

**MEMBERSHIP AND MESSAGES: THE (IL)LOGIC OF EXPRESSIVE
ASSOCIATION DOCTRINE**

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INTRODUCTION

The First Amendment right of “expressive association” gives an organization a pass on antidiscrimination laws if compliance would result in the dilution or obfuscation of its message. But the pass will not issue on its mere say-so. It must show three things: (1) it is an expressive organization with a particular message to send; (2) it will not be able to send that message, at least in the manner it would prefer, if it cannot exclude certain people; and (3) its expressive interest in *exclusion* is not outweighed by the public’s interest in *inclusion*. The first two prongs are questions of fact, and the third is more a question of law.

This Article focuses on the second prong of that analysis and, in particular, on the “message attribution” claim. Simply put, the message attribution claim is that: “If we include X as a member, we will be sending the message that we like what X stands for. But, we do not want to send that message because we *do not* like what X stands for. Therefore, we have an expressive interest in excluding X.”

To be very clear—and this is important—message attribution claims are not the only ticket through the second prong of the expressive association analysis. An organization could also argue that unwanted members will alter its very character or expressive agenda, or that they will positively obstruct its expression in some way. But this could be true without the views those unwanted members represent actually being attributed to the organization. This will become clearer below when I address the seminal expressive association cases.

If a court accepts a message attribution claim, it is accepting three things. First, it is accepting that X will be seen as standing for something. Second, it is accepting that the organization’s audience—internal or external—will actually get the impression, or draw the in-

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ference, that the organization likes what X stands for, essentially by attributing X's message or views to the organization. And third, it is accepting that this impression or inference is a reasonable one. Framing the issue this way brings an important feature of message attribution claims into sharper focus.

When courts ask what message an unwanted member's presence in an organization will send, or whether the unwanted member's presence in the organization will compromise its message, what they are really asking is what impressions a third party will get, or what inferences that third party will draw, from that unwanted member's presence. In other words, expressive association claims are not based on anything an organization must say or is forbidden from saying; they are based on speculation about what other people might think.

So long as this is the analysis, nearly all message attribution claims are doomed to fail. Virtually no organization, merely by accepting a member it would rather reject, necessarily emits approval of what that unwanted member is presumed to stand for. To the contrary, it will almost always be the case that an unwanted member's presence in an organization can mean any number of things beyond the organization's approval of what he or she stands for. I will say a lot about *Boy Scouts of America v. Dale* below, in which the Supreme Court affirmed the Scouts' First Amendment right to exclude a gay scoutmaster, but I will say just this here. Suppose James Dale wrote the book on knot-tying and was in fact the world's leading authority on rope knots. Would that not be a huge enticement for the Boy Scouts, even if the organization was somewhat bothered, or even greatly bothered, by his homosexuality? If so, what might that say about the reasonableness of a third party's impression or inference that because the Boy Scouts welcomes a gay scoutmaster, it is accepting of his homosexuality? Do we not all find various faults in people we associate with, even those we love deeply, but value the association nonetheless because the pros outweigh the cons? If we really value the freedom of association, then, we are going to have to do better than a message attribution claim to identify the expressive interest at issue, if not abandon expression altogether as the constitutional interest on the line.

To be clear, message attribution claims may be vulnerable for other reasons too. It may be, for example, that X's message—"what X stands for"—is itself contested. This was a huge issue in *Dale*, of course; many critics were outraged that the Supreme Court accepted, on seemingly very little evidence, the Boy Scouts' claim that by merely identifying as gay, Dale was the equivalent of a gay rights activist who would promote a particular view of homosexuality. In this Article, I am more interested in the message attribution claim that lies at the

heart of the expressive association cases. I want to take on the reasoning by which a member's message—assuming there is one—is thought to be attributable to his organization.

I acknowledge that this Article arrives pretty late to the academic literature on this topic. In 2000, when *Dale* was decided, it started a kind of wildfire in the constitutional law of free association. Countless scholars parachuted in pretty quickly to put this fire out, control the burn, or fight it in some other way. (Not nearly so many parachuted in to add more antidiscrimination laws to the fire.) Some of those efforts took on *Dale* specifically, and some of them also took on the very idea of yoking free association to free speech in the first place. The next time a big expressive association case presented itself, involving the opposition of law schools to a federal law that required them to allow military recruiters full access to their students, the fallout was not nearly so dramatic.¹ This is probably because, as much as the law schools did not want to accommodate the military recruiters, they really had no argument and were told as much by a unanimous Supreme Court.²

In any event, exhausted as the expressive association flare-up caused by *Dale* may seem, I think there is still room for the point I want to make in this Article about message attribution claims. When we ask how an organization's message will be distorted by the presence of an unwanted member, we are really asking what a third party will think. And whatever that third party's impression—whatever inference he or she actually draws—the organization's approval of what the unwanted member stands for will always be one of a number of possible explanations for that member's presence, and it will rarely be the most reasonable.

In Part I, I take a step back from the law and highlight implicit message attribution claims in everyday public discourse. There are two points in doing this. First, that message attribution claims are not peculiar to First Amendment jurisprudence. Second, it may be beneficial to bring some of the common-sense intuitions we bring to everyday message attribution claims to their constitutional counterparts.

In Parts II and III, I introduce the expressive association doctrine and detail what I consider to be the important expressive association cases. Again, not all present pure message attribution claims. As we will see, the Boy Scouts' interest in excluding gays relies much more on message attribution logic than, for example, the Jaycees' interest

¹ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

² *Id.*

in not admitting women as full members. Still, it is worth discussing these cases in sequence, and readers who are mildly familiar with the cases can safely skip Part III.

In Part IV, I explore the criticisms of *Dale*, which I argue are various ways of undermining expressive association claims more generally. I focus on *Dale* only because it has generated the most commentary, and because I think it presents the purest (and probably most problematic) message attribution claim. The point in Part IV is not to refute these criticisms, but to show that they are on some level unnecessary and that there is room for my own criticism, namely that the logic of message attribution claims is fundamentally flawed.

Part IV is where I develop the argument that the mere presence of an unwanted member in an organization almost never necessarily means that the organization accepts what that member stands for. There are always other possible explanations, namely that the unwanted member offers something else that makes his inclusion a net gain for the organization. Indeed, just as we take the bad with the good in our personal relationships, and are never presumed to applaud every last thing our friends and loved ones do, organizations should not be presumed to sign onto every aspect or stance of their members' lives.

Also, I survey a number of other cases—most of them compelled speech cases—in which courts, almost always without much discussion, have rejected message attribution claims. There are two points in conducting this survey. First, if courts are so dismissive of message attribution claims in compelled speech cases, why do they seem to take them more seriously in expressive association cases? Second, courts consider message attribution claims on an ad hoc basis, without any discernible methodology or standard. Forcing the Boy Scouts to include a gay scoutmaster would force it to send a message that it approves of homosexuality, and that is that. On the other hand, requiring law schools to accommodate military recruiters would not force them to send a message that they are supportive of “Don’t Ask, Don’t Tell,” and again, that is that. We never get much of a working theory that explains the distinction. This may not be a weakness in the doctrine per se, but it definitely leaves something to be desired in the adjudication of real cases.

I. MESSAGE ATTRIBUTION CLAIMS IN EVERYDAY DISCOURSE

First, I would like to take a step back from the expressive association doctrine and the case law responsible for that doctrine and highlight non-legal instances involving message attribution claims, or in

which the logic of message attribution claims appears. It is important to see message attribution claims as rather straightforward attempts to disassociate from objectionable speech and to expose the logic behind them. The intuitions most of us bring to these everyday disassociation attempts, I suggest, are equally useful when it comes to reasoning through the big expressive association cases and the message attribution claims in those cases.

For a familiar example, consider the common practice of authors with some kind of institutional affiliation—say, attorneys in large law firms or government lawyers—writing something for public consumption and mentioning in their bylines that they speak only for themselves.³ Academics do it too.⁴ Now, these are not message attribution claims of the kind that are made in cases like *Dale*—no one is trying to discriminate—but they do betray a comparable logic or worry, namely that some third party observer will take the writer’s message to be that of his institution. The writer knows that he speaks only for himself, and so does the institution. What motivates the disclaimer is some conjecture about what the reader might think; the disclaimer guards against the potential reaction of a third party.

Here is another example. It is very common for movie DVDs with extra features (such as interviews with the director or actors) to offer up front something like the following disclaimer: Any views or opinions expressed in interviews or commentary are those of the individuals speaking and do not necessarily represent the views or opinions of Universal Studios Home Entertainment, its parent, or any of its affiliates or employees. There again, those offering commentary likely know they speak only for themselves, as does the film studio, but there is apparently a worry that third parties will think otherwise. This example is not exactly the kind of message attribution claim in *Dale*, but the logic of it is indistinguishable. In *Dale*, the organization attempted to disassociate by discrimination; here (and in the above example), there is an attempt to disassociate by disclaimer (first by the organization and second by the speaker) based on the concern

³ See, e.g., George S. Howard, *State high court to hear sampling case*, L.A. DAILY J., Sept. 19, 2012, at 4 (“George S. Howard Jr. is a partner at Jones Day. Mr. Howard practices labor and employment law on behalf of management The views expressed in this article are those of Mr. Howard alone and not those of his firm or its clients.”).

⁴ See, e.g., Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425, 1427 n.* (2009) (“The opinions expressed herein are those of its author and not of his employer, Seton Hall University, the Catholic university in New Jersey.”); see also Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639, 1639 n.† (2001) (“The views herein are solely my own.”).

that an individual's message will be attributed to an entity of which he is only a small part.

We also see disassociation attempts, and the same logic of message attribution claims, as a response to public relations nightmares for companies embarrassed or shamed by an employee's conduct. In February 2011, for example, Christian Dior Creative Director John Galliano was caught on camera in a Paris bar, drunk, saying to women at a neighboring table, "I love Hitler," and "People like you would be dead. Your mothers, your forefathers, would all be fucking gassed."⁵ Provocations on the runway are one thing; anti-Semitic provocations in a country that takes racism seriously are quite another. And so, Galliano was fired.

But Dior did not just fire Galliano and leave it at that. When he was arrested for his remarks, the Dior chairman said, "Christian Dior has an unequivocal zero-tolerance policy regarding anti-Semitism and racism."⁶ And upon his firing, the fashion house said basically the same thing in a statement: "We unequivocally condemn the statements made by John Galliano, which are in total contradiction to the longstanding core values of Christian Dior."⁷ In other words, Dior disavowed Galliano's speech for fear that it would be attributed to Dior, or at least that Dior would be seen as accepting of or ambivalent toward it if it said and did nothing.

A third example: In September 2007, the President of Iran, Mahmoud Ahmadinejad, spoke at Columbia University, where he was introduced by Columbia's president, Lee Bollinger. Bollinger's introduction was lengthy and confrontational, and in the beginning he preemptively disavowed Ahmadinejad's speech, saying,

It should never be thought that merely to listen to ideas we deplore in any way implies our endorsement of those ideas or our weakness of our resolve to resist those ideas or our naivety about the very real dangers inherent in such ideas. It is a critical premise of freedom of speech that we do not honor the dishonorable when we open our public forum to their voices.⁸

5 Richard White, *Film of Galliano's racist rant in bar*, THE SUN (London), Feb. 14, 2013, available at <http://www.thesun.co.uk/sol/homepage/news/3436757/Film-of-John-Gallianos-racist-rant-in-bar.html> (internal quotation marks omitted).

6 Hannah Elliott, *John Galliano Arrest: Full Statement from Dior*, FORBES (Feb. 25, 2011, 10:46 AM), <http://www.forbes.com/sites/hannahelliott/2011/02/25/full-statement-from-dior-about-john-gallianos-arrest/> (internal quotation marks omitted).

7 Belinda White, *Christian Dior sacks John Galliano*, TELEGRAPH (London), Mar. 1, 2011, <http://fashion.telegraph.co.uk/news-features/TMG8354927/Christian-Dior-commencement-termination-proceedings-with-John-Galliano.html> (internal quotation marks omitted).

8 President Mahmoud Ahmadinejad, Speech at Columbia University (Sept. 24, 2007), available at <http://www.globalresearch.ca/full-transcript-of-ahmadinejad-speech-at>

Bollinger then transitioned to a critique of Iran and President Ahmadinejad that culminated in the line, “I feel all the weight of the modern civilized world yearning to express the revulsion at what you stand for.”⁹ During the speech, he said, “You are either brazenly provocative or astonishingly uneducated,” and “Mr. President, you exhibit all the signs of a petty and cruel dictator.”¹⁰ President Bollinger made it very clear, in other words, that whatever was about to come out of President Ahmadinejad’s mouth in no way had the imprimatur of Columbia.

It is useful to see that in each of the above examples the logic of a message attribution claim is at work: one party is worried that what another says may be attributed to it, or identified with it, or understood to be endorsed by it. And so it takes affirmative steps to disassociate. That is exactly what happens in the expressive association context, only rather than issue a disclaimer that does the disassociating, organizations aim to discriminate to avoid the association in the first place. In *Dale*, the Boy Scouts’ alleged message was to be preserved by outright exclusion. In the above examples, exclusion was not a meaningful possibility—Dior did not know Galliano would go overboard in a Paris café, and Columbia had countervailing reasons for wanting to welcome President Ahmadinejad to campus—and so a disclaimer had to do the job.

But in each of the above examples—and, as I will argue below, with respect to the expressive association context—we would do well to ask if the fear of attribution, or of being seen as ambivalent, is really so reasonable. Do readers of law review articles need to be told that the author’s views are the *author’s* views, and not those of his home institution? Or are people who read law review articles, on the other hand, sophisticated enough to know this?

Likewise, do we need a fashion house to affirm its commitment to equality when a notoriously eccentric designer—a designer known for his zaniness and his willingness to go too far—praises one of the great moral scourges in the history of humankind? Or, is the reasonable view that the designer can be an odd bird, but the fashion house employs him because of his way with fabrics and tailoring? Now, some people might boycott Dior just because they do not care to own anything Galliano had a hand in designing or do not want to con-

columbia-university/6889) (prefacing remarks by President Bollinger of Columbia University).

9 *Id.*

10 *Id.*

tribute to his income, but if that is the case, Dior needed only to fire him. It did not need to go the extra step of disavowing his speech.

And President Bollinger? Was his verbal assault in the introduction of President Ahmadinejad really so necessary? Did the Columbia community really need some reassurance that the global political vision of a theocratic leader in the Middle East is not exactly Columbia's vision? President Ahmadinejad called President Bollinger out for this when he finally took the microphone:

At the outset, I want to complain a bit on the person who read this political statement against me. In Iran, tradition requires that when we demand a person to invite us as a—to be a speaker, we actually respect our students and the professors by allowing them to make their own judgment, and we don't think it's necessary before the speech is even given to come in with a series of claims and to attempt in a so-called manner to provide vaccination of some sort to our students and our faculty.¹¹

If President Bollinger had let Ahmadinejad speak, it may have been that *nothing* might have come out of his mouth. With the introduction he gave, though, he really threw President Ahmadinejad a bone.

These examples are not exactly on all fours with the expressive association cases I will discuss below, but I think it is important to see the way in which they present a kind of message attribution claim. It is important, too, to mine them for our intuitive reactions to the message attribution claims, and to wear these intuitions as a kind of headlamp into what is sometimes the constitutional darkness of expressive association doctrine.

II. A VERY BRIEF INTRODUCTION TO EXPRESSIVE ASSOCIATION DOCTRINE

At least as things stand now, the Constitution does not protect the freedom of association in any robust or absolutist sense. There is a right to associate for expressive purposes under the First Amendment,¹² and there is a right of intimate association with a less clear constitutional source.¹³ That is it, though. For example, the Supreme

¹¹ *Id.*

¹² *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking on the close nexus between the freedoms of speech and assembly.").

¹³ *Less* clear does not mean *unclear*, however. The prevailing view in the case law seems to be that the intimate association right is rooted in the liberty protections of the Fourteenth Amendment's Due Process Clause. *See, e.g.,* Adler v. Pataki, 185 F.3d 35, 42 (2d Cir. 1999) (pointing out language in previous cases suggesting that the right to intimate

Court, in *City of Dallas v. Stanglin*, rejected a First Amendment freedom-of-association challenge to a Texas law that restricted admission to certain dance clubs to fourteen through eighteen-year-olds, noting that “the First Amendment does not in terms protect a ‘right of association’”—only “such a right in certain circumstances.”¹⁴

In other words, “[t]he doctrine is penumbral; it assists in the enjoyment of other rights but does not stand on its own.”¹⁵ So, an organization’s raw interest in limiting its membership to a certain class or certain classes of people—or, in the case of *Stanglin*, opening membership—receives less constitutional protection than its interest in not being understood as liking that class of people; repugnance matters less than conveying repugnance. Maybe this is a good thing, despite the argument of some that it misunderstands the value of association and its relationship to speech,¹⁶ misunderstands the constitutional priority of association vis-à-vis speech,¹⁷ misses the

association is a “component of the personal liberty protected by the Due Process Clause”); *Griffin v. Strong*, 983 F.2d 1544, 1546–47 (10th Cir. 1993) (categorizing the right of intimate association as a substantive due process right under the Fourteenth Amendment). There is also an argument, however, that the intimate association right, just like the expressive association right, is rooted in the First Amendment. A number of scholars have written on this. See, e.g., Nancy Catharine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R. L.J. 269, 275 (2006) (arguing that the right to intimate association implicates a First Amendment analysis); Collin O’Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 236 (1998) (making the argument that First Amendment doctrine is useful in intimate association cases).

¹⁴ *City of Dallas v. Stanglin*, 490 U.S. 19, 23–24 (1989).

¹⁵ David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121, 131 (2001).

¹⁶ Seana Valentine Shiffirin, for example, has sharply argued that the value of association lies more in the *formation* of views than in their ultimate *expression*. See, e.g., Seana Valentine Shiffirin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840–41 (2005) (“Associations have an intimate connection to freedom of speech values not solely because they can be mechanisms for message dissemination or sites for the pursuit of shared aims. Associations have an intimate connection to freedom of speech values in large part because they are special sites for the generation and germination of thoughts and ideas. As with compelled speech, our concern should be turned inward onto the internal thinking process of group members, rather than predominantly on whether there is confusion in the transmission of a group’s message.”); see also George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 35 (Amy Guttman ed., 1998) (expressing frustration that “association is instrumentally yoked to speech and is protected only because speech is protected”).

¹⁷ See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011). Bhagwat argues that the tendency “to treat the associational right as subsidiary to free speech and . . . to assume that the primary purpose of association is to facilitate speech” is both “ahistorical and incorrect.” *Id.* at 1029. In fact, Bhagwat argues, “speech is often subsidiary to association,” and both have as their common goal the enabling of self-governance. *Id.*; see also Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 645 (2002) (“[T]he modern notion of ‘expression’ is a dubious peg on which to hang a constitutional right of free association.”).

broader importance of organizational autonomy,¹⁸ is not really that workable as constitutional doctrine,¹⁹ or is otherwise philosophically objectionable.²⁰ Were it otherwise, the many anti-discrimination and public accommodation laws on the books, which these days are offensive only to hardline libertarians, would probably be in serious trouble.²¹

This Article will focus only on “message attribution” expressive association claims.²² As I described these claims above, they are claims

18 See Johnson, *supra* note 4, at 1641 (“In particular, the notion of autonomy—especially structural or organizational autonomy—more fully captures the associational values at stake in *Dale* than does the bare idea of expressive association.”).

19 See David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 205. As Cole sees it, yoking association to speech “require[s] courts to engage in incoherent line-drawing,” because judges must ask whether associations are sufficiently “expressive” to warrant protection, and whether acts of association should be viewed as “association” or “conduct.” But most, if not all, association is expressive to one degree or another, and one cannot distinguish conduct from association without reducing the right to a meaningless formality.

Id.

Cole, to be fair, also shares Shiffrin’s view that yoking association to speech discredits association because “[a]ssociation, no less than speech, plays a central role in both the political process and personal development, and deserves protection analogous to, but not limited to, that afforded speech.” *Id.* at 206; see also Mazzone, *supra* note 17, at 646 (“It requires judges to engage in the uncertain enterprise of determining, on an ad hoc basis, whether a particular organization’s specific message is undermined by a particular governmental regulation. This approach, as widespread surprise with the Court’s *Dale* decision demonstrates, gives us few tools to determine or predict what types of governmental regulations of what kinds of associations unduly infringe constitutional interests.”).

20 See, e.g., Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000) (“The right outcome [in expressive association cases] should not depend on a delicate balance of what kinds of organizations counts as expressive organizations under the First Amendment. Rather, any proper decision must recognize that the state has no interest in counteracting discrimination by private associations that do not possess monopoly power. The fine-spun efforts to shoehorn freedom of association into some ill-defined expressive box will breed only pointless and arcane distinctions.”).

21 The Civil Rights Act of 1964, for example, prohibits a law partnership from discriminating on the basis of, among other things, sex. Pub. L. No. 88-352 § 703, 78 Stat. 241, 255 (1964). That seems a clear limit on the partnership’s associational freedom, albeit one that most of us are comfortable with and that the Supreme Court has held does not violate the partnership’s constitutional right of association. See *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). Likewise, the Supreme Court has held that a private school may not discriminate on the basis of race in its admission policy. *Runyon v. McCrary*, 427 U.S. 160, 168–72 (1976). That too seems a clear limit on its freedom of association, even if it is a limit most of us regard as socially just and constitutionally permissible. See Cole, *supra* note 19, at 204 (“[A]s a matter of social governance, the right [of association], if uncontained, is something we cannot live with.”).

22 An expressive association claim might also exist, for example, where an organization is punished for the content of its speech. See, e.g., *Healy v. James*, 408 U.S. 169 (1972)

by an organization that requiring it to accept someone as a member whom it would rather exclude would force it to send a message it does not want to send, namely that it is on board with that unwanted member's expression. The claims are made when an organization's exclusionary preferences run into tension with a state's antidiscrimination law and commitment to social equality. I think it is safe to say that *Boy Scouts of America v. Dale*²³ is the seminal case, or at least the one that is most familiar to students of the First Amendment. The other landmark cases, in chronological order, are (1) *Roberts v. United States Jaycees*,²⁴ (2) *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,²⁵ (3) *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("FAIR");²⁶ and (4) *Christian Legal Society v. Martinez* ("CLS")²⁷.

(holding that a state college could not deny official recognition to a local chapter of Students for a Democratic Society without justification); *see also* *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 660–61 (1st Cir. 1974) (holding that the University of New Hampshire could not deny certain privileges to a gay student group on account of its expression). The right of expressive association is also implicated where an organization is forced to disclose who its members are, *see* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), or where individuals are required by law to pay dues to an organization that supports ideological activities, *see* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233–34 (1977) (concerning non-unionized public school teachers).

²³ 530 U.S. 640 (2000).

²⁴ 468 U.S. 609 (1984).

²⁵ 515 U.S. 557 (1995).

²⁶ 547 U.S. 47 (2006).

²⁷ 130 S. Ct. 2971 (2010). *CLS* involved the Hastings College of Law's policy for official recognition of student groups. A lot has been written about the case, and I am going to steer clear of it in this Article because it is factually distinguishable from the predecessor cases in ways that are doctrinally significant.

The policy at issue at Hastings was a so-called "all comers" policy. It required any student group that wished to receive official recognition from the law school—and the benefits that come with that recognition—to welcome any other students, regardless of their status or beliefs. *Id.* at 2979. And this posed a problem for the Christian Legal Society. The group wanted Hastings' official recognition, but it wanted to limit its membership to those who would sign a "Statement of Faith" affirming, among other things, that unrepentant homosexual conduct is immoral and that the Bible is the word of God. *Id.* at 2980. It was of course free to limit its membership in that manner; it would just have to exist on its own, independent of Hastings' recognition and support. The complex overlay of the public university setting and the idiosyncrasies of the policy at issue led the Supreme Court to treat *CLS*, first and foremost, as a subsidization case, and to therefore decide it in a way that departed significantly from the doctrinal course it charted in the earlier cases. For an excellent discussion of this departure—and a critique of it—see Erica Goldberg, *Amending Christian Legal Society v. Martinez: Protecting Expressive Association as an Independent Right in a Limited Public Forum*, 16 *TEX. J. C.L. & C.R.* 129 (2011); *see also* Alan Brownstein & Vikram Amar, *Reviewing Associational Freedom Claims in a Limited Public Forum: An Extension of the Distinction Between Debate-Dampening and Debate-Distorting State Action*, 38 *HASTINGS CONST. L.Q.* 505 (2011). As both articles' titles suggest, and as their respective analyses explain, the *CLS* decision imported a forum analysis that was absent in

The basic framework for analyzing these claims, which was really crystallized by the Supreme Court in *Dale*, is as follows. First, the organization must show that it engages in expressive association—that is, that it exists in part to disseminate a particular message. Second, it must show that the state action at issue—for the purposes of this Article, an antidiscrimination law—impairs in some significant way its ability to disseminate the particular message. Third, the state interest reflected in the antidiscrimination law must be weighed against the burden on the organization’s expression.²⁸

III. THE BIG THREE, PLUS ONE

Above I identified *Roberts*, *Hurley*, *Dale*, *FAIR*, and *CLS* as the landmark expressive association cases—and explained why *CLS* is in many ways an outlier. *FAIR*, too, is a bit of an outlier—it certainly broke no doctrinal ground—but it did involve a pure message attribution claim, and for that reason I include it here. I now look at each case, hopefully not in boring depth, to cover the evolution of the expressive association doctrine and to expose the way in which message attribution claims are made. I repeat, though, that not every expressive association claim makes or relies on a message attribution claim. An organization can argue that an unwanted member will interfere with its expression without exactly arguing that the unwanted member’s views will be attributed to it. This is a difference between *Dale*, in which the Boy Scouts did not want to be seen as approving of homosexuality, and *Roberts*, in which the Jaycees simply did not want women’s interests or views to overtake those of men.

the earlier expressive association cases, and by so doing conflated the Christian Legal Society’s free speech claims with its expressive association claim. Not only that, but by importing a *limited* public forum analysis, it was far more deferential to the associational limitation than in the earlier cases. See *id.* at 513–14 (“All the Court’s earlier freedom of association cases evaluating regulations directed at or burdening the ability to associate or maintain associational autonomy focused on associations operating on private property or in traditional public forums. The Court rigorously reviewed restrictions on associational freedom in these circumstances and locations.”). The point here is that it is very easy to read *CLS* as something other than an expressive association case in the line of *Jaycees*, *Hurley*, *Dale*, and *FAIR*. It is for this reason that I will not say anything more about it.

²⁸ See *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2000) (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 658–59 (2000)). *Pi Lambda Phi* involved a fraternity that lost its status as a recognized student organization because of its alleged drug activity. *Id.* at 438. The Third Circuit held that it was not an expressive association, and that even assuming otherwise, the state action was based on the fraternity’s conduct rather than ideology, and therefore did not burden its expression in any way. *Id.*

A. *Roberts v. United States Jaycees*

By most accounts, the right of expressive association was first articulated in *Roberts v. United States Jaycees*.²⁹ At the time the case was tried and argued on appeal, regular membership in the Jaycees was open only to men between the ages of eighteen and thirty-five. Women and older men could still join, but only as associate members with a kind of second-class status.³⁰ When two local chapters in Minnesota disregarded the membership distinction to comply with Minnesota's Human Rights Act and admitted women as full members, the Jaycees filed a lawsuit to have the Act declared unconstitutional so that it could revoke the chapters' charters.³¹

The Supreme Court first affirmed the connection between association and speech:

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.³²

The Court also conceded that the Jaycees, as an organization, engaged in protected speech, and that forcing it to accept members "it does not desire . . . may impair the ability of the original members to express only those views that brought them together."³³

But that is as far as the Jaycees got. The Court went on to hold that merely being forced to admit women as regular members would not "impede the organization's ability to engage in these protected

²⁹ See, e.g., Shawn M. Larsen, Note, *For Blacks Only: The Associational Freedoms of Private Minority Clubs*, 49 CASE W. RES. L. REV. 359, 366–67 (1999) (highlighting *Roberts v. U.S. Jaycees* as the first in a trilogy of cases). But see John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 486 (2010) ("But neither the right of association nor its doctrinal problems began with *Roberts*, as the Court first recognized a constitutional right of association just over fifty years ago in its 1958 decision, *NAACP v. Alabama ex rel. Patterson*.") Inazu may well have a point. The Supreme Court did recognize in *Patterson* that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). David McGowan traces expressive association to yet another case, *United States v. Cruikshank*, 92 U.S. 542 (1875). McGowan, *supra* note 15, at 126.

³⁰ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 613 (1984).

³¹ *Id.* at 615–17. The history provided above is somewhat abbreviated.

³² *Id.* at 622.

³³ *Id.* at 623.

activities or to disseminate its preferred views.”³⁴ Indeed, it could continue to promote the interests of young men and exclude anyone with an incompatible ideology; it just could not categorically bar women from regular membership on the assumption that admitting them would “change the content or impact of the organization’s speech”—at least “[i]n the absence of a showing far more substantial than that attempted by the Jaycees.”³⁵

Two features of the Supreme Court’s opinion in *Roberts* are worth highlighting. First, the Jaycees actually got a bench trial in the District of Minnesota, and before that a full hearing before the Minnesota Human Rights Department. That is important. It means that the Supreme Court did not just speculate, in the abstract, that admitting women would not interfere with expression. It held that there was no basis in the record for the Jaycees’ claim that it would.

Second, while the Supreme Court identified in rather broad terms a right to associate for the purpose of engaging in First Amendment activity,³⁶ the Court made it equally clear that the right is not absolute.³⁷ For the right to be infringed, the Jaycees had to show more than that it engaged in speech in some general sense. The Court agreed that it did at least that.³⁸ But the Jaycees had to further demonstrate that the message it wanted to send—or not send—required the exclusion of women from the ranks of regular members, and this is where it came up short in the Court’s eyes.³⁹

³⁴ *Id.* at 627.

³⁵ *Id.* at 628.

³⁶ *Id.* at 618 (“[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.”).

³⁷ *Id.* at 623 (“The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”).

³⁸ *Id.* at 626–27 (“To be sure, as the Court of Appeals noted, a ‘not insubstantial part’ of the Jaycees’ activities constitutes protected expression on political, economic, cultural, and social affairs.” (quoting *U.S. Jaycees v. McClure*, 709 F.2d 1560, 1570 (8th Cir. 1983))).

³⁹ At oral argument, the Jaycees’ lawyer’s recurring argument was that the character of the organization, and namely its commitment to the interests of young men, would be fundamentally altered if it had to accept women on equal terms. See Transcript of Oral Argument at 13, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (No. 83-724), available at http://www.oyez.org/cases/1980-1989/1983/1983_83_724; *id.* at 18 (“I think an organization in which you change the membership from one which is all men, dedicated to the voting interests of men, and you change it to an organization which also includes women, I think it’s only rational to assume that organization is going to undergo a substantial change.”). But at least one Justice (unidentified in transcript) was quick to ask where

The Eighth Circuit saw it differently below, and it is worth looking at its reasoning. Like the Supreme Court, it agreed that the Jaycees engaged in protected speech.⁴⁰ And it went to some trouble to identify particular positions the organization had taken over the years: The record contains many examples of this political and ideological activity. We mention only a representative selection.

These resolutions supported a balanced budget, a fund drive to fight muscular dystrophy and juvenile diabetes, legislation to permit “voluntary prayer in American schools,” and the economic development of Alaska. All of these positions, except the second one, relate to highly controversial political questions. . . .

Over the years, the national organization has taken stands in favor of the draft, the efforts of the FBI “to eliminate disloyalty” in this country before World War II, the formation of the United Nations, an increase in the corporate income tax, the recommendations of the Hoover Commission on reorganization of the federal government, the ratification of the Panama Canal treaty, the 18-year-old vote, the vote for citizens of the District of Columbia, the “defense of freedom” in Vietnam, and (apparently at a later time) the withdrawal of U.S. troops from Southeast Asia. It has opposed “one-man” congressional committees, “socialized medicine,”

the expressive activity occurred, and drew a distinction between an organization that simply wanted to limit its membership to men and one in which that very limitation helped it realize some expressive goal:

If you have an organization of all male stockbrokers that are solely concerned with the business of stockbrokering and what’s happening to stockbrokering, and they’re required to take in women stockbrokers, it seems to me that the great focus on stockbrokering may be very little different between men and women. On the other hand, if you have an organization of male chauvinists that says we’re tired of this affirmative action in favor of women, we want what we think is a square deal, it seems to me there you get a different thing. But you haven’t really shown that the Jaycees are in the latter category at all, that they espouse anything close to men’s rights of the kinds of issues that men and women might feel differently about.

Id. Indeed, another Justice (also unidentified by transcript) said it would be a very different case “where there was something called the National Organization of Men, that is anti-affirmative action, anti-ERA, and so forth.” *Id.* at 21. There, quite conceivably, the forced inclusion of women could compromise the organization’s expressive agenda. Where the Jaycees’ lawyer did point to specific positions the organization had taken in the past, by his own admission those positions did not promote the interests of young men as distinguished from young women. *Id.* at 19. The only issues he did identify where men and women might have distinct and divergent perspectives—the ERA, the draft, and abortion—were ones on which the organization had not ever taken a position. *See id.* at 15 (“I can’t think of a public commitment issue which is applied only to men, but I can foresee that the organization itself, if they take a vote on ERA or the draft or abortion, or any of those sensitive issues, they could very well take a different position.”).

⁴⁰ *See McClure*, 709 F.2d at 1570 (“We conclude that a good deal of what the plaintiff does indisputably comes within the right of association, even as limited to association in pursuance of the specific ends of speech, writing, belief, and assembly for redress of grievances.”).

federal funds for teachers' salaries and school construction, and pornography.⁴¹

The Eighth Circuit could not, however, locate a single, identifiable message with which the regular admission of women would interfere. The Court thought that "[i]f the [Minnesota Human rights Act] is upheld, the basic purpose of the Jaycees will change" and that "some change in the Jaycees' philosophical cast can reasonably be expected."⁴² But even then the Court had to admit that "the specific content of most of the resolutions adopted over the years by the Jaycees has nothing to do with sex."⁴³ Why then did it rule in favor of the Jaycees? Because it believed that the potential shift in purpose was enough to compromise the Jaycees' expressive agenda:

The regulation at issue here, though not overly related to the content of what the Jaycees are saying, nevertheless has the potential of changing that content, because it purports to specify, in one respect at least, the identity of those who may be Jaycees, and who therefore determine the content of what Jaycees say.⁴⁴

The Supreme Court obviously disagreed, in part because the character of an organization is not entitled to the same degree of First Amendment protection as some clear and identifiable message it wishes to send, and in part because such a view relies on stereotypical assumptions about how men's interests and views differ from those of women.

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

Hurley, like *Roberts*, involved an organization whose exclusionary preferences were at odds with a state's public accommodations law. The organization was a parade—the annual St. Patrick's Day and Evacuation Day parade in Boston—put on by the South Boston Allied War Veterans Council. The group it wished to exclude was the Irish-American Gay, Lesbian and Bisexual Group of Boston, or GLIB. To be clear, the Veterans Council did not want to keep all gays out of the parade; it simply did not want GLIB to march as its own parade unit. Its argument was that excluding GLIB formalized its commitment to traditional religious and social values.⁴⁵

41 *Id.* at 1569–70.

42 *Id.* at 1571.

43 *Id.*

44 *Id.* at 1576.

45 *Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos. v. Boston*, No. 921518, 1993 WL 818674, at *4 (Mass. Super. Ct. Dec. 15, 1993).

In the Superior Court of Massachusetts, which held a bench trial, *Hurley* was treated as an expressive association case, and one that called for the rather straightforward application of *Roberts*. As the court put it, “The Veterans argue that their Parade is a form of speech protected by the First Amendment via the Fourteenth Amendment, and that their speech will be effectively diluted or distorted if they are required to include GLIB in their Parade.”⁴⁶ It fell on the Veterans Council, then, to identify some message it wished to convey with which the inclusion of GLIB would interfere. The Veteran’s Council could not do that to the court’s satisfaction. The court could not look past how wildly diverse and eclectic, and in some instances how oppositional, the parade’s other participants were. In light of the Veterans Council’s seeming preference for heterogeneity and low barrier to parade entry, the court found it “impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.”⁴⁷

The Massachusetts Supreme Judicial Court affirmed, but the Supreme Court reversed. One of the more striking features of the Court’s opinion is that it did not treat the case, as the Massachusetts Superior Court did, as an expressive association case. In the substantive portion of its analysis, it cited *Roberts* only twice for inconsequential points, and it referenced the expressive association right only once in its discussion of another case. Instead, it relied on its earlier compelled speech cases—cases involving, for example, the requirement that children in public schools salute and pledge allegiance to the American flag;⁴⁸ the requirement that newspapers allow those running for public office to respond to editorial criticism;⁴⁹ and the requirement that a public utility grant space in a newsletter accompanying its monthly bills to a third party’s advocacy.⁵⁰ Framed as a compelled speech case, the Court was less interested in the Veterans Council’s identification of some discrete message it wished to send that GLIB’s presence in the parade would compromise, and more interested in whether requiring the Council to include GLIB would force it to support or convey a message with which it did not agree. In fact, in some way it dismissed that first question as immaterial, finding that a coherent, particularized message was not a prerequisite

46 *Id.* at *12.

47 *Id.* at *13.

48 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

49 *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

50 *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1 (1986).

of constitutional protection.⁵¹ The point was not what the Veterans Council wanted to say, but what it did not want to say or be perceived as saying.⁵² Parades are an expressive activity, and as the Court put it, “the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.”⁵³ At a minimum, it reasoned, the presence of GLIB in the parade would communicate the fact that some Irish are gay *and* the view that they are entitled to the same level of social acceptance as heterosexuals.⁵⁴

And not only that—here comes the message attribution claim—but observers would assume this communication had the Veterans Council’s support: “GLIB’s participation would likely be perceived as having resulted from the Council’s customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well.”⁵⁵ The nature of a parade made this inevitable:

[T]he parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow “any identity of viewpoint” between themselves and the selected participants.⁵⁶

For the Court, then, *Hurley* appeared to be a rather easy case. The Veterans Council had a First Amendment right not to promote GLIB’s point of view: “Thus, when dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”⁵⁷ The determinative principle was the primacy of speaker autonomy.

51 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995) (“But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”).

52 *Id.* at 573.

53 *Id.* at 574.

54 *Id.*

55 *Id.* at 575.

56 *Id.* at 576.

57 *Id.*

C. Boy Scouts of America v. Dale

Roberts may be *the* foundational expressive association case, but *Dale*, it is probably safe to say, carries the most enduring significance. It is certainly the case with which most non-scholars are familiar, and it is the case on which most scholars' opinions are the fiercest—and most fiercely divided. To some, the Supreme Court got it exactly right,⁵⁸ and to others the Court shamefully derailed expressive association doctrine.⁵⁹ Regardless of who is right on that question, it is probably true that *Dale* “marks the end of the *Roberts* era.”⁶⁰

The facts of *Dale* begin with James Dale becoming a Cub Scout at age eight and many years later achieving the position of assistant scoutmaster of a New Jersey troop.⁶¹ Around that time, he left for college at Rutgers, where he came out as gay.⁶² And for that, the Boy Scouts revoked his adult membership, explaining that it “specifically forbid[s] membership to homosexuals.”⁶³ Dale sued under New Jersey's public accommodations statute, which prohibited discrimination on the basis of sexual orientation in places of public accommodation.⁶⁴

The case was never tried. The New Jersey Superior Court granted summary judgment in favor of the Boy Scouts, holding, among other things, that the Boy Scouts had a clear position on homosexuality and that the First Amendment prevented New Jersey from forcing the organization to accept Dale.⁶⁵ The New Jersey Supreme Court went the other way, first, refusing to accept that it was truly important to the Boy Scouts to take a stand against homosexuality and, second, disputing that Dale's inclusion would stand in the way of its other various purposes.⁶⁶ Addressing *Hurley*, the Court denied that including Dale would force the Boy Scouts to express any message with respect to homosexuality.⁶⁷ The Supreme Court's holding in *Roberts* shines

58 See, e.g., Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1917 (2001) (calling *Dale* one of “[t]he three most significant, rightly-decided cases of the Supreme Court's 1999 Term,” in which “[f]reedom won but, shockingly, just barely”).

59 See generally ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. DALE* WARPED THE LAW OF FREE ASSOCIATION (2009).

60 David Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 623–25 (2001).

61 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).

62 *Id.* at 644–45.

63 *Id.* at 645.

64 *Id.*

65 *Id.* at 645–46.

66 *Id.* at 647.

67 *Id.*

through in the New Jersey Supreme Court's analysis; to that court, the Boy Scouts could not credibly identify a discrete and coherent message it wished to convey, and with which Dale's mere presence in the organization would interfere.

The Supreme Court reversed, and if anything stands out in the Court's opinion it is its deference to the Boy Scouts' assertions that it does not approve of homosexuality and that Dale's presence would send a contrary message—hence the sense that *Dale* marked the end of the *Roberts* era. But the opinion starts out ordinary enough. The Court cited *Roberts* for the broad principle that implicit in the panoply of First Amendment rights is a corresponding right to associate with others for a wide range of purposes. It recognized, corollary to this principle, that forcing a group to accept certain members may impair its expressive tone and range, and that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”⁶⁸ And finally, the Court acknowledged, probably uncontroversially, that the Boy Scouts seeks to instill values in young people and therefore engages in expressive activity.⁶⁹

It is at this point that the opinion takes a turn that is highly deferential to the Boy Scouts' own assertions—and that most critics think the Court lost its jurisprudential way. The Court conceded that neither the Scout Oath nor the Scout Law mentioned sexual orientation. In the Oath, scouts pledge to do their best to keep themselves “morally straight,” and the Law states that a scout must be “clean,” but those terms, the Court admitted, “are by no means self-defining.”⁷⁰ That did not matter, however, in the final analysis:

The Boy Scouts asserts that it teaches that homosexual conduct is not morally straight, and that it does not want to promote homosexual conduct as a legitimate form of behavior. We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality.⁷¹

⁶⁸ *Id.* at 648 (citing *N.Y. State Club Ass'n., Inc. v. City of N.Y.*, 487 U.S. 1, 13 (1988)).

⁶⁹ *Id.* at 649–50.

⁷⁰ *Id.* at 650.

⁷¹ *Id.* at 651 (internal quotation marks omitted). To be fair, it was not *just* a matter of taking the Boy Scouts at its word. The record before the Court contained some written evidence of the Boy Scouts' viewpoint. For example, a 1978 position statement from the Executive Committee contained the following remark by the President: “We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.” *Id.* at 652. The most recent position statement in the record maintained,

Having accepted that the Boy Scouts is an expressive organization, and that at the organizational level it has a view of homosexuality, the Court then turned to the final link in the analytical chain: whether the forced inclusion of Dale as a scoutmaster would burden the Scouts' expression. Again, the Court's deference gave the Scouts a massive advantage in the constitutional analysis. "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."⁷² The simple fact that Dale was openly gay, a leader in his community, and a gay rights activist was enough for the Court. "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."⁷³ This is a message attribution claim.

For support, the Court analogized only to *Hurley*, holding that just as GLIB's presence in the St. Patrick's Day parade would have interfered with the organizer's choice not to promote a particular point of view, Dale's presence in the Boy Scouts would interfere with the organization's choice not to promote a view of homosexuality contrary to its own.⁷⁴ It did not matter to the Court that the Boy Scouts was not in the business of speaking out loud and clear against homosexuality, or that it tolerated dissent on the moral standing of homosexuals and their rightful place in the Scout ranks. The critical point was that "[t]he 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."⁷⁵

Justice Stevens wrote the dissent in *Dale*. He took the majority to task in a number of thoughtful ways, and the substance of his critique is captured perfectly in the following two sentences:

But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's antidiscrimination law. More critically,

The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

Id. (internal quotation marks omitted).

⁷² *Id.* at 653.

⁷³ *Id.*

⁷⁴ *Id.* at 654.

⁷⁵ *Id.* at 655–56.

that inquiry requires our *independent* analysis, rather than deference to a group's litigating posture.⁷⁶

Justice Stevens drilled the majority, hard, on both questions. First, giving the evidence a far more searching inspection than the majority did, he called into serious question the credibility of the Boy Scouts' claim that it took a clear and unequivocal view of homosexuality, the only kind of view, in Justice Stevens' mind, entitled to protection of the First Amendment.⁷⁷ Assuming it did take such a view, Justice Stevens went on to question "whether the mere inclusion of homosexuals would actually force BSA to proclaim a message it does not want to send."⁷⁸ Stevens thereby engaged the message attribution claim. Here, he distinguished *Hurley* as a case in which the plaintiff wished to convey a particular message through the defendant association, and the plaintiff's message would likely be perceived as the defendant's own.⁷⁹ The only message from which the Boy Scouts could wish to disassociate, by contrast, was that sent by Dale's mere presence in the organization.⁸⁰

This brought Justice Stevens to the second question—whether the Boy Scouts' professed message would be compromised by Dale's inclusion. He refused to accept that it would: "[Dale's] participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message."⁸¹ Not only that, but the Boy Scouts is an enormous organization, and the notion that it "implicitly endorses the views that each of [its members] may express in a non-Scouting context is simply mind boggling."⁸² As Justice Stevens saw it, a man who happened to be homosexual could participate in scouting, even be a scoutmaster, without the Boy Scouts itself being put in the allegedly uncomfortable position of either condoning his homosexuality or *being seen* as condoning his homosexuality. To him, the Boy Scouts' message attribution claim was fanciful.

⁷⁶ *Id.* at 686 (Stevens, J., dissenting).

⁷⁷ *Id.* at 666–78, 682–86.

⁷⁸ *Id.* at 689.

⁷⁹ *Id.* at 694.

⁸⁰ *Id.* at 695.

⁸¹ *Id.* at 694–95.

⁸² *Id.* at 697.

D. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*

FAIR was, at least for the Supreme Court, an easy case. In a unanimous opinion, it upheld the Solomon Amendment, which essentially requires universities, as a condition of receiving certain federal funds, to provide the same access to military recruiters that they provide to other recruiters.⁸³ At the time, this was something many law schools were loathe to do because of their disagreement with the military's "Don't Ask, Don't Tell" policy. In fact, the schools had non-discrimination policies of their own that any recruiters seeking access were required to observe, and that the military stood in clear violation of.⁸⁴

And so *FAIR*, an association of law schools and law faculties, sued Donald Rumsfeld, then the Secretary of Defense, under the First Amendment.⁸⁵ It argued (1) that the Solomon Amendment compelled speech on the law schools' part, by forcing them to assist the recruiters in meeting with students and by forcing them to host the message communicated by the "Don't Ask, Don't Tell" policy; (2) that the law schools' treatment of the military recruiters was itself protected symbolic speech; and (3) that effectively being forced to accommodate the military violated the law schools' right of expressive association.⁸⁶

In just a few words, the Court rejected the expressive association claim that the military's compelled presence on the law schools' campuses would interfere with or undermine their message that discrimination on the basis of sexual orientation is wrong. The law schools—probably with considerable reluctance—invoked *Dale*, and the Court got around it by distinguishing between a scoutmaster who is a full member of the plaintiff organization and recruiters who are "by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association."⁸⁷ In other words, nobody would assume that the military recruiters spoke for the law schools, or that the law schools' mere accommodation of military recruiters signaled a favorable or accepting view of "Don't Ask Don't Tell." This was a firm rejection of a message attribution claim. And, anyway, the law

83 10 U.S.C. § 983 (2006).

84 *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 (2006).

85 *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003).

86 *Forum for Academic & Institutional Rights*, 547 U.S. at 60–61.

87 *Id.* at 69.

schools remained perfectly free to speak out against the military's policy: "Students and faculty are free to associate to voice their disapproval of the military's message."⁸⁸ That was all the Court had to say.

The district court below was more thorough in its discussion but came out exactly where the Supreme Court did.⁸⁹ First, it found there was no realistic threat that the law schools' opposition to discrimination would be muddled by the periodic visits of military recruiters, especially considering the law schools' continuing freedom "to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the views of the military recruiters."⁹⁰ It did not matter to the court that some students lost faith in the law schools' message of tolerance; the law schools were still able to disseminate it "loudly and clearly."⁹¹

Turning to *Hurley* and the law schools' related compelled speech claim that they were being forced to host a contrary message, the court refused to analogize participation in a parade, an inherently and chiefly expressive activity, to recruiting, the purpose of which it saw as chiefly economic and functional.⁹² GLIB, after all, wanted to be included in the St. Patrick's Day Parade to disseminate a particular message, and in no sense were the military recruiters "seeking access to campuses and students with the primary purpose of expressing the message that disapproval of openly gay conduct within the armed forces is morally correct or justifiable."⁹³ And finally, the court rejected the law schools' claim that they were being forced to actually *endorse* a message which they abhorred. "Facilitating interviews and even disseminating recruiting literature on behalf of military recruit-

88 *Id.* at 69–70.

89 *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 303–10.

90 *Id.* at 305.

91 *Id.* at 306.

92 The Supreme Court embedded this point in its discussion of FAIR's compelled speech claim rather than its expressive association claim. See *Forum for Academic & Institutional Rights*, 547 U.S. at 64 ("In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."). This point, to be fair, is vulnerable to the criticism that it construes the purpose of a recruiting event far too narrowly. See Case Note, *Freedom of Expressive Association—Campus Access for Military Recruiters*, 120 HARV. L. REV. 253, 262 (2006) ("Specifically, treating law schools as mere vocational institutions denies their inevitably political character; inculcates a passive approach to the law; and robs law schools of their potential to become dynamic and beneficial shapers of coming generations of legal practitioners and, with time, of the law.").

93 *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 307.

ers, when a law school does all these things for every other potential employer in the context of a large recruiting function, are not obvious endorsements of a particular ideological point of view.⁹⁴ This is particularly true, again, considering that the law schools were not limited in their ability to disclaim any contrary message communicated by the military recruiters.

E. Summary

Roberts, *Hurley*, *Dale*, and *FAIR* comprise a lineage of cases in which the Supreme Court took a message-based approach to expressive association claims. They are not the only cases, but certainly the important ones.⁹⁵

That approach, as we have seen, asks three questions. First, does the organization making the claim actually engage in expression? Second, assuming it does, would requiring it to accept unwanted members impair that expression? The second question encompasses a message attribution claim; it is a particular kind or mechanism of impairment caused by unwanted members' views being seen as the views of the organization. Third, and seemingly less significant in the caselaw, is the state's interest in equality nonetheless so important that the burden on the expressive association right is warranted? It was not until *Dale* that this question became an explicit prong of the analysis,⁹⁶ and one of the more forceful criticisms of *Dale* is that the

⁹⁴ *Id.* at 310.

⁹⁵ See *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 8 (1988) (upholding New York City's Human Rights Law, which prohibited discrimination by certain clubs, against a First Amendment expressive association challenge); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding that requiring California Rotary Clubs to admit women did not violate First Amendment rights of organization).

⁹⁶ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) ("Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association."). The district court in *FAIR* also found in *Dale*—not, it suggested, in the earlier cases—"a three-step process to analyze a group's expressive association claim." *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 303.

In fairness, the Supreme Court in *Roberts* did incorporate this point into its analysis, but because it had already determined that the Jaycees message would not be compromised by the presence of women, it comes off as more of an afterthought in the Court's discussion. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) ("In any event, even if enforcement of the Act causes some incidental abridgement of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes."); see also *id.* at 623 ("Infringements on [the right to associate for expressive purposes] may be justified by regulations adopted to serve compelling state interests, un-

Court basically punted on it, or at least failed to take it very seriously.⁹⁷

The plaintiff in *Roberts* failed on the second question; it was not able to articulate how admitting women as full members would compromise its expressive agenda.⁹⁸ The plaintiff in *Hurley* prevailed on both questions; its parade was an expressive event, and accommodating an unwanted message would modify the character of that expression.⁹⁹ The plaintiff in *Dale*, too, prevailed on both questions: the Boy Scouts was engaged in the instillation of values—that is expression—and the presence of a gay scoutmaster would complicate its efforts.¹⁰⁰ The plaintiffs in *FAIR* failed on both questions; recruiting events are not so much expressive activities, and it would not matter if they were, because the presence of military recruiters would not compromise in any way the law schools' professed commitment to tolerance and nondiscrimination.¹⁰¹

What about message attribution claims in these cases? There was not much of one in *Roberts*. The Jaycees' claim, rather, was that the organization was committed to promoting the interests of young men, and if women became full members that commitment would shift.¹⁰² In *Hurley*, the Court accepted the message attribution claim that the Veterans Council would be seen as endorsing GLIB's message that its constituency merited recognition and support, but the opinion turned more on a logically separate compelled speech claim that focused on speaker autonomy.¹⁰³ *Dale* and *FAIR* implicated rather pure message attribution claims. The Supreme Court held in

related to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”). In *Hurley*, too, the Court considered Massachusetts's interest in preventing the denial of access to public accommodations on the basis of someone's sexual orientation, but because the parade sought to exclude only a message rather than homosexuals per se, it regarded the application of the statute in question as a wholly unjustified interference with speech. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578–81 (1995). For a critique of this distinction, see Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1191 n.150 (1997) (arguing that the “space that this distinction carves out is a very small one”).

97 See Andrew Koppelman, *Should Noncommercial Associations Have An Absolute Right to Discriminate?*, 67 LAW & CONTEMP. PROBS. 27, 27 (2004) (criticizing *Dale* because “it seemed to hold that substantial burdens were per se unconstitutional, rather than merely subject to strict scrutiny. In effect, any plaintiff's claim was so powerful that all antidiscrimination laws were unconstitutional in all their applications.”).

98 *Roberts*, 468 U.S. at 627–28.

99 *Hurley*, 515 U.S. at 547–76.

100 *Dale*, 530 U.S. at 651–56.

101 *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64–70 (2006).

102 *Roberts*, 468 U.S. at 627–28.

103 *Hurley*, 515 U.S. at 574–75.

Dale that the Boy Scouts would be seen as endorsing homosexuality simply by allowing a homosexual to be a scoutmaster, while it held in *FAIR* that nobody would attribute to the law schools the military's discriminatory view of homosexuals manifested in "Don't Ask Don't Tell."¹⁰⁴

IV. PROBLEMATIZING EXPRESSIVE ASSOCIATION, PARTICULARLY *DALE*

The three elements of an expressive association claim are also pressure points for critics. Critics of *Dale*, for example, could argue that the Boy Scouts really had no critical, discernible message respecting homosexuality to disseminate, *or* that *Dale*'s mere identification as gay would not get in the way of any such message, *or* that the private and social harms of discrimination are simply too important to suffer the override of a group's discrimination. And as it happens, all critiques of *Dale*, in one way or another, make these points.¹⁰⁵ I want to survey them here, but they usually fall into two categories.

The first category, and probably the more familiar, attacks the Supreme Court for its astounding level of deference to the Boy Scouts' claim of what its message was with respect to homosexuality and what would impair that message. Over fifteen years before *Dale* was decided, in *Roberts*, the Supreme Court articulated a seemingly workable "message-based" approach to an organization's claim for immunity from antidiscrimination laws on free speech grounds: *If* an organization is expressive in nature; and *if* the acceptance of an unwanted member would distort its expression; and *if* the burden on expression is not outweighed by the government interest in *nondiscrimination*, the organization has a First Amendment right to discriminate against and turn away the unwanted member. But the majority opinion in *Dale*, rather than asking the *ifs*, instead just took the Boy Scouts' word. And as a result, it appeared to give any organization an easy out from antidiscrimination law, as well as any other regulation that conflicted with its values.

The second category, which has more of a critical theory ring to it, asks not what the Boy Scouts' message really was, or what would im-

¹⁰⁴ *Forum for Academic & Institutional Rights*, 547 U.S. at 64–65; *Dale*, 530 U.S. at 653.

¹⁰⁵ For a general critique that traverses all three points, see Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595 (2001) (arguing that the Boy Scouts' so-called opposition to homosexuality was really just a litigation posture, that *Dale* advocated no particular view of homosexuality, that the Boy Scouts remained free to advocate their own view even in his presence, and that the elimination of discrimination is a compelling enough public interest that it ought to override the expressive interest of the Boy Scouts).

pair it, but questions the analytically prior point of whether Dale expressed some contrary viewpoint merely by identifying as a homosexual. The literature on this point gets into more abstract issues like the social significance or cultural evaluation of gay identity.

As I said above, my aim here is not to discuss these critiques in detail, much less to take them on. They are all sensible critiques. My aim, rather, is to show that there is still room for my critique of *Dale*, the expressive association doctrine, and message attribution claims in particular.

A. *Unjustified Deference*

Probably the most fair critique of *Dale* is that the Supreme Court was entirely too deferential to the Boy Scouts' claim that it did in fact disapprove of homosexuality and that Dale's mere presence in the organization would limit its ability to communicate that message. Maybe it is useful here to return to *Roberts*, and particularly the Supreme Court's holding that it would not find the potential for message dilution "[i]n the absence of a *showing* far more substantial than that attempted by the Jaycees."¹⁰⁶ In *New York State Club Ass'n*, too, the Court recognized "that an association might be able to *show* that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership."¹⁰⁷ There was virtually no *showing* in *Dale*, but rather the assertion of a position in litigation. The Court even said that "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."¹⁰⁸ Even those who are pleased by the outcome in *Dale* are willing to admit that the opinion was soft on reasoning here.¹⁰⁹

This first critique comes out, obviously, in Justice Stevens's spirited dissent in *Dale*, and in particular his statement that

[i]f this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one

106 *Roberts*, 468 U.S. at 628 (emphasis added).

107 *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 13 (1988) (emphasis added).

108 *Dale*, 530 U.S. at 653.

109 See Johnson, *supra* note 4, at 1641 (contending that "the *Dale* Court set the bar in approximately the right place" but that "the Court's opinion is a bit cursory on supportive reasoning").

hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand.¹¹⁰

Justice Souter, too, took the majority opinion in *Dale* to task for essentially converting an expressive association claim into “an easy trump of any antidiscrimination law.”¹¹¹

And following Stevens’s lead, one of the more robust academic critiques comes from Andrew Koppelman and Tobias Barrington Wolff.¹¹² Koppelman and Wolff have no problem in theory with a message-based approach that looks to (1) the nature of the expressive practice at issue; (2) whether compelled association will undermine that practice; and (3) whether the organization’s interest in expression is sufficiently great to outweigh the public interest in nondiscrimination.

Their grievance, rather, is that the Supreme Court was entirely too deferential to the Boy Scouts on (1) and (2), and that it made no serious effort to consider (3).¹¹³ As a result, the Court gifted to future organizations an argument for discriminating against unwanted members that really admits of no limiting principle. If, after all, a court must defer to an organization’s view of what its message is, as well as its view of what would impair its message, “[i]t follows that an expressive association claim is available to any entity that wants to discriminate at any time for any purpose.”¹¹⁴ In other words, the deference requirements the Supreme Court instituted “are not just procedural provisos that shift the burden of establishing certain facts. They tilt the balance so radically as to transform the underlying law.”¹¹⁵

It is true, to be fair, that the majority opinion in *Dale* denied “that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”¹¹⁶ But as Koppelman and

110 *Dale*, 530 U.S. at 687 (Stevens, J. dissenting).

111 *Id.* at 701–02 (Souter, J., dissenting).

112 See KOPPELMAN & WOLFF, *supra* note 59, at 25–42 (arguing that the Court’s deference in the ruling produces bizarre results).

113 *Id.* at 28, 31–34, 38–39. For a similar critique, see Bernstein, *supra* note 60, at 624 (“Moreover, despite lip service paid to *Roberts* and its weak compelling interest test, neither the majority opinion nor the dissent discussed whether the government has a compelling interest in eradicating discrimination against homosexuals.”); see also Taylor Flynn, *Don’t Ask Us to Explain Ourselves, Don’t Tell Us What to Do: The Boy Scouts’ Exclusion of Gay Members and the Necessity of Independent Judicial Review*, 12 STAN. L. & POL’Y REV. 87 (2001) (claiming that the Court has severely weakened antidiscrimination statutes).

114 KOPPELMAN & WOLFF, *supra* note 59, at 28.

115 *Id.* at 29.

116 *Dale*, 530 U.S. at 653.

Wolff argue, “[Chief Justice Rehnquist] does not explain why the logic of his opinion does not lead to that conclusion. If there is a stopping point, the court does not say where it is located.”¹¹⁷ Koppelman and Wolff also criticize the Supreme Court for its quick conclusion that Dale’s mere presence in the Boy Scouts would send a contrary message. While it seems wrong of them to suggest that the Court reached this conclusion as a matter of law¹¹⁸—the Court based this finding on some evidence, however thin it was—they are justified in arguing that this question, which they call one of “cultural anthropology,” requires more of an interrogation than the Court made.¹¹⁹ Unless, of course, what the Court really meant to say in *Dale* was that antidiscrimination laws are unconstitutional in their application any time that obeying them would be construed as the endorsement of some message.

It is hard to find serious fault in Koppelman and Wolff’s critique. The Court *was* extremely deferential to the Boy Scouts’ account of what message it wished to send, as well as how that message could be disrupted by Dale’s presence. It was deferential in a way that seemed to open the door to any organization claiming an expressive interest in noncompliance with antidiscrimination law. There is a lot to the Koppelman-Wolff critique, and I do not cover all of it here, but they seem to me quite justified in questioning the Supreme Court’s deference to the Boy Scouts, and searching in vain for a limiting principle in the opinion.¹²⁰

We may, though, question whether *Dale* was really the disastrous, “anarchic,”¹²¹ and “pathological”¹²² decision Koppelman and Wolff ar-

117 KOPPELMAN AND WOLFF, *supra* note 59, at 29.

118 *Id.* at 36.

119 *Id.*

120 I do not want to suggest, of course, that *Dale* is simply indefensible. Michael Stokes Paulsen has proven the opposite to be true. See Paulsen, *supra* note 58, at 1921–36. Building on *Roberts* and other cases, Paulsen articulates the contours of the expressive association right in a manner that should not be controversial and then claims “[*Dale*] is likewise an easy case under *Roberts*’ rule that interference with the internal structure of a group can violate that group’s freedom of expressive association.” *Id.* at 1931. What Paulsen does not speak to, however, is the gulf between the factual inquiries the Court made of the Jaycees’ expressive claims in *Roberts* and the Court’s near-total deference to the Boy Scouts’ expressive claims in *Dale*. Nor does he speak, really, to the constitutional balancing of interests the *Roberts* Court commanded as the final prong of the analysis. See *id.* (“Once the nature of the Boy Scouts as an expressive association is recognized, everything else follows.”). Instead, Paulsen implicitly attributes that scrutiny differential to *Roberts* being a harder case that “represents the narrow, commercial-context, business-networking, no-evidence-of-impairment-of-expression exception to the broader freedom-of-expressive-association First Amendment rule.” *Id.* at 1926.

121 KOPPELMAN & WOLFF, *supra* note 59, at 40.

gue it was, because their analysis goes on to concede that in *FAIR* the Supreme Court “retreated” from and “defused” its suspect implications.¹²³ Not only that, but Koppelman and Wolff explain in some detail how other courts have managed *not* to take *Dale* to its feared conclusions, and to narrow its holding to the particular facts of the case in a way that limits its future applications.¹²⁴ Indeed, before the Solomon Amendment litigation got underway, the authors note, only three reported cases relied on *Dale* in upholding a freedom of association claim, and they seem not to be terribly bothered by those cases.¹²⁵ And when the Court decided *FAIR*, it appeared to confine *Dale* to the narrow case in which antidiscrimination law, or some other regulation, threatens to interfere with the membership composition of a group. On top of all of that, *Dale* may, as one scholar has argued, actually serve certain liberal causes, such as the preservation of affirmative action and university speech codes.¹²⁶

B. Collapsing the Status-Ideology Distinction

A separate critique of *Dale*, though not wholly unrelated to the Court’s astounding deference to the Boy Scouts’ associational claims, is that it collapsed what seemed to be a workable belief—status distinction in the adjudication of expressive association claims with its origins in *Roberts*.¹²⁷ In *Hurley*, for example, the Court was moved by the fact that the Veterans Council wanted to exclude only GLIB from marching under a banner with an identifiable message, not all homosexuals categorically.¹²⁸ But when it came to *Dale*, which relied heavily

122 *Id.* at 43.

123 *Id.* at 43–45.

124 *Id.* at 49–51.

125 *Id.* at 51.

126 *See, e.g.*, Bernstein, *supra* note 60, at 630–41 (explaining that private universities, like racist and sexist organizations, also discriminate due their strong belief in the importance of racial diversity).

127 *See* Goldberg, *supra* note 27, at 136, 144 (explaining that in *Roberts*, “the Court took a first step towards drawing a line between a group’s desire to exclude members based on status (or immutable characteristics) and a group’s ability to select its membership based on chosen beliefs or conduct,” whereas in *Dale*, the Court “relied on the fact that expressive association contains both speech and conduct elements, such that the mere presence of certain individuals may distort a group’s message”). In fairness, Goldberg does not seem to offer this as a criticism as much as descriptive account of how the status-belief distinction evolved from *Roberts*.

128 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (“Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.”).

on *Hurley*, the Court seemed to conflate the banner with the person carrying it in accepting the Boy Scouts' argument that, as one critic puts it, "people who are openly homosexual are, whether consciously or not, constantly propagandizing for approval of homosexuality by their mere presence."¹²⁹ The result is that "status and conduct are conflated to justify treating people differently on account of their sexual orientation."¹³⁰

C. *The Expressiveness of Outness*

Another critique of *Dale* expresses frustration with the Supreme Court for blindly accepting that one's mere identification as gay speaks, and brands him with an outness, as it were, that is inherently expressive and perhaps even dangerously so.¹³¹ As one critic puts the point, *Dale* "emblazons every homosexual with a Scarlet 'H,' loudly proclaiming the presence of homosexuality with all its attendant messages."¹³² The Court could not have been more clear, after all, that a heterosexual scoutmaster who opposes the Boy Scouts' view of homosexuality just is not the same kind of problem as a scoutmaster who is actually gay: "The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."¹³³ This school of criticism interrogates the relationship between being an "avowed homosexual" and expression with respect to homosexuality.

This critique is captured by Justice Stevens' dissenting remark that

129 Arthur S. Leonard, *Boy Scouts of America v. Dale: The "Gay Rights Activist" as Constitutional Pariah*, 12 STAN. L. & POL'Y REV. 27, 30 (2001).

130 *Id.*; see also James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 IOWA L. REV. 75, 82 (2001) ("The gist of *Roberts* is that an organization cannot use a person's status as a proxy for the individual's ideology. More specifically, an individual who avows that she shares the organization's philosophy cannot have an ulterior, hostile agenda attributed to her based solely on her status.").

131 See, e.g., Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 406-07 (2000) (explaining the belief among pro-family activists that any public image of a homosexual that is not negative, including the presence of an openly gay person, sends "normal people" and children a dangerous message).

132 Christopher S. Hargis, *The Scarlet Letter "H": The Brand Left After Dale*, 11 LAW & SEXUALITY 209, 235 (2002). The problem with this branding, as Hargis sees it, is that rather than searching for Dale's views, the Court "presumed a set of views concomitant with his status as a homosexual and proceeded to pit those views against the views of the Boy Scouts." *Id.* at 236.

133 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-56 (2000) (Stevens, J., dissenting).

[t]he only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism.¹³⁴

James Madigan does an exemplary job of taking this critique and running with it. Madigan's core challenge to *Dale* is that "self-identified homosexuals are not . . . message-creatures—they are people."¹³⁵ In Madigan's eye, Dale's mere identification as gay in one context (a college student at Rutgers) carries with it no determinate message that can be grafted onto him in some other context (the Boy Scouts), particularly when that second context can structure or regulate his expression. As Madigan sees it, one's self-identification as gay is simply a descriptive statement that could be made for any number of reasons, and it need not carry with it, wherever one goes, any particular message with respect to that identification or any "social or normative prescription."¹³⁶ If Dale were a vegetarian, after all, would that choice necessarily be seen as validated by the Boy Scouts?

The flipside of this argument, and a potential critique of *Dale*, is that sexual identity *is* in fact expressive, and that the law has not developed the adequate doctrinal tools to afford this "expressive identity" adequate protection.¹³⁷ Nan Hunter has argued, along these lines, that when one's identity is reduced to pure expression, his or her ex-

¹³⁴ *Id.* at 696. This reading of *Dale* is open to question, though. See McGowan, *supra* note 15, at 140–42. McGowan is hesitant to read *Dale* as an expressive identity case because the Court referred to Dale not just as a gay man but as a "gay rights activist," and also because such a reading would carry serious consequences for its previous cases and antidiscrimination law generally. *Id.*

¹³⁵ See Madigan, *supra* note 130, at 143.

¹³⁶ *Id.* at 100 (emphasis omitted).

¹³⁷ The issue is somewhat peripheral to my analysis, but any discussion of expressive association cases cannot fail to mention it. Nan Hunter's work is seminal. See Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000) [hereinafter Hunter, *Expressive Identity*] (discussing the need for the development of a theory of expressive identity to guide courts dealing with claims arising out of identity politics); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993) [hereinafter Hunter, *Identity, Speech, and Equality*] (exploring the relationship between expression and equality in the modern gay rights movement); see also Darren Lenard Hutchinson, "Closet Case": Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility, 76 TUL. L. REV. 81, 110 (2001) ("The Court's separation of outness and gay status fails to recognize the compelling linkages among outness, identity, and equality. Under the Court's constricted analysis, sexual identity exists apart from any expressive and associational activities.").

clusion from social spaces is justified by a kind of neutral deference to the host's own expression when, in effect, that exclusion perpetuates social inequalities.¹³⁸ Just as problematic, the expression itself is trivialized to the point where it is not recognized as the dissent from social devaluation that it inherently is.¹³⁹ These are the responses to and critiques of *Dale* grounded in critical theory: they interrogate the decision's—and the law's—construction of sexual identity and the perpetuation of exclusionary norms.¹⁴⁰

V. THE ILLOGIC OF MESSAGE ATTRIBUTION CLAIMS

The foregoing critiques, sharp as they are, leave room for the critique of the expressive association doctrine I want to offer in this Article. Let us assume the critical theorists are largely wrong, and Dale's identification as gay does, in and of itself, brand him with a pro-homosexual message. Let us also assume Justice Stevens, Koppelman, and Wolff are wrong, and the Boy Scouts has a sincere, identifiable view that homosexual conduct is immoral and that it wishes to impart this view on its young members. Let us even assume that there is nothing the Boy Scouts can do, at the organizational level, to dull the expressive nature of Dale's homosexuality or reaffirm its own commitment to heteronormativity. Even then, I would argue, an expressive association claim has problems. Why? Because it is a leap to assume that the mere presence of a gay scoutmaster in the Boy Scouts would force the organization to send the message that it approves of homosexuality. And yet, that is precisely the logic of the message attribution claim doing the work for the expressive association claim. To begin, it is worth seeing how casually courts have dismissed message attribution claims in other contexts.

¹³⁸ See Hunter, *Expressive Identity*, *supra* note 137; Hunter, *Identity, Speech, and Equality*, *supra* note 137.

¹³⁹ For a very interesting treatment of this issue, see Nancy J. Knauer, "Simply So Different": *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1072 (2001) (conceding that in contemporary social contexts openness unavoidably sends a message, but arguing that because Dale's "recognition of the expressive value of the openly gay individual potentially offers a new level of constitutional protection for coming out speech, particularly in the majority of jurisdictions where sexual orientation is not a protected class for purposes of state or local anti-discrimination laws").

¹⁴⁰ For another example, see Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271 (2003) (arguing that the decision in *Dale* will ultimately maintain dialogue about homosexuality in youth education).

A. *Courts' Typical Approach to Message Attribution Claims*

Dale is a distressing case, in particular, because previously (and since it was decided) the Court has taken a very realistic approach to message attribution claims and repeatedly rejected them as fanciful. Here, I want to survey a number of other contexts and cases in which message attribution cases were rejected—almost out of hand—with very little discussion.

1. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*

We have already seen the Court, in one expressive association case, refuse to credit as reasonable the impression that an outsider's speech was attributable to the host organization, in *FAIR*. Responding to the law schools' argument that accommodating military recruiters "could be viewed as sending the message that [the law schools] see nothing wrong with the military's policies," the Court held that "[n]othing about recruiting suggests that the law schools agree with any speech by recruiters."¹⁴¹ The Court went even further than that, questioning whether the law schools' exclusion of military recruiters would really send the message they hoped to send in the first place:

An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.¹⁴²

This shows willingness on the Court's part to sharply interrogate attribution claims, and it is the Court's unwillingness to do that in *Dale* that stands out so much.

The basic expressive association problem the plaintiffs in *Hurley*, *Dale*, and *FAIR* identified—an unwanted member's speech being imputed to the organization, or being identified as that of the organization, or getting in the way of the association's own speech—pops up in other contexts, too. And there, the courts have proven themselves not to be pushovers like the Supreme Court was in *Dale*. To the contrary, in these other contexts, much like the Supreme Court in *FAIR*, courts have sharply questioned message attribution claims, and frequently have rejected them out of hand.

¹⁴¹ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64–65 (2006).

¹⁴² *Id.* at 66.

2. *Compelled Speech*

This same issue comes up frequently in the compelled speech context—where a plaintiff’s argument, generally speaking, is that he or she cannot be required to disseminate an ideological message by displaying it on his property,¹⁴³ or cannot be compelled to affirm a particular belief.¹⁴⁴ While compelled speech may be impermissible for other reasons, courts are consistently unwilling to hold that there is a risk that such speech will be falsely attributed to the speaker and that *that* is the constitutional problem.¹⁴⁵

143 See *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that New Hampshire could not require residents to display the state’s “Live Free or Die” message on vehicle license plates).

144 See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that forced salute of the American flag and recitation of the Pledge of Allegiance is unconstitutional).

145 This is a really important point. The plaintiffs in *Wooley*, for example, could not credibly argue that they would be seen as endorsing the “Live free or die” message when every state-issued license plate in New Hampshire carried that message. And the Supreme Court’s opinion did not come close to suggesting that. Instead, it framed the case in terms of the state having an ideological message that it was forcing on its citizens. *Wooley*, 430 U.S. at 715 (“Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State ‘invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.’” (quoting *Barnette*, 319 U.S. at 642)). *Wooley* and *Barnette* are not message-attribution cases, then, in any meaningful sense; they turned instead on other First Amendment values like the freedom of conscience. See Madigan, *supra* note 130, at 113 (“The problem in *Wooley* was hardly misattribution . . . [It] can be classified as an intrinsic objection case.”).

The same can be said of the Supreme Court’s major cases respecting mandatory union and state bar contributions, in which the Court has held that such contributions cannot be used for political or issue advocacy that members find objectionable. See *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Those cases turn more on a freedom of conscience rationale than they do on any concern about advocacy being falsely attributed to individual contributors. See, e.g., *Abood*, 431 U.S. at 234–35 (“For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First Amendment’s protections.” (citation omitted)).

Just as cases like *Wooley* and *Abood* turned on a freedom-of-conscience rationale, newspapers cannot be required to print certain content on a freedom-of-the-press rationale—not on the thinking that what they are forced to print will be attributed to them. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974). At issue in *Tornillo* was a Florida “right of reply” statute that required newspapers to give reply space to political candidates it criticized. The Supreme Court found the statute unconstitutional because it interfered with the exercise of editorial control and judgment, not because the candidates’ replies would somehow garble the newspapers’ own criticism of them. *Id.* at 258.

A seminal case is *PruneYard Shopping Center v. Robins*.¹⁴⁶ Before the case got to the United States Supreme Court, the California Supreme Court had determined that the California constitution protected the speech and petitioning of a student group in a privately owned shopping center, even though it was against the shopping center's regulations.¹⁴⁷ The question in *PruneYard* was whether this violated the shopping center's First Amendment rights under the federal Constitution. The Court held it did not, in part because "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner."¹⁴⁸ Moreover, the shopping center was free to "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."¹⁴⁹

Subsequent to *PruneYard*, a number of courts, including the United States Supreme Court, rejected the argument of plaintiffs that being forced to host or accommodate certain speech would risk their being identified with that speech. For example, a Massachusetts law requiring landlords to permit the installation of cable television equipment did not threaten to associate them with the contents of cable programming.¹⁵⁰ An African American citizen of Georgia could not credibly argue that the racist connotations present in the state flag, which was reminiscent of the Confederate flag, would be seen as commanding his or her allegiance.¹⁵¹ A contraceptive coverage requirement for group insurance plans did not infringe the First Amendment rights of a faith-based organization by forcing it to en-

146 447 U.S. 74 (1980).

147 *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (1979).

148 *Pruneyard*, 447 U.S. at 87.

149 *Id.* In the wake of the California Supreme Court's *PruneYard* decision, it has become a contested question what makes a particular commercial establishment a public forum under state law, such that it cannot exclude speakers. The answer does not turn, though, on whether the speech at issue could be attributed to the establishment, but on a range of factors, such as whether the property owner has opened the property to the public, the scope of the invitation to the public, and whether the property includes common areas that encourage people to come together. *See, e.g.*, *Slevin v. Home Depot*, 120 F. Supp. 2d 822 (N.D. Cal. 2000) (holding that the main exit of a Home Depot store is not a public forum); *Van v. Target Corp.*, 66 Cal. Rptr. 3d 497 (Ct. App. 2007) (holding that the front of a Target store is not a public forum); *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 86 Cal. Rptr. 2d 442 (Ct. App. 1999) (holding that a Trader's Joe's storefront is not a public forum).

150 *Greater Worcester Cablevision, Inc. v. Carabetta Enters.*, 682 F. Supp. 1244, 1255 (D. Mass. 1985) ("[T]here is no reason to believe that Lincoln's tenants will assume that Lincoln endorses messages transmitted into tenants' apartments at their request.").

151 *Coleman v. Miller*, 912 F. Supp. 522, 530 (N.D. Ga. 1996) ("[T]he courts finds that entering a public building displaying the flag is an insufficient action to associate Plaintiff with its message.").

gage in symbolic, pro-contraceptive speech.¹⁵² Requiring cable television providers to carry local broadcast stations did not risk associating them with the stations' messages.¹⁵³ And employers required to hang a National Labor Relations Board ("NLRB") poster detailing its contact information and employees' various rights could not claim that they would be identified with the NLRB's message.¹⁵⁴

3. *Establishment Clause Cases*

Message attribution claims also come up when the government refuses to tolerate or assist religious speech on the worry that doing so will be seen as endorsing it in violation of the Establishment Clause.¹⁵⁵ This comes up, of course, because the question of whether the government will be seen as conveying a message that religion or a particular religious belief is favored is central to the Establishment Clause analysis.¹⁵⁶

152 *Catholic Charities of the Diocese of Albany v. Serio*, 808 N.Y.S.2d 447, 460 (App. Div. 2006) ("Given plaintiffs' well-known religious beliefs regarding contraception, we cannot conclude that there is a 'great likelihood' that plaintiffs' provision of contraceptive coverage to its employees would be perceived as anything more than compliance under protest with a statutory mandate that is generally applicable to all employers offering group health insurance coverage.").

153 *Turner Broad. Sys. v. FCC.*, 512 U.S. 622, 655 (1994) ("Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator. Indeed, broadcasters are required by federal regulation to identify themselves at least once every hour, and it is a common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility." (citation omitted)).

154 *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 59–60 (D.D.C. 2012) ("[N]othing in the notice posting suggests that employers favor collective bargaining activities, and nothing in the regulation restricts what the employers may say about the Board's policies. Since the notice simply recites what the law is, employers could not possibly have an alternative message that posting the notice could affect.").

155 There is a lot to be said, obviously, about this so-called "Endorsement Test" and its place in Establishment Clause jurisprudence, and I do not address it here with the intention of diving into that discussion. See, e.g., Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545 (2010); Steven Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667.

Instead, I want to point to a narrow set of cases in which courts have held, I think without controversy, that government tolerance of religion, or particular kinds of support for religious conduct, cannot reasonably be thought to communicate the message that it endorses or favors religion or that the religious content is attributable to the government.

156 See, e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989).

The Supreme Court has repeatedly dismissed that worry, however, as in *Rosenberger v. Rector and Visitors of the University of Virginia*.¹⁵⁷ In *Rosenberger*, a campus Christian group challenged the University's unwillingness, based on Establishment Clause concerns, to subsidize the printing costs of its publication "Wide Awake" with student activity funds.¹⁵⁸ The Fourth Circuit affirmed the University's concerns, holding that contributing student funds to "Wide Awake" would "send an unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values."¹⁵⁹

The Supreme Court flatly rejected this conclusion: "The Court of Appeals' apparent concern that Wide Awake's religious orientation would be attributed to the University is not a plausible fear, and there is no real likelihood that the speech in question is being either endorsed or coerced by the State."¹⁶⁰

In an earlier case, the Court, along similar lines, dismissed the concerns of a school district that granting official recognition to a Christian student group would be construed as an endorsement of the group's religious purposes.¹⁶¹ A nearly identical case is *Widmar v. Vincent*, in which the Court allowed that a university's so-called "open forum" policy for student groups could welcome those with religious objectives, largely because this "does not confer any imprimatur of state approval on religious sects or practices."¹⁶² The Ninth Circuit, in this spirit, has flatly dismissed the concern of the California Department of Motor Vehicles that allowing religious advocacy on DMV premises would connote state approval or endorsement of religion.¹⁶³

4. Board of Regents of the University of Wisconsin System v. Southworth

The Supreme Court upheld a mandatory student activity fee at the University of Wisconsin, over the objections of some students that

157 515 U.S. 819 (1995).

158 *Id.* at 825.

159 *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 18 F.3d 269, 286 (4th Cir. 1994).

160 *Rosenberger*, 515 U.S. at 841–42.

161 *Board of Educ. v. Mergens*, 496 U.S. 226, 250 ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis The proposition that schools do not endorse everything they fail to censor is not complicated.").

162 *Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

163 *Jaffe v. Alexis*, 659 F.2d 1018, 1022 (9th Cir. 1981) ("We believe that the Department's fears that the public will attribute the Krishnas' views to the State of California are not only unsubstantiated in the record, but have no basis in reality.").

they were being forced to subsidize the objectionable speech of organizations to which the fees were distributed.¹⁶⁴ So long as funds were allocated on a viewpoint neutral basis, however—and the parties agreed they were—the Supreme Court held that nobody would get the mistaken impression that every recipient organization spoke for all contributing students.¹⁶⁵ Similar in logic to *Southworth*, the government's mere granting of a parade permit to a discriminatory party does not amount to the state espousing discriminatory principles.¹⁶⁶

5. *Private Speakers at Private Events*

Other courts have followed the Supreme Court's lead here, even if not relying explicitly on the logic of *PruneYard* that an outsider's speech cannot automatically be attributed to the host party. One line of cases, for example, holds, at least partially on this basis, that city-permitted events open to the public, even though hosted by a private party, cannot exclude other private speakers: a Sparks, Nevada rib cook-off could not exclude a group collecting signatures for a recall petition;¹⁶⁷ a "National Coming Out Day" celebration in Philadelphia could not turn away counter-protestors in attendance to offer a different view of homosexuality;¹⁶⁸ permit-holding event sponsors in Portland, Oregon could not evict an evangelic preacher even though an ordinance ostensibly allowed them to do so;¹⁶⁹ a Columbus, Ohio riverfront arts festival could not exclude a man wearing a sign bearing

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

165 *Id.* at 233.

166 Invisible Empire of the Knights of the Ku Klux Klan, Md. Chapter v. Mayor of Thurmont, 700 F. Supp. 281, 287 (D. Md. 1988) ("If the Town's parade permission procedure were to automatically grant permission to every group which wished to parade peacefully (as it does for use of park pavilions), it would be clear to all that the Town does not support each parading group.").

167 Dietrich v. John Ascuaga's Nugget, 548 F.3d 892, 899 (9th Cir. 2008). The cook-off wished *not* to be identified with political speech, and the Ninth Circuit held "there is little chance that the public would have viewed Plaintiff's petitioning activities as endorsed by the Cook-Off. To the extent that such a concern existed, Defendant Nugget easily could have disclaimed Plaintiff's activities with a sign or through some other simple mechanism." *Id.* at 899.

168 Startzell v. City of Phila., 533 F.3d 183, 196 (3rd Cir. 2008) ("Appellants were dissenting speakers on the Philadelphia streets and sidewalks where OutFest took place. There was no danger of confusion that Appellants' speech would be confused with the message intended by Philly Pride.").

169 Gathright v. City of Portland, 439 F.3d 573, 578 (9th Cir. 2006) ("Here, there is no risk that Gathright's provocations could be mistaken by anybody as part of the message of the events he protests . . . Dale's holding, like *Hurley's*, was grounded in whether the plaintiff's views could be mistaken for those of the defendant.").

religious descriptions and distributing religious literature;¹⁷⁰ a Memorial Day air show honoring veterans in Columbia, Missouri could not exclude antiwar protestors or someone collecting signatures for a renewable energy initiative;¹⁷¹ and a Minnesota gay pride parade could not exclude an evangelical Christian there to talk about his faith and hand out bibles.¹⁷² Even a permitted, public Ku Klux Klan rally on *private* property could not limit the audience to white gentiles.¹⁷³

B. *The Best of All Possible Meanings*

In all of the above cases, courts made what seemed like an ad hoc decision that compelled association would not infringe the speech interests of an organization because the speech of the person the organization was forbidden from excluding could not reasonably be attributed back to the organization. Unlike in *Dale*, in these cases there was not much of a dispute as to what the compelled associate's message actually was. What we do not get in these cases, or even in the more seminal Supreme Court cases, however, is some deeper explanation as to why the message attribution claim fails. The courts simply reject the message attribution claim, and that is that. In *FAIR*, for example, the Supreme Court simply said that military recruiters are outsiders and everyone knows it, and to the extent there is any confusion, the law schools themselves could clear it up. That was the end of the discussion. Ditto in *Dale*. Dale's presence would send the message that the Boy Scouts approves of homosexuality, period. And the same held true in *PruneYard*: shopping mall visitors would be unlikely

170 *Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005) ("If, however, we were to construe the message of the Arts Festival to be 'visual and performance art,' nothing in the record indicates that Parks interfered with or prevented this 'message' from being conveyed. In fact, Parks was merely another attendee of the festival, walking up and down the street.")

171 *Wickersham v. City of Columbia*, 481 F.3d 591, 600 (8th Cir. 2007) ("There is no evidence that Salute's message was diluted by the presence of a small number of sign carriers and leafleters at the . . . air show, which was attended by over 25,000 people. Appellees sought only to express their own views as spectators at the air show, and their signs and leaflets were not likely [to] be identified with Salute." (internal quotation marks omitted)).

172 *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park & Recreation Bd.*, 721 F. Supp. 2d 866, 873 (D. Minn. 2010) ("Assuming that Johnson attends the Pride Festival and conveys such a dissenting message, the Court finds that there would be no danger of confusion that Johnson's speech would be confused with the message intended by Twin Cities Pride." (internal quotation marks omitted)).

173 *NAACP v. Thompson*, 648 F. Supp. 195 (D. Md. 1986). The lengthy opinion does not address head-on a potential attribution argument—and maybe the Klan did not make one—but suffice it to say no reasonable person would attribute to the Ku Klux Klan the views of NAACP members who show up in protest at a Klan rally.

to identify the positions of signature-seekers with the mall ownership. The Court had nothing else to say.

But let us think about *FAIR* and consider what else the Supreme Court could have said, just to drive home the problem with the message attribution claim made in that case. The presence of military recruiters, in the eyes of students and outsiders, could mean any number of things apart from the law schools' approval of "Don't Ask, Don't Tell," or acceptance of employment discrimination generally. It could mean that (1) the law schools respect students with an interest in the JAG Corps and do not want to inconvenience them by marginalizing the recruiters with whom they need to meet; (2) the law schools respect the autonomy of their students to decide on their own whether to interview with the military, and do not want to be seen as weighing in on that independent moral decision in any way; (3) the law schools know they have been more than clear about their view of "Don't Ask, Don't Tell" and do not need to marginalize military recruiters to supplement or reiterate this view; (4) the law schools recognize that "Don't Ask, Don't Tell" is the law, duly enacted by a democratic Congress after rich debate, and that no small number of military members and recruiters may well oppose it, too;¹⁷⁴ (5) the law schools are committed to the "robust exchange of ideas," even when that requires them to accommodate speakers who express or stand for something they find morally objectionable; and (6) the law schools think it is most effective to protest "Don't Ask, Don't Tell" in the presence of military recruiters, rather than in their absence.¹⁷⁵

We could run an identical thought experiment in *Dale*. Even assuming Dale's homosexuality was itself expressive, and even assuming that he would be seen as a banner for gay equality, it would remain

174 This was indeed one glitch in *FAIR*'s litigation position—that it was the *military* that was the object of its egalitarian ire. The military did not come up with "Don't Ask, Don't Tell"—Congress did. See Nelson Polsby, *Polsby: "Barely A First Amendment Case At All,"* ACS BLOG (Nov. 30, 2005), <http://www.acslaw.org/acsblog/polsby-barely-a-first-amendment-case-at-all> ("F.A.I.R.'s members must surely be aware that it is not the military that is actually making the policy that they don't like. It isn't up to the armed services to determine who is eligible to serve and who is not. 'Don't ask, don't tell' is a statute—the law of the land. The law schools, if they are morally serious, should boycott the organizations actually responsible for that law.").

175 A Yale Law School professor actually made some of these points in arguing against the school's position in the Solomon Amendment litigation. See Peter Schuck, *Fighting on the Wrong Front*, N.Y. TIMES, Dec. 9, 2005, http://www.nytimes.com/2005/12/09/opinion/09schuck.html?_r=0 ("The issue is not what the universities think about 'don't ask, don't tell'—they have made that clear—but how their students view it. A university's moral and pedagogical duty to its students is to cultivate their capacity for independent thinking, explain its own view (if it has one) and then get out of the way. The students' duty is to listen carefully—and then make their own decisions.").

an open question whether the Boy Scout's inclusion of him could reasonably be understood as approval of homosexuality at the organizational level. Are there reasons the Boy Scouts may accept a gay scoutmaster even though, as an organization, it professes disapproval of homosexual conduct? Of course there are—lots of them.

Perhaps James Dale (as the record in the case suggested) was an exemplary scout himself and, on balance, a net asset to the organization. Perhaps the Boy Scouts operate on a model of moral education whereby the organization voices its position on moral questions, but exposes its members to the alternatives and respects their autonomous decisions. Perhaps the Boy Scouts believes its position on homosexuality is abundantly clear, and that it does not need to exclude homosexuals to enhance or supplement that position. Perhaps the Boy Scouts, however strong its view of homosexual conduct, is committed first to respecting the laws on the books, even those that put the organization in a compromising position. Perhaps the Boy Scouts wanted to use James Dale as an anti-example—that is, the organization could point to him as a homosexual and implore its members not to conduct their lives as he conducted his. Perhaps the Boy Scouts thought the best way to communicate its disapproval of homosexuality was in his presence, while also taking a public stand against the nondiscrimination law that compelled the organization to accept Dale.

When we consider these possibilities, or any other explanations for James Dale's continued presence in the Boy Scouts, we see clearly the problem with Justice Rehnquist's assertion in *Dale* 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."¹⁷⁶ That is simply not true. The "message" to which Justice Rehnquist refers, of course, is not the *Boy Scouts'* message—Dale's presence does not force the organization to say anything, nor does it prevent the organization from saying anything—but rather the impression of onlookers, whether from within the organization or from the outside. And that impression—the Boy Scouts must approve of homosexuality because there is a homosexual among them—is one of numerous impressions to be drawn. And it is far from the most reasonable. Finally, while the Boy Scouts may be entitled to deference on what its views are and what might impair the expression of its views, its guess as to what others might think is *not*, because it is really

176 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

just that: a guess. The Boy Scouts is in no better position than anyone else in the world to know or intuit what a third party observer might think when he or she sees a gay scoutmaster in its ranks.

And so, it is with all message attribution claims that yoke an associational interest to an expressive one. The fact is that compelled association does not require an organization to say anything, nor does it prevent an organization from saying anything. Indeed, there is nothing deliberately communicative about association from the organization's end at all.¹⁷⁷ The question of whether its message is diluted or interfered with by the presence of an unwanted person is a question of what an observing third party might reasonably infer from the presence of that person. And there will always be some explanation available, or some rational inference, other than the organization's acceptance or approval of what that unwanted person stands for.

The working premise of message attribution claims is that no organization would ever tolerate a member whose values and conduct are not in line with every last organizational principle, and that a single "defect" in a member, for lack of a better word, is categorically disqualifying. It is only in the abstractions of constitutional argument that *that* premise holds water. Sure, there are some instances where a single personal attribute is categorically disqualifying—a Jew could never become the Pope—but in reality a person is never a truly perfect fit for anything; in our personal relationships, in our social relationships, and in our professional relationships, we suffer one another's inadequacies because in the aggregate we gain something for it. That does not mean that we do not see their inadequacies as such and are seen as endorsing them. It merely means associating with them is a net positive, and with the good (or even the great) we take some bad. It is against that backdrop that *Dale* seems most absurd, and that message attribution claims generally seem dead on arrival. The Boy Scouts may very well not wish to associate with homosexuals, but it is another argument altogether that they will be seen as endorsing homosexuality just because a scoutmaster is gay.

When the Third Circuit found the Solomon Amendment unconstitutional, Judge Aldisert invoked the principles of logic in a sharp dissent. What is interesting is that for Judge Aldisert, the logic ques-

¹⁷⁷ See John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1337 (2008) ("[C]ommunication occurs when Person A conveys a thought to Person B, and Person B freely chooses whether to accept that thought. An act is communicative, in other words, if the important change that A wants to make in B's mind occurs only when B wills it to . . .").

tion in the case preceded the First Amendment question altogether. The logic question was not what people might think of a discriminatory recruiter being on law schools' campuses, but rather whether it was logical, in the first instance, to see the military as discriminatory, or to *infer* discrimination from the recruiters' presence. Now, arguably this question can be stuffed into the expressive association analysis—it is analogous to whether James Dale radiates homosexuality just because he is gay—and in particular into the middle prong that asks whether an organization's message will be compromised by the presence of an unwanted member. But Judge Aldisert located it elsewhere. On the subject of inference, he wrote:

Inference is a process where the thinker passes from one proposition to another that is connected with the former in some way. But for the passage to be valid, it must be made according to the laws of logic that permit a reasonable movement from one proposition to another. . . . The passage cannot be mere speculation, intuition or guessing. The key to a logical inference is the reasonable probability that the conclusion flows from the evidentiary datum because of past experience in human affairs.¹⁷⁸

From here, Judge Aldisert just refused to accept that “the mere presence of a uniformed military recruiter permits or compels the inference that a law school's anti-discrimination policy is violated.”¹⁷⁹ Again, this is before he got to the *Roberts* expressive association analysis. Judge Aldisert was taking on, up front, the very premise that the military recruiters would be identified as discriminators. When he got to the *Roberts* analysis, he wrote not in terms of what was a logical inference, but simply that there was no likelihood that the military's message and the law schools' would be conflated, especially considering the law schools' known opposition to “Don't Ask, Don't Tell” and its continued ability to speak out against it:

Here, in contrast, the likelihood that members of a law school community will perceive a military recruiter's on-campus activities as reflecting the school's “customary determination” that the recruiter's message is “worthy of presentation and quite possibly of support” is vanishingly small. Unlike bystanders watching a passing parade, law school students, and to be sure, their professors, are an extraordinarily sophisticated and well-informed group, who understand perfectly well that their schools admit military recruiters not because they endorse any “message” that may be conveyed by the recruiters' brief and transitory appearance on campus, but because the economic consequences of the Solomon Amendment have induced them to do so. The likelihood that the mili-

178 *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219, 252 (3rd Cir. 204) (Aldisert, J., dissenting).

179 *Id.*

tary's recruiting will be seen as part of a law school's own message is particularly small when schools can take—and have taken—ameliorative steps to publicize their continuing disagreement with the military's policies and the reasons for their acquiescence in military recruiting.¹⁸⁰

It is important to see, though, that this is also a question of logical inference even if Judge Aldisert's did not explicitly treat it as one. In other words, Judge Aldisert's reasoning about whether military recruiters could logically be viewed as discriminators could apply equally well to the question of whether, assuming the military recruiters were identified as discriminators, their discrimination would be attributed to the law schools so as to garble their message of tolerance. Is there a reasonable probability that the Boy Scouts would be seen as endorsing homosexual conduct by including a homosexual in its ranks? Would this conclusion, in Judge Aldisert's words, "flow[] from the evidentiary datum because of past experience in human affairs?"¹⁸¹ The answer has to be at least, "Not necessarily."

CONCLUSION

The Supreme Court recognized in *Dale* that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."¹⁸² The word "presence" there matters. *Dale* would not have been a front-page case if he had been expelled from the Boy Scouts for explicit pro-homosexual advocacy. But he was not expelled for that. He was expelled simply for *being* gay and on the assumption that his presence would send a particular message that was at odds with the Boy Scouts' own. Similarly, the law schools in *FAIR* may have had a very different case if the military recruiters devoted a portion of their on-campus "recruiting" efforts to defending "Don't Ask, Don't Tell" and arguing for the inferior social treatment of homosexuals. But that was not and could not have been their argument. They wanted to exclude the military recruiters categorically, simply because of what they were assumed to stand for.

I have argued in this Article that for organizations to get around antidiscrimination laws and exclude categories of people outright—to not even allow their *presence*—they must make a message attribution claim. That is, they must assert that the unwanted members

180 *Id.* at 257.

181 *Id.* at 252.

182 *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

stand for something, and that what they stand for will be attributed to the organization if it cannot exclude him.

There are two problems with this that I have tried to highlight. The first problem is doctrinal: There will always be some available explanation for an unwanted member's presence other than the organization's endorsement of what he or she stands for. As Chemerinsky and Fisk ask, does a Catholic University's employment of a Jewish law professor mean its commitment to Catholicism is squishy, and that it will be seen as affirming tenets of the Jewish faith?¹⁸³ To ask that question is to answer it. The consequence of this is that if we really think association merits constitutional protection, we may have to either (1) broaden the interest in "expression" to encompass more than how someone's mere presence will ultimately affect the dissemination of an organization's message; or (2) reconfigure the constitutional relationship between association and speech in the first place, perhaps by simply decoupling the two.

The second problem goes more to the ad hoc manner in which message attribution claims are adjudicated. The question of whether compelled association will get in the way of an organization's message is really a question of what third parties will infer from the association. And courts must do better than the ad hoc speculation that we see wherever message attribution claims are made. Even if, in our eyes, they get the answer right, they do so in a completely under-theorized manner that leaves the doctrine guessing from one case to the next.

183 See Chemerinsky & Fisk, *supra* note 105, at 602–03.