENCE MITCHELL, JR.'S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS* 563-70 (1990).

153. See GRAHAM, *supra* note 152, at 128.

154. See WATSON, *supra* note 152, at 567. ADA counsel Joseph Rauh relied primarily on *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (holding state court enforcement of restrictive covenants to deny access to property based on race violates equal protection), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961) (holding lessees of state property must comply with the proscriptions of the Fourteenth Amendment). See *id.* These legislative arguments were formulated in the summer of 1963. In June 1964, the Supreme Court announced its holding in *Bell v. Maryland*, deciding whether enforcement of a trespass law against lunch counter sit-in demonstrators violated the Fourteenth Amendment. 378 U.S. 226 (1964). The Court reversed the conviction on the ground that Maryland's subsequent adoption of a state public accommodations law had abolished the crime of which Bell, the petitioner, had been convicted. *Id.* at 238-42. By so ruling, the Court sidestepped the opportunity to address whether state action to enforce a property owner's exclusion based on race violated the Fourteenth Amendment. Chief Justice Warren, to-

The Justice Department advocated strongly for restricting the entities covered to those with direct relation to the movement of people and goods across state lines.¹⁵⁵ In addition to the danger of a second Supreme Court invalidation, the Department, reinforced with a memorandum from Professor Paul A. Freund, argued that the Fourteenth Amendment theory left control to the states, which could deregulate certain entities, and resulted in many more entities covered, although not necessarily the same ones in each state.¹⁵⁶ In the end, Congress mentioned both constitutional grounds in the Act's preface,¹⁵⁷ but structured the Act solely as a regulation of interstate commerce.

The final definition was limited even more narrowly than the Commerce Clause authority could have encompassed, primarily reaching hotels, restaurants, and theaters.¹⁵⁸ The definition, however, also included places of business that contained eating establishments,¹⁵⁹ and because of that, it reached hundreds of department and variety stores that contained restaurants or lunch counters. In addition, federal courts consistently interpreted the list of public accommodations broadly, rejecting, for example, a campaign to distinguish "places of entertainment and exhibition" from those of "enjoyment" in an effort to exclude participatory activities and cover only spectatorship.¹⁶⁰

gether with Justices Douglas and Goldberg, concurred in the judgment but would have reached the merits and held that the Fourteenth Amendment extended "the traditional rights of access to places of public accommodation . . . to Negroes." *Id.* at 316 (Goldberg, J., concurring). In a separate concurrence, Justice Douglas argued that "the right to be served in places of public accommodations is an incident of national citizenship." *Id.* at 250 (Douglas, J., concurring). Justices Black, Harlan, and White dissented, arguing instead that it was permissible for the state to enforce the wishes of a private property owner to exclude persons based on race. *Id.* at 318 (Black, J., dissenting). The *Bell* decision came too late to influence the text of the 1964 Civil Rights Act.

155. GRAHAM, *supra* note 152, at 91-92, 127-28; MORGAN, *supra* note 152, at 300-02, 308-09; WATSON, *supra* note 152, at 565-66.

156. See GRAHAM, *supra* note 152, at 92-93. More prosaically, but perhaps of equal importance, basing the bill on the Commerce Clause ensured that it would be sent to a Senate committee chaired by a bill supporter rather than to the Judiciary Committee chaired by Senator James Eastland of Mississippi. See *id.* at 81, 90.

157. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(b), 78 Stat. 241, 243.

158. *Id.* §§ 201(b)(1)-(4).

159. *Id.* § 201(b)(2).

160. See *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438-39 (1973); *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969); *United States v. Slidell Youth Football Ass'n*, 387 F. Supp. 474, 482-83 (E.D. La. 1974); *Miller v.*

Title II probably realized its fullest potential as an anti-discrimination mechanism, given its confining list of covered establishments, because of such judicial interpretations. The ensuing dismantlement of apartheid in the everyday consumer life of the South was the most immediate and visible result of the entire 1964 Civil Rights Act.¹⁶¹

Nonetheless, in important ways, the 1964 Act did not break with the past. It continued the model of enumerating specific public accommodations rather than attempting a more generic definition. Within those categories, Congress asserted its plenary power to reach those “discriminatory practices which inhibit travel.”¹⁶² But with no Fourteenth or Thirteenth Amendment grounding to the statute, there was no underlying logic to it other than providing access on a non-discriminatory basis to institutions serving, or instrumentalities moving in, interstate commerce.¹⁶³

Although the Commerce Clause authority reached non-profit entities, its surest application was to business exchanges and consumer purchases.¹⁶⁴ Even the Senate bill, which had a broader scope than the final enactment, only applied to a “public place that keeps goods for sale to the public . . . and any other establishment where goods, services, facilities, privileges, advantages, or accommodations are held out to the public for

Amusement Enters., Inc., 394 F.2d 342, 349 (5th Cir. 1968) (en banc); Lerman & Sanderson, *supra* note 119, at 222; see also generally Donald T. Kramer, Annotation, *Validity, Construction, and Application of § 201 (3) and Related Provisions of the Civil Rights Act of 1964 (42 USC § 2000a(b)(3)), Prohibiting Discrimination or Segregation in Motion-Picture Houses, Theaters, Concert Halls, Sports Arenas, Stadiums, or Other Places of Exhibition or Entertainment*, 7 A.L.R. FED. 415 (1971 & Supp. 2000).

161. I do not mean to imply, however, that completely equal access has been achieved anywhere in the United States, even as to everyday retail sales. See generally Regina Austin, “A Nation of Thieves”: *Securing Black People’s Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147 (discussing African-Americans’ attitudes toward commerce in modern America).

162. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964).

163. The *Heart of Atlanta Motel, Inc.*, Court, in a nod to those who defended the Act on other grounds, acknowledged that Congress was also legislating on a moral basis and declared that this component of legislative purpose did not invalidate the Act. *Id.* at 257.

164. Non-profits that were engaged in selling products or running recreational facilities were generally covered. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201(b)(1)-(4), 78 Stat. 241, 243. Membership clubs, which were exempt from coverage, *id.* § 201(e), became a frequent sticking point, see *infra* text accompanying notes 168-179.

sale, use, rent, or hire."¹⁶⁵ The judicial interpretation of Title II also reflected that focus.¹⁶⁶ The end result was a doctrinal hangover from the civil versus social rights ideology that Congress could not cure because of the *Civil Rights Cases* and that the Supreme Court has never repudiated.

C. SEX DISCRIMINATION AND THE EMERGENCE OF THE EXPANSIVE MARKET CONCEPT

Because sex discrimination was not included as part of the federal public accommodations law, women's rights advocates turned to state legislatures for a remedy. By the late 1970s, twenty-six of the existing thirty-nine state public accommodations statutes had been amended to add sex as a prohibited basis for discrimination.¹⁶⁷

The result was a subtle but powerful shift in the import of public accommodations law. The shift was subtle because, other than adding sex to the list of prohibited bases for exclusion or discrimination, the 1970s changes to state laws did not alter statutory language. It was powerful, however, because the addition of sex discrimination reframed the social impact of these laws.

Women as a group were not excluded from, or segregated in, their participation in American life as consumers the way that African-Americans had been. Indeed, if anything, they were celebrated for consumption. In cases brought by women, the targets shifted from nominally public businesses with racialized practices to nominally private entities that functioned as sites for the informal exchange of social and economic capital. The laws were applied to clubs, such as the Jaycees or Rotary Club, that were formally membership organizations but which functioned as adjunct business places, where the kind of networking that is essential to success often occurred.

This expansion of the equality mandate was enabled by the fact that the sex discrimination challenges brought under state law were not required to adhere to an interstate commerce rationale for their viability as causes of action. In fact, any concern was quite the opposite. When a state law materially affects the flow of interstate commerce, it will run afoul of the

165. S. REP. NO. 88-872, at 3 (1964). In addition, all such establishments had to be shown to have an impact on interstate commerce. *Id.* at 3-4.

166. *See, e.g., Heart of Atlanta Motel, Inc.*, 379 U.S. at 252-57.

167. Lerman & Sanderson, *supra* note 119, at 264.

Dormant Commerce Clause. Thus, the increased use of state public accommodations laws that occurred in sex discrimination cases had the effect of localizing the inquiry. It focused judicial attention on the interstitial connections between economic and social institutions.

As a result of the sex discrimination cases brought against membership clubs, courts held that the scope of public accommodations was not limited to venues for the sale of tangible goods and services, but that intangibles, such as leadership skills, could be classified as "goods."¹⁶⁸ Courts also stressed that there was an economic link, albeit somewhat indirect, between these non-profit clubs and the market, and that persons excluded from such clubs suffered tangible, material harm.¹⁶⁹ In general, the business and civic clubs' activities were conceptualized as falling under the rubric of "public, quasi-commercial conduct."¹⁷⁰ The Supreme Court in *Roberts v. United States Jaycees* framed the market as a proxy for democratic institutions: "This expansive definition reflects a recognition of the changing nature of the American economy and of the importance . . . of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups."¹⁷¹

Justice O'Connor is the Court's leading proponent of basing application of such a civil rights provision squarely on whether the group is primarily commercial. Her concurring opinion in *United States Jaycees* rejected the Court's balancing of an entity's expressive function against a state's least restrictive implementation of a compelling interest.¹⁷² Instead, Justice O'Connor would draw a much brighter line, that between organizations predominantly engaged in protected expression and those predominantly engaged in market related activity.¹⁷³ Positing the state's proper goal as that of "ensuring nondiscriminatory access to the commercial opportunity presented by membership,"¹⁷⁴ Justice O'Connor argued that "[o]nce [a group]

168. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984).

169. *Id.* at 625-26.

170. *Id.* at 625.

171. *Id.* at 626.

172. *Id.* at 632-35 (O'Connor, J., concurring).

173. *Id.* at 635-38 (O'Connor, J., concurring).

174. *Id.* at 640 (O'Connor, J., concurring).

enters the marketplace of commerce in any substantial degree," it loses its constitutional defense.¹⁷⁵

That, in her view, is what happened to the Jaycees. Justice O'Connor agreed that "advocacy of political and public causes, selected by the membership, is a not insubstantial part of what [the club] does."¹⁷⁶ Even accepting that as a legitimate claim to an expressive function, however, the Jaycees were an "easy case" for application of the statute because commercially-linked entities, no matter how expressive, fell outside an association defense. "Notwithstanding its protected expressive activities, the Jaycees . . . is, first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management."¹⁷⁷

Justice O'Connor reiterated her views four years later, joined this time by Justice Kennedy, who had not been a member of the Court at the time of *United States Jaycees*. In *New York State Club Ass'n v. City of New York*, the Court upheld a New York City public accommodations statute against a facial challenge filed by a consortium of private clubs, holding that it was constitutional as applied to a significant number of the member clubs and thus could not be stricken as overbroad.¹⁷⁸ Justices O'Connor and Kennedy wrote separately to emphasize that a large membership would not per se disqualify a private club from having an expressive association defense, adding, however, that "[p]redominately commercial organizations are not entitled to claim" such a defense.¹⁷⁹

D. SEXUAL ORIENTATION AND ACCESS TO DISCURSIVE SPACE

The most recent wave of public accommodations claims has arisen under state and local statutes prohibiting discrimination based on sexual orientation. Here, too, there has been no statutory language change other than the addition of a new prohibited basis for discrimination to a pre-existing list, but the impact of this two-word addition has been substantial. As illustrated by two major gay rights litigation efforts—the Boy Scouts cases and cases seeking admission for openly lesbian and gay contingents in ethnic pride parades, most famously the

175. *Id.* at 636 (O'Connor, J., concurring).

176. *Id.* at 639 (O'Connor, J., concurring).

177. *Id.* at 639 (O'Connor, J., concurring).

178. 487 U.S. 1, 18 (1988).

179. *Id.* at 20 (O'Connor, J., concurring).

St. Patrick's Day parades¹⁸⁰—the claim has been of a right to presence, even when there is no material benefit at issue and a fixed space is either non-existent or irrelevant. These claims are not about access to either physical space or to an opportunity for material gain, but access to cultural or discursive space.¹⁸¹

This current round of cases calls the question of the extent to which the rationale of regulating the market and its penumbras is a necessary part of the foundation for public accommodations laws. It marks a moment when the law has moved from its initial concern with innkeepers and common carriers to, potentially, a willingness to carry the equality principle into civic organizations not linked in any obvious way to market forces or economic harm. It signals a new kind of rights claim, not to any form of property, however broadly conceived. It is a claim to cultural citizenship.

Notably, each of the sexual orientation cases that has reached the Supreme Court in the last five years has implicated public accommodations laws in some way. In *Romer v. Evans*, the Court struck down a state constitutional amendment that would have repealed civil rights protections for lesbians and gay men and erected a uniquely high barrier to their re-enactment.¹⁸² Among the laws affected were public accommodations provisions, which the Court described not as “special” rights, but as “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”¹⁸³ In *Romer*, however, no specific application of a public accommodations statute was before the Court.

180. In addition to the Boston litigation, which ended with *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), there were years of litigation concerning the New York City St. Patrick's Day Parade. *E.g.*, *Irish Lesbian & Gay Org. v. Giuliani*, 918 F. Supp. 732 (S.D.N.Y. 1996); *Irish Lesbian & Gay Org. v. Bratton*, 882 F. Supp. 315 (S.D.N.Y. 1995); *Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986). In addition, other groups of lesbians and gay men have sought recognition in the celebrations of minority communities to which they belong. *E.g.*, KEITH BOYKIN, *ONE MORE RIVER TO CROSS: BLACK AND GAY IN AMERICA* 176-78 (1996) (describing an African-American community parade in Chicago).

181. I take the phrase “discursive space” from Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 49 STAN. L. REV. 143, 144 (1996).

182. 517 U.S. 620, 635-36 (1996).

183. *Id.* at 631.

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, the Court refused to permit enforcement of the Massachusetts state public accommodations statute to require the St. Patrick's Day parade to allow a gay contingent to march.¹⁸⁴ The Court in *Hurley* described the Jaycees in *United States Jaycees* as an "association provid[ing] public benefits to which a State could ensure equal access,"¹⁸⁵ and "[a]ssum[ed] the [St. Patrick's] parade to be . . . a source of benefits (apart from its expression) that would generally justify a mandated access provision."¹⁸⁶ The Court did not discuss market links or the absence thereof explicitly, but the language suggests a desire to frame the protection as centered on some form of benefits.

That discomfort became explicit in *Dale*. A full paragraph in the *Dale* opinion is devoted to the Court's bemoaning the increasing reach of public accommodations statutes, far beyond inns and common carriers, to "places that often may not carry with them open invitations to the public" and "without even attempting to tie the term 'place' to a physical location."¹⁸⁷ The paragraph closes with a sentence that appears to reflect the views expressed in *United States Jaycees* by Justice O'Connor¹⁸⁸ (who joined the opinion authored by Chief Justice Rehnquist): "As the definition of 'public accommodation' has expanded from clearly commercial entities . . . to membership organizations . . . , the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."¹⁸⁹ It is evident that a majority of the Court would prefer limiting the scope of public accommodations laws to "clearly commercial entities."

At issue beneath the surface of the debates over interpreting the scope of public accommodations statutes is the proper meaning of "public" in the context of civil rights law. The currently dominant view would be that the term "public," as applied to the private sector, connotes an expansive market, including services as well as goods, and intangible as well as tangible benefits. Commerce itself is a marker of what is public; the absence of commerce can mark an entity as private.¹⁹⁰

184. 515 U.S. 557, 573 (1995).

185. *Id.* at 580.

186. *Id.*

187. 120 S. Ct. 2446, 2455-56 (2000).

188. *See supra* text accompanying notes 172-77.

189. *Dale*, 120 S. Ct. at 2456.

190. This bright line might, however, not be as bright as it first appears.

The expansive market model, however, sells short the historical tradition embodied in public accommodations statutes: the successive waves of campaigns by subordinated groups to claim access to fuller participation in a democracy.

IV. A THEORY OF, AND FOR, PUBLIC ACCOMMODATIONS

The newer civil rights claims have shifted the meaning of public accommodations law from what began as a property-based concept linked to certain “places” and the limits on ownership rights associated with those places, to a much more abstracted set of claims for recognition and cultural participation. This shift has occurred simultaneously with new directions in constitutional theory. Legal and political theorists such as Jurgen Habermas have wrestled with the ramifications for democratic governance of what Habermas labeled the “public sphere,” a zone distinct from the state, the market, and the family that included the voluntary associations of civil society.¹⁹¹

Under its current interpretation, California’s public accommodations law will reach a boys club, a country club, and a non-profit homeowners association, but not the Boy Scouts. In *Curran v. Mount Diablo Council of the Boy Scouts of America*, the California Supreme Court ruled that the statute did not cover the Boy Scouts because the Boy Scouts were primarily social and expressive with only a few auxiliary commercial or business functions. 952 P.2d 218, 238 (Cal. 1998). Treating the Boy Scouts, which proclaims itself “open to every boy,” as not a public accommodation was limited to its membership decisions and policies; the court acknowledged that other organizational activities such as a retail store might produce a different result. *Id.* In *Warfield v. Peninsula Golf & Country Club*, the court found that a private country club with highly selective membership criteria was a public accommodation based on the fact that non-members could use club facilities on a daily fee basis, a source of club income that benefited members. 896 P.2d 776, 792-93 (Cal. 1995). Girls won the right to join a Boys Club on the ground that it was open to any boy for a nominal fee and operated a large recreational facility in *Isbister v. Boys’ Club of Santa Cruz, Inc.*, 707 P.2d 212, 217-18 (Cal. 1985) (en banc). These decisions are difficult to reconcile: “To put it bluntly,” one justice wrote, “the law is a mess.” *Curran*, 952 P.2d at 260 (Brown, J., concurring).

The decisions illustrate the complications that can arise from the interpenetration of market and non-market functions within a single non-profit entity. *Warfield* would suggest that if any function were classifiable as a public accommodation, then the entire entity would be covered, including the membership policies. The *Curran* court, on the other hand, treated the two functions as independent, implying that the organization would be classifiable as a public accommodation for some of its activities, but not for others.

191. JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 2, 23, 30 (Thomas Burger trans., 1989) (1962); Jurgen Habermas, *Further Reflections*

For Habermas, the public sphere is primarily a discursive zone: "the *social space* generated in communicative action. . . . This space stands open, in principle, for potential dialogue partners who are present as bystanders or could come on the scene and join those present."¹⁹² The concept of public sphere is part of a complex theory of democratic legitimacy, which itself is open to attack on the basis of a failure to address issues such as the gendered nature of realms that Habermas describes in universalistic terms.¹⁹³ Despite those shortcomings, and although not the same as the zone defined by civil rights statutes as public accommodations, the concepts of the public sphere and civil society can help us reconceptualize what should be the law's relationship to the buffer zone between the state and the individual.

A. THE PUBLIC SPHERE, CIVIL SOCIETY, AND PUBLIC ACCOMMODATIONS

The first duties imposed by public accommodations statutes in the nineteenth century were to accept travelers seeking transportation and lodging. Congress continued to place primary reliance on the same reasoning when it enacted the Civil Rights Act of 1964. But with the acceptance of an expansive market interpretation of those statutes which are more generous in scope, the emphasis is no longer on the activity of travel or on any discrete activities, but on an entire domain of life. How broad that domain should be—whether it should consist of only the market or of a large number of non-market-linked entities as well—depends on what we intend these laws to achieve.

As applied to the market, civil rights laws establish a level playing field and eliminate irrationalities deriving from prejudice. They secure access to markets in commodities and capital, enabling both consumption and production. But they have much deeper political functions as well because they also pro-

on the Public Sphere, in HABERMAS AND THE PUBLIC SPHERE 421, 453 (Craig Calhoun ed., 1992).

192. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 360-61 (William Rehg trans., 1996).

193. See generally Nancy Fraser, *What's Critical about Critical Theory?*, in FEMINISTS READ HABERMAS: GENDERING THE SUBJECT OF DISCOURSE 1, 1-55 (Johanna Meehan ed., 1995).

vide access to discursive systems that generate a host of regulatory norms, many extending far beyond the market.

Although economic harm is undeniably important, indeed sufficient, to justify a law mandating access to market-linked venues, that sufficiency has hidden the importance of other functions. Functions associated with cultural and social citizenship are not mere epiphenomena of commercial entities. They occur across a range of market and non-market sites, exclusion from which constitutes much more than either economic or emotional harm.

Take the example of theaters and places of amusement, a category that was included in the 1964 Civil Rights Act despite the fact that it is the category least connected to the consumer's right to travel, which underlay the remainder of the legislation (although it posed no constitutional problems to regulation under that theory because entertainment moved in interstate commerce). What Congress had most prominently in mind, movie theaters, are certainly commercial enterprises,¹⁹⁴ but the category clearly covered non-profit enterprises as well. Yet the critical role of local theaters in the South did not turn on their being one of life's most important or necessary services or on the fact that films and production companies moved across state lines. What made theaters important was their role as a generator of public culture. Implicit in the demand to constitute an audience was a recognition that performance is relational, not merely passive. Moviegoers constituted both a market and a specific cultural public. Theaters are a stellar example of how much more than money and goods is exchanged in the market. Spaces and relations that are nominally commercial or material have powerful normalizing functions as well.

Such important aspects of a democratic system are captured only awkwardly by a public accommodations law. One result is that courts have stretched to interpret "entertainment" and "amusement" to reach activities that do not fall so obviously in those categories. The claim by gay and lesbian marchers to participate in the St. Patrick's Day parade, for example, was grounded on the fact that the Massachusetts statute covered places of amusement.¹⁹⁵ No matter how one char-

194. Indeed, the Court once held that movies lacked First Amendment protection as expression because they were nothing more than business enterprises. *Mut. Film Corp. v. Indus. Comm'n*, 236 U.S. 230, 244-45 (1915).

195. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S.

acterizes what was at stake in that case, it is certainly a great deal more significant than amusement. The discursive systems that arise around these venues, as well as around market-based entities, trigger concerns for democratic self-governance. They form the core of civil society.

In many instances, such voluntary organizations instantiate norms of citizenship. Some, such as political parties, overlap directly with the state and form multiple direct connections with the legislative and administrative branches. Others interact with the state in less direct ways or less frequently—the Boy and Girl Scouts would be examples of that form. Still others, such as private schools, have no direct connection to state authority, but may nonetheless openly profess or seek to inculcate normative behaviors that trench on qualities of citizenship. In each instance, there is a broad invitation for members of the public to participate. Discursive communities arise that directly implicate civic identity. What is at stake in cases based on public accommodations laws is access to that discursive space—“the power to create and contest social meaning.”¹⁹⁶

Public accommodations statutes reach a public sphere or a component of civil society in which widely-shared social norms and meanings related to citizenship emerge. Habermas described the public sphere as a “realm of our social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens. A portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body.”¹⁹⁷ These are spaces that may be mundane but nonetheless function as sites for political discourse. They are “multiple . . . and decentered publics where people formulate their democratic aspirations.”¹⁹⁸ Habermas’s work does not address the deep normative conflicts raised by cases such as *Dale*,¹⁹⁹ but his fundamental insight linking the operations of civil society’s discursive infrastructure to the in-

557, 561-62 (1995).

196. Sunder, *supra* note 181, at 145.

197. Jurgen Habermas, *The Public Sphere*, in CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 105, 105 (Robert E. Goodin & Philip Pettit eds., 1997).

198. MARY P. RYAN, *CIVIC WARS: DEMOCRACY AND PUBLIC LIFE IN THE AMERICAN CITY DURING THE NINETEENTH CENTURY* 8 (1997).

199. I agree that his work could use a “more pragmatic temper regarding plurality and difference.” William E. Forbath, *Habermas’s Constitution: A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969, 1012 (1998).

tegrity of democratic political processes is nonetheless extremely useful.

Rather than persist in thinking of the issue as social rights or social equality in the channels originally carved out in an attempt to resist full racial equality, we should begin with the question of which institutions and relations function most significantly as generators of the norms and meanings of citizenship. We need a theory of social citizenship, a recognition that multiple social locations and spheres form parts of Americans' lived experience of citizenship. One can imagine a Venn diagram of three adjacent circles representing the state, the market, and private sector non-commercial entities that are broadly open to the public. A fourth circle superimposed on top, that comprises segments of each of the other three, represents social citizenship.

Jane Schacter argues that civil society occupies a horizontal plane that intersects with vertically aligned political institutions.²⁰⁰ In the context of commenting on *Romer v. Evans*, Schacter reviews the scholarship on two questions: whether social equality is endogenous or exogenous to democracy and whether the equal protection clause is properly viewed as substantive or procedural.²⁰¹ Schacter concludes that the dynamics of political and social equality are better expressed in two intersecting planes.²⁰² She proposes that social status be imagined as a horizontal plane encompassing multiple institutions, which intersects with the vertical plane of political society at the level of individual citizens and voters.²⁰³ The full vertical plane in her analysis includes legislative, executive, and judicial levels as well.²⁰⁴ On this conception, social status inevitably, but indirectly, affects core political life.

Like Schacter, I believe that our concept of politics and citizenship should attempt to capture the ramifications of the regulatory quality of social norms and cultural meanings. I differ in that I argue that we should shift the focus from rights to the forces that shape "citizens," and that we should recognize that those forces are far broader than the traditional juridical functions and institutions of the state on which most of the citi-

200. Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 399-403 (1997).

201. *Id.* at 389-98.

202. *Id.* at 399.

203. *Id.*

204. *Id.*

zanship scholarship has focused. "Citizen," in other words, is not purely a creature of the state, either in birth or definition.

Implicitly, the law has recognized that markets have a role in constituting citizenship. Indeed, public accommodations laws constitute one example of that acknowledgment. Markets seek consumers and thereby bring previously excluded individuals into central social dynamics. That development, however, also commodifies the concept of citizenship. One can appreciate the value of market mechanisms while still believing that citizenship should mean more than access to networking and a fair chance to become a rainmaker.²⁰⁵

The concept of social and cultural citizenship can be only the beginning of an effort to define the scope of public accommodations. It is not necessarily more vague than the concept of market has become, however, in the interpretations generated by *United States Jaycees* and its progeny. Its touchstone is whether norm-generating entities represent themselves as broadly open to the public. If they do not, the exclusion of any particular individual carries little meaning. If they do, however, exclusion becomes a marker, a badge of inferiority, as the dissent noted in *Dale*.

B. APPLYING THE SOCIAL CITIZENSHIP MODEL

Let us imagine a slight change in history: Reconstruction did not end the same way. More justices sharing Justice Harlan's philosophy were appointed to the Court. As a result, the *Civil Rights Cases* were overruled, and the Court adopted the Thirteenth Amendment reasoning that was the basis of Justice Harlan's dissent. Although Justice Harlan did not renounce the "social rights" discourse, he framed the issue as one involving the full range of meaningful citizenship. It is a fair inference that this interpretive model would later have formed the basis for analysis of other civil rights statutes (as well as, perhaps, *Brown v. Board of Education*²⁰⁶).

205. There is an argument that full and meaningful citizenship requires not merely opportunity for economic advancement, but an assurance of economic security. British sociologist T.H. Marshall developed a theory of "social citizenship" that stresses the indispensability of "social rights" such as a basic living standard, housing, and health care. See generally T.H. Marshall, *Citizenship and Social Class*, in CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 291, 291-319 (Robert E. Goodin & Philip Pettit eds., 1997). The theory provides an alternative frame for critiquing the shortcomings of formal, legalistic definitions of citizenship. See *id.*

206. 347 U.S. 483 (1954).

That, of course, did not happen. What did happen, however, was that in the wake of the *Civil Rights Cases* decision, eighteen states enacted public accommodations statutes.²⁰⁷ Although I do not contend that all of these laws must necessarily be read today as endorsements of Justice Harlan's dissent and as adoption of the citizenship analysis,²⁰⁸ I do argue that the concept of social citizenship as an interpretive frame for public accommodations statutes is valid, all the more so for those statutes enacted specifically to repudiate the reasoning of the *Civil Rights Cases*.

To pose the question of what direction such a sustained development of the concept of citizenship in this context would have taken is not to answer it.²⁰⁹ Certainly Justice Harlan himself would not have extended civil rights laws to civic organizations at the turn of the last century. But had his dissent been adopted by the Court, it would have initiated a set of questions that were centered on the meaning of citizenship, specifically in the context of public accommodations. At the federal level, using the citizenship framework would require an explicit repudiation of at least the Thirteenth Amendment portion of the *Civil Rights Cases*.

No such dramatic reversal would be necessary at the state level. Indeed, another major (and continuing) doctrinal border established by the same Court was the tightly cabined scope of the Privileges and Immunities Clause. In the *Slaughter-House Cases*, the Court held that "fundamental citizenship" was determined by the states, and only a specified bundle of rights enumerated in the Constitution was protected by that clause as a part of national citizenship.²¹⁰

The voluminous commentary on the *Slaughter-House Cases* and its progeny has centered on the proper scope of federal citizenship. What that body of law does as well, however, is to paint the authority of states in broad strokes, giving them enormous discretion to determine not only who are citizens of a

207. KONVITZ & LESKES, *supra* note 130, at 157.

208. The legislative histories of particular laws may vary, and subsequent amendments may have altered the text in ways that would affect whether this interpretive approach would be appropriate.

209. For a comprehensive political and historical analysis of the development of the concepts of citizenship and "civic identity" through 1912, see generally ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

210. 83 U.S. (16 Wall.) 36, 77, 79-81 (1873).

state, but what the concomitant operative effects of such citizenship might be.²¹¹ It is, therefore, particularly open to state legislatures and judges to think expansively about the meaning of citizenship. That potential makes it especially ironic that the states, many of which first enacted public accommodations laws in order to fill a gap left by the federal government after the invalidation of the Civil Rights Act of 1875, have so often opted to extend that law only into the sorts of venues that the much more limited federal authority is permitted to reach. It renders all the more unfortunate the impulse by the Supreme Court to enshrine those limits.

What is most critical, however, is answering the question of what the society should seek to achieve by enacting public accommodations laws. In both their historical context and in contemporary social theory, they resonate most powerfully with concepts of full participatory membership in those venues that undertake to generate, in a broadly open and highly unselective way, norms of citizenship. Habermas's concept of the public sphere provides, at the least, a theoretical starting point for developing that conceptualization.²¹²

CONCLUSION

Statutes prohibiting discrimination in public accommodations comprise a continuously cutting edge of civil rights law. They extend the mandate of equality beyond state action, beyond a right of political participation, and beyond the core necessities of employment and housing. They operate as the zoning laws for democracy, creating boundaries for the reach of public law into those institutions that Tocqueville, and many others since, saw as forming defensive bulwarks against a coercive state.²¹³ They virtually define inclusion and exclusion in civil society.

211. Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 926 (1986) ("The framers[] [of the Reconstruction Amendments] understanding of citizenship involved an important distinction between fundamental and nonfundamental rights. . . . [C]ontroversial rights [such as access to public accommodations] . . . were nonfundamental rights of state citizenship and were within the jurisdiction of the states."). As to federal law, they were secured not directly by, but through, the equal protection clause of the Fourteenth Amendment. *See id.*

212. *See supra* text accompanying notes 197-99.

213. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513-14 (J.P. Mayer ed., George Lawrence trans., 1969) (1835).

Legislators and judges should resist suggestions to solve the kind of expressive association problem presented in *Dale* by truncating the meaning of public accommodations. Instead, courts need to examine much more carefully than the Supreme Court did in *Dale* whether an organization's policy of excluding persons with an identity characteristic protected by anti-discrimination law is necessary to preserving the group's unity of beliefs. And they should do so with an understanding that public accommodations properly encompass more than the market; the concept has from its inception shaped and been shaped by our understandings of citizenship.

With regard to state institutions, equality law protects the individual's right to meaningful participation in diverse institutions that powerfully construct both citizen and self. One can read *Brown v. Board of Education*,²¹⁴ *United States v. Virginia*,²¹⁵ and *Romer v. Evans*,²¹⁶ for example, to that effect. In public accommodations law, the *United States Jaycees-Rotary Club-New York State Club Ass'n*²¹⁷ line of cases established the threshold for exploring how to weave that principle into the law as it affects broadly open, private institutions. Sadly, at least for the moment, *Boy Scouts of America v. Dale* has cut short that exploration.

214. 347 U.S. 483 (1954).

215. 518 U.S. 515 (1996).

216. 517 U.S. 620 (1996).

217. See *supra* note 76 and accompanying text.

