Foreword

Speaking in the First Person Plural: Expressive Associations and the First Amendment

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> As soon as several of the inhabitants of the United States have taken up an opinion or a feeling which they wish to promote in the world, they look out for mutual assistance; and as soon as they have found one another out, they combine. From that moment they are no longer isolated men, but a power seen from afar, whose actions serve for an example and whose language is listened to.
>
> —Alexis de Tocqueville[1]

Expressive associations have never loomed larger in American constitutional law. As the contributions to this Symposium indicate, important recent cases involve the immunity of private associations from anti-discrimination law,[2] campaign finance reform,[3] and government assistance to religious schools.[4]

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1. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 109 (Knopf Inc., 1994).

2. *See generally* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639 (2001); Martin H. Redish & Christopher R. McFadden, *HUAC, The Hollywood Ten and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669 (2001).

3. *See generally* Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729 (2001); Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence*

The Supreme Court's interest in protecting expressive associations comes at a time of renewed appreciation for their importance. Long ago, Tocqueville observed that "Americans of all ages, all conditions, and all dispositions constantly form associations" in order "to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes."[5] Tocqueville viewed such associations as critical to American society.[6] Today, however, concern exists about whether private associations can continue to play this role in American society. In his comprehensive empirical study of American civic life,[7] Robert Putnam found signs of sharp declines in all kinds of private associations, from PTAs[8] and bowling leagues[9] to club meetings,[10] professional organizations,[11] and contributions to charitable organizations.[12] Putnam is aligned with others who fear a decline in civic strength, and urge a revival of civil society.[13]

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to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy, 85 MINN. L. REV. 1773 (2001); John Copeland Nagle, *Voluntary Campaign Finance Reform*, 85 MINN. L. REV. 1809 (2001)

4. *See generally* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001); Steven G. Gey, *The No Religion Zone: Constitutional Limitations On Religious Association In The Public Sphere*, 85 MINN. L. REV. 1885 (2001); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917 (2001).

5. TOCQUEVILLE, *supra* note 1, at 106. In particular, he observed, "[i]f it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society." *Id.*

6. Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations of America. The political and industrial associations of that country strike us forcibly; but the others elude our observation, or if we discover them, we understand them imperfectly because we have hardly ever seen anything of the kind. It must be acknowledged, however, that they are as necessary to the American people as the former, and perhaps more so. In democratic countries the science of association is the mother of science; the progress of all depends upon the progress it has made. *Id.*

7. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

8. *Id.* at 55-57.

9. *Id.* at 111-13.

10. *Id.* at 60-61.

11. *Id.* at 83-85.

12. *Id.* at 126-27. Putnam also argued that the "social capital" produced by these organizations has numerous benefits to society as a whole, including a stronger sense of community, greater compliance with the law, and more democratic participation. *See id.* at 143, 287-95, 347-48.

13. For an overview, see Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 1-7, 32-34 (2000).

Even those who are skeptical of some aspects of the civic revival movement share its appreciation for the positive role played by these private associations in American society.[14] As John McGinnis suggests, although the Court has not directly invoked the civic revivalists, recent cases "can be understood as moving toward protecting the autonomy of civil society from the state."[15] Thus, the new law of expressive associations is well worth our careful attention.[16]

This Essay begins the process of putting this emerging jurisprudence into perspective. The first half traces the doctrinal evolution. Part I provides a brief overview of the traditional doctrines regarding individuals' freedom of association. Part II explains how the Court's more recent cases focus on the autonomy of the organization itself and its leadership. Accordingly, the Court is increasingly attuned to providing distinctive legal protections for expressive associations as entities. Thus, the focus is now on expressive associations rather than the act of associating itself.

The second half of this Essay explores the emerging issues. While there may be some dominant themes in the case law, the doctrines have retained elements of ambiguity. Part III provides a roadmap to government regulation of expressive associations. What is an expressive association? How much autonomy does it have? Despite the bold language of some opinions, the answers found in the case law seem tentative and context-based. Part IV investigates the vexing problems that arise when the government's relationship with an expressive association is too cozy rather than being too adversarial.[17] Economic theory suggests reasons for worry about undue influence in these relationships but does not tell us where to draw the line.

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14. *See* Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301, 306-07, 316-18 (2000).

15. *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery* 47 (unpublished manuscript, on file with author).

16. If one may be forgiven for quibbling with the title of this Symposium, the issue today is usually the freedom of expressive associations, not the individual's "freedom of expressive association." *See infra* Part II.B.

17. Here, the issues are whether the association's expression can be limited so as to prevent undue influence on the government, and the extent to which the government in turn is limited in influencing the "market" for expressive associations. As we will see, economic theory suggests that these are potentially serious problems but does not provide the basis for pat doctrinal answers.

Part V closes the essay with some brief remarks about the multi-faceted nature of expressive associations.

It is too early to know how these emerging questions will be answered. As the contributions to this Symposium indicate, the answers are highly controversial and relate to basic disagreements about American society and constitutional values.[18] The sooner we begin to map this novel and important terrain, however, the better our chances to avoid hopelessly losing our way.

I. THE OLD FREEDOM OF ASSOCIATION

As of a few years ago, the Court had developed several lines of authority about the freedom of association. One major development of the past few years has been to draw together and expand upon these lines of authority. Thus, it is helpful to begin with a quick look at the terrain, as it appeared before the latest wave of integration and expansion. These cases provided some protection to the autonomy of the organizations as such, but more vigorously defended the rights of members to join associations.

One line of authority concerned the application of anti-discrimination laws to private associations. *Roberts v. United States Jaycees*[19] is illustrative. In compliance with state anti-discrimination laws, two local chapters of the Jaycees admitted women as members. The local chapters were sanctioned for violating a national bylaw prohibiting admission of women. The local chapters filed a state civil rights complaint against the national organization, which responded with a federal law suit. The Supreme Court held that compelling the national organization to accept women in its local chapter would not violate its constitutional rights.

Justice Brennan's opinion for the Court in *Roberts* distinguishes two different senses of freedom of association. Some cases had held that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our

18. For a broad examination of the normative issues involved in expressive and other forms of association, see FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998).

19. 468 U.S. 609 (1984).

constitutional scheme."[20] Brennan referred to this as the intrinsic feature of the right to associate, since it involves protection of association for its own sake.[21] The Jaycees did not qualify as an intimate association.[22] Other cases had 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."[23] Brennan referred to this as the instrumental feature of association; it would be called "expressive association" today.[24]

With respect to expressive association, Justice Brennan observed that "collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."[25] Hence, the Court has recognized a right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[26] As the Court noted, the Jaycees' national and local organizations had taken public positions on a variety of issues, and members regularly engaged in civic, charitable, lobbying, and other protected activities.[27] But limitations on expressive association may be justified "by regulations adopted to serve compelling state interests, unrelated to suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[28] The Court concluded that the government's compelling interest in eliminating gender discrimination justified regulation of the Jaycees.[29] The Court was skeptical that admission of women would change the content or impact of the organization's speech, and in any event, found that any ef-

20. *Id.* at 617-18.

21. *See id.* at 618.

22. Justice Brennan observed that human groups span a broad range, from families to business corporations. Intimate associations such as families are characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620. The Jaycees were closer to the business end of the spectrum. Among other matters, except for exclusions based on gender and age, membership was completely unselective, and local chapters had several hundred members. *Id.* at 620-21.

23. *Id.* at 618.

24. *Id.*

25. *Id.* at 622.

26. *Id.*

27. *Id.* at 626-27.

28. *Id.* at 623.

29. *Id.* at 623-24.

fect on protected speech was "no greater than is necessary to accomplish the State's legitimate purposes."[30]

Several years later, the Court extended the *Roberts* holding in *Board of Directors of Rotary International v. Rotary Club*.[31] The national Rotary revoked the charter of a local club because it had admitted women, and the local club and two women members filed suit in state court challenging the action as a violation of state civil rights law.[32] As in *Roberts*, the Court found no significant impact on the clubs' expressive activities, and held that any "slight infringement" was justified by the state's compelling interest in eliminating discrimination.[33]

A second line of authority relating to expressive association involved political parties.[34] Two cases from the 1980s illustrate the limits of state regulatory power. In *Democratic Party of United States v. Wisconsin, ex rel. LaFollette*,[35] state law required national political parties to seat only delegates who were pledged to abide by the Wisconsin primary.[36] Contrary to the Democratic party's rules for selecting delegates, Wisconsin held an "open" primary in which voters did not need to make a public declaration of party affiliation.[37] The Democratic party's rule was intended to restrict crossover voting, which had allowed Republican voters to play a decisive role in some controversial Democratic primaries.[38] The Court held that the state could not constitutionally require party delegates to abide by the results of the primary.[39] Freedom of association "necessarily presupposes the freedom to identify the people who consti-

30. *Id.* at 628.

31. 481 U.S. 537 (1987). As in *Roberts*, the Court found no violation of the right to intimate association. *Id.* at 547. The size of local clubs ranged from fewer than twenty to nearly a thousand, with an annual turnover about ten percent. *Id.* at 546. Rather than carrying out their activities in private, local clubs sought publicity. *Id.* at 547.

32. *Id.* at 541-42.

33. *Id.* at 549. A similar result was reached in N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13-14 (1988).

34. For a critical overview, see Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1745-54, 1770-87 (1993). On the role of parties in civil society, see Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813 (2000).

35. 450 U.S. 107 (1981).

36. *Id.* at 109-12.

37. *Id.* at 110-12.

38. *Id.* at 118-20.

39. *Id.* at 126.

tute the association, and to limit the association to those people only."[40] The Democratic party "chose to define [its] associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention," and the state was unable to show any compelling interest in interfering.[41]

The converse situation was presented in *Tashijian v. Republican Party*.[42] In *Tashijian*, the state insisted on a closed primary while the party wanted to allow independents to participate.[43] Considering that "the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs," the Court held that the invited participation of independents was an aspect of freedom of association.[44] By placing limits on the "group of voters whom the Party may invite to participate," the state limited the "Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[45] The state asserted several justifications for the statute, most notably the desire to prevent splintered parties and factionalism.[46] Although concerns about the effects of open primaries were shared by some leading political scientists, the Court held that it was up to the party itself to determine its own long-term interest, not the state government.[47]

A third line of decisions protected the ability of individuals to join groups. One question was whether an individual who joined a group for a lawful reason could be punished for the group's unlawful activities. This issue was highlighted in the McCarthy era, a period revisited in Martin Redish and Christopher McFadden's contribution to this Symposium.[48] In addition to banning advocacy of revolution, the Smith Act also made it a felony to be a knowing member of any group advocating forceful overthrow of the government. In *Scales v. United*

40. *Id.* at 122.
41. *Id.* at 122, 125-26.
42. 479 U.S. 208 (1986).
43. *Id.* at 212-13.
44. *Id.* at 215, 224-25.
45. *Id.* at 215-26.
46. *Id.* at 217-25.
47. *See id.* at 222-24; *see also* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 233 (1989) (striking down another state effort to limit the party leadership's impact on primaries).
48. *See generally* Redish & McFadden, *supra* note 2.

States,[49] Justice Harlan's opinion for the Court gave the membership clause a narrow reading. [50] He held that membership in the Communist Party could be punished only if the member was active in the Party, knew of the Party's illegal aims, and had a specific intent to further those aims.[51]

Justice Harlan also wrote for the Court in another case protecting the right to join unpopular organizations, *NAACP v. Alabama ex rel. Patterson*.[52] As part of its general statute regulating foreign corporations, Alabama required disclosure of numerous NAACP documents, including membership lists. Taking cognizance of the obvious risk of retaliation against NAACP members in that state, the Court held that the production order violated the First Amendment.[53] Notably, although the NAACP also attempted to assert its own rights as an organization, the Court said the group "more appropriately" argued the rights of its members.[54]

More recent cases have continued to protect members from the risk of formal or informal sanctions. In *Brown v. Socialist Workers '74 Campaign Committee*,[55] the Court rejected the application of public disclosure requirements to the Socialist Workers Party on grounds similar to *NAACP v. Alabama ex rel. Patterson*.[56] Thus, individuals must not be deterred from joining unpopular organizations by fear of public disclosure.[57] The NAACP also figured in another notable freedom of association case, *NAACP v. Claiborne Hardware Co.*[58] *Claiborne Hardware* was a suit by white merchants against a civil rights organization and some of its members, seeking damages for economic loss caused by a boycott.[59] The Court rejected an award of damages against the individuals: "For liability to be imposed by reason of association alone, it is necessary to establish that

49. 367 U.S. 203 (1961).

50. *Id.* at 219.

51. *Id.* at 224-30; *see also* Noto v. United States, 367 U.S. 290 (1961).

52. 357 U.S. 449, 451 (1958).

53. *See id.* at 462-63, 466-67. For similar cases protecting members of unpopular organizations during this period, see Gibson v. Fla. Legislative Investigating Comm., 372 U.S. 539, 544 (1963), and Shelton v. Tucker, 364 U.S. 479, 483-84, 486-87 (1960).

54. *Patterson*, 357 U.S. at 458-59.

55. 459 U.S. 87 (1982).

56. *Id.* at 91-98.

57. *Id.* at 97-98.

58. 458 U.S. 886 (1982).

59. *Id.* at 889.

the group itself possessed unlawful goals and that the individual held a specific intent to further those goals."[60] These decisions provide a safety zone for members, who might otherwise fear that joining a dissident group could lead to social or legal sanctions.[61]

Thus, from the 1960s to the 1980s, the "old" freedom of expressive association primarily applied to groups like political parties or civil rights groups, formed for the sole purpose of engaging in core political speech. The rights of non-political associations like the Jaycees were rarely at issue, and organizational autonomy was only one of several themes in the Court's decisions. At the turn of the century, as we will see in Part II, the Court's emphasis shifted. The groups qualifying for vigorous constitutional protection were defined more broadly, and the right of the organization's leadership to control its members and platform loomed larger than concerns about barriers to membership.

II. THE TRANSFORMATION OF FREEDOM OF ASSOCIATION

Freedom of association is not a new concept in First Amendment law. In recent cases, however, it seems to be conceptualized in a subtly different way while receiving significantly more vigorous enforcement. This Part traces the doctrinal evolution.

A. *DALE* AND EXPRESSIVE ASSOCIATION

The most dramatic example of the "new" freedom of expressive association is *Boy Scouts of America v. Dale*.[62] James Dale was virtually a life-long boy scout, having joined at age eight, become an Eagle Scout, and finally taken his place as an assistant scoutmaster.[63] While he was in college, however, a newspaper interview discussed his role as co-president of the student gay rights group.[64] Finding his continued association with the organization intolerable, the Scouts promptly expelled him.[65] In an opinion by Chief Justice Rehnquist, a sharply di-

60. *Id.* at 920.

61. The Court also protected the right of individuals to avoid compulsory association with groups having political messages. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232-37 (1977).

62. 120 S. Ct. 2446 (2000).

63. *Id.* at 2449.

64. *Id.*

65. *Id.*

vided Supreme Court held that this action was immune from New Jersey's anti-discrimination law.[66]

Rehnquist's opinion begins by stressing that the Boy Scouts "is a private, not-for-profit organization engaged in instilling its system of values in young people."[67] The opinion goes on to document in painstaking detail that the Scouts' mission is to transmit a system of values to young people, including moral straightness.[68]

Whether the Scouts had any message with respect to homosexuality was contested. The Court deferred to the Scouts' brief, which asserted that the organization did have such a message.[69] Would Dale's presence in the organization undermine its message? Again, the Court veered away from an independent evaluation of the record: "As we give deference to an association's assertions regarding the nature of its expression," Rehnquist said, "we must also give deference to an association's view of what would impair its expression."[70] Even though the Scouts were allegedly tolerant of heterosexual scoutmasters who advocated tolerance for gays,[71] Dale was a "gay rights activist," and his presence "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."[72]

Rehnquist also rejected the adequacy of the state's interest in combating discrimination. Although he never actually described the state interests in question, he flatly asserted that those interests (whatever they may have been) could not "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."[73] But of course, the primary basis for finding a "severe intrusion" was deference to the Scouts' own assertions in the course of the litigation. Thus, the upshot of the majority opinion seems to be that once an association is identified as expressive, any colorable claim of interference

66. *Id.*

67. *Id.*

68. *Id.* at 2451-52 (citing the Boy Scout Oath).

69. *Id.* at 2453. The Court also considered some of the evidence in the record regarding the Scouts' views "as instructive, if only on the question of the sincerity of the professed beliefs." *Id.*

70. *Id.*

71. *Id.* at 2455.

72. *Id.* at 2454.

73. *Id.* at 2457.

with its activities is enough to block application of anti-discrimination laws (at least in cases where the Court does not find the particular state interest particularly compelling). This is a sharp turnabout from *Roberts*, in which the Court had demanded a greater showing of interference with the group's expression and had placed more emphasis on enforcing anti-discrimination laws.

Justice Stevens authored a pointed dissent that stressed the weakness of the record.[74] The group's failure to make any affirmative effort to communicate its alleged anti-homosexual values to the boys themselves, he remarked, "speaks volumes" about the credibility of its claims.[75] In the absence of any serious examination of the group's message, "there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate non-expressive private discrimination, on the other hand."[76] Stevens suggested that the majority's argument was so weak that it could only be explained on the basis "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."[77] In the majority's view, he charged, "an openly gay male" carries with him a label which, "even though unseen, communicates a message that permits his exclusion wherever he goes."[78]

Only time will tell whether, as feared by Stevens and the other three dissenters, *Dale* will prove to be a major defeat for anti-discrimination law.[79] For example, as we will see later, it is unclear whether the decision provides any protection to commercial or quasi-commercial organizations. Indeed, even its impact on gay rights is sharply disputed.[80] But if nothing

74. *Id.* at 2460-66 (Stevens, J., dissenting).

75. *Id.* at 2466 (Stevens, J., dissenting).

76. *Id.* at 2471 (Stevens, J., dissenting).

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

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

79. At least some commentators would greet such an effect with enthusiasm. *See* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 121, 139-43 (2000); *The Supreme Court, 1999 Term, Leading Cases*, 114 HARV. L. REV. 179, 268 (2000) (denouncing anti-discrimination law as involved in a "truly Orwellian task" of cultural transformation).

80. Compare Dale Carpenter's contribution to this Symposium, extolling the decision as a victory for gays because of its emphasis on the expressive na-

else, it demonstrates a dramatic change since the days when Justice Brennan held that discrimination is akin to violence in being "a source of unique evils" and therefore "entitled to no constitutional protection."[81] Putting aside any arguable factual distinctions, the difference in the tone of the two opinions speaks volumes about how the Court evaluates the conflicting interests at stake: on the one hand, an arguable but unproven First Amendment harm, on the other, an open act of discrimination. *Dale* is a tribute to the seriousness with which the Court now regards the freedom of expressive associations.

B. THE NEW APPROACH TO EXPRESSIVE ASSOCIATIONS

Apart from the result, *Dale* is noteworthy because of its methodology. The decision implicitly treats the rights of expressive associations as a unified doctrine. In a case involving a youth organization, the Court relies on prior opinions dealing with a wide range of organizations and activities. *Dale* relies heavily on an earlier case dealing with discrimination by the organizers of a parade.[82] It also cites authority concerning the rights of political parties[83] and private clubs,[84] as well as a case involving interpretation of religious doctrine.[85] *Dale* is not alone in its use of cross-cutting citations. For instance, the parade case mentioned above is cited as authority in an opinion about political parties.[86] Thus, the Court seems to consider clubs, parades, civil rights groups, and political parties as all being members of a single genus, *Association Expressivius*.

Dale also highlights another notable change in the way judges conceptualize freedom of association cases. As we saw in Part I.A, earlier cases often focused on protecting the par-

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ture of "coming out," with Nan Hunter's critique of the decision. Carpenter, *supra* note 2, at 1549-55; Hunter, *supra* note 2, at 1605-13. Steffen Johnson's contribution illuminates the connection between *Dale* and other cases dealing with group autonomy. Johnson, *supra* note 2, at 1648-57.

81. Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984).

82. *See Dale*, 120 S. Ct. at 2454, 2456 (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 572-75 (1995)).

83. *Id.* at 2453 (citing Democratic Party of U.S. v. Wisconsin *ex rel* LaFallotte, 450 U.S. 107, 123-24 (1981)).

84. *Id.* at 2447, 2456 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623, 626, 636 (1984)).

85. *Id.* at 2452 (citing Thomas v. Rev. Bd., 450 U.S. 707, 714 (1981)).

86. Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2412 (2000). Similarly, *Roberts* cited political parties and civil rights cases. *Roberts*, 468 U.S. at 623.

ticipation of members in the association. The focus in recent cases such as *Dale*, however, is on the rights of the organization as an entity, not on the rights of its individual members.[87]

This entity-based orientation is reflected in the language of the opinion. When the Court speaks of the "Boy Scouts," it refers to a single entity, not to the members themselves. Thus, "Boy Scouts" is consistently used as a singular noun, as shown by the following examples:

> The Boy Scouts is a private, not-for-profit organization . . . .[88]
>
> [T]he Boy Scouts engages in expressive activity . . . .[89]
>
> [T]he Boy Scouts asserts . . .[90]
>
> The Boys Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation.[91]
>
> We cannot doubt that the Boy Scouts sincerely holds this view.[92]
>
> The Boy Scouts has a First Amendment Right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.[93]

There is nothing here to remind us that ultimately the Boy Scouts are a "they" rather than an "it," a collection of people joining together for certain purposes.

Even more strikingly, much of the evidence of the organization's view of homosexuality derived from the litigation positions taken by its leadership and, more strikingly yet, in an internal memo to the leadership.[94] Whether a majority of the members shared these beliefs is unknown, let alone whether Dale's admission interfered with their efforts to express a collective message. The record contains only weak evidence of a consensus among the members on this point, and some reason to suspect that the organization's real motivation was to avoid the issue as much as possible because of internal divisions.[95]

A similar emphasis on the rights of the leadership is found in *Hurley v. Irish-American Gay, Lesbian and Bisexual*

87. *See* Garnett, *supra* note 4, at 1849-56.
88. *Dale*, 120 S. Ct. at 2449.
89. *Id.* at 2452.
90. *Id.*
91. *Id.* at 2453.
92. *Id.*
93. *Id.* at 2455.
94. *Id.* at 2453.
95. *See* David McGowan, *Making Sense of* Dale, 18 CONST. COMM. (forthcoming 2001) (manuscript at 22-25, on file with the *Minnesota Law Review*).

Group,[96] a case on which *Dale* relied heavily.[97] *Hurley* involved the attempt of a gay advocacy group to march in Boston's St. Patrick's Day parade.[98] One might have thought that a parade was the collective speech of the marchers. Instead, the Court identified the "speaker" as the veterans' groups that organized the parade:

> Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day.... [T]he 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.[99]

Thus, the Court viewed the parade as being constituted by its organizers rather than by the mass of participants.

In these cases, the Court's primary focus is seemingly on protecting the expression of organizations, rather than on protecting the desire of the members to combine their voices. In many circumstances, the two coincide. If the members have full information and there is perfect competition between organizations for members, each organization's expression will match the views and desires of its members. But in the real world, the interests of the organizations (as embodied in their leadership) and that of their members may diverge just as ownership may diverge from control in business corporations. Hence, the distinction may be an important one in practice. If nothing else, the new emphasis in organizational rights means that the Court is likely to phrase the questions before it in a different way.

But the focus on organizational rights may have more significant consequences as well. For example, in the arena of campaign finance, the Court has actually given more protection to organizational speech than to the participation of the group's supporters. Expenditures by the group are subject to much less regulation than member contributions, provided that contribution restrictions do not unduly restrict the speech activities of the organization.[100] More importantly, this focus on organiza-

96. 515 U.S. 557 (1995).

97. *See Dale*, 120 S. Ct. at 2453-58.

98. *Hurley*, 515 U.S. at 560-61.

99. *Id.* at 574.

100. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 381-98 (2000); FEC v. Nat'l Conservative PAC, 470 U.S. 480, 490-500 (1985); Cal. Med. Ass'n v.

tions also distracts the Court from potential disjunctures between the leadership and the members. The leadership's positions are taken to be those of the group as a whole, although the membership may be only faintly aware of the leadership's positions or may have no collective consensus on the subject.[101]

Whether for better or worse, however, the Court's concern about protecting organizational rights and managerial prerogatives cannot be gainsaid. The growing strength of this concern can be seen in the contrast between *Roberts* and *Dale*. In *Roberts*, the Court recognized that the Jaycees defined itself as a "young men's civic organization[]"[102] and engaged in a wide range of significant expressive activities.[103] Nevertheless, the Court rejected the expressive association claim because the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association."[104] In contrast, the Court was willing to presume the existence of such a serious burden in *Dale*. Yet the antidiscrimination law in question in *Dale* potentially required the admission of a far smaller number of individuals, and the allegedly discriminatory feature of the association was not even an explicit part of its creed. The difference in the importance attached to organizational autonomy seems unmistakable.

III. REGULATION OF EXPRESSIVE ASSOCIATIONS

Given the Court's clear interest in the subject of expressive associations, it behooves us to at least classify and describe the major legal issues that are now emerging in the area. It is surely too early to attempt a "Restatement of the Law of Expressive Associations." It is not too early, however, to provide a roadmap to the emerging issues. As we will see, despite the bold rhetoric of some of the opinions, the rulings often seem tentative and contextual.

A. WHAT IS AN EXPRESSIVE ASSOCIATION?

If expressive associations are to receive special First Amendment protection, then it is obviously important to be

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FEC, 453 U.S. 182, 197-98 (1981).

101. On the potential conflict between party organizations and public participation in expressive activities, see Rosenblum, *supra* note 34, at 813.

102. Roberts v. U.S. Jaycees, 468 U.S. 609, 612 (1984).

103. *Id.* at 626-27.

104. *Id.* at 626.

able to define this class of organizations. So far, the Court has given us a series of examples without any defining principle. We know from *Dale* that the Boy Scouts are an expressive association.[105] So are political parties, under earlier decisions.[106] We also know that various other organizations do not enjoy this status (at least to the same extent): law firms,[107] private schools,[108] and large social clubs.[109]

The stakes are high because of the possible impact of *Dale* on anti-discrimination laws. For this reason, opponents of anti-discrimination laws like Richard Epstein argue that the distinction between expressive and non-expressive associations is untenable.[110] Epstein admits that "[o]nly the bold and foolhardy would claim that current law allows business associations . . . out from under the thumb of the anti-discrimination laws."[111] He argues, however, that "this ostensible divide" between types of association "cannot be defended on either political theory or constitutional law grounds."[112]

The most serious effort to explain and justify the special treatment for expressive associations is found in Justice O'Connor's concurrence in *Roberts*. Presaging *Hurley* and *Dale*, she rejected the Court's inquiry into the connection between a membership exclusion and the messages expressed by the association.[113] Instead, she said that an "association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members," for the "formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[114] Rather than examining the association's message, she said that the line should be drawn between com-

105. 120 S. Ct. at 2451.

106. *See Supreme Court, 1999 Term, Leading Cases*, *supra* note 79, at 269.

107. Hishon v. King & Spalding, 467 U.S. 69 (1984).

108. Runyon v. McCrary, 427 U.S. 160, 175-76 (1976).

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

110. *See* Epstein, *supra* note 79, at 139-43.

111. *Id.* at 139.

112. *Id.* Going perhaps even a little farther, it is has also been suggested that freedom of association should not be based on the nature of the association and ought to apply equally to street gangs. David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 219-23.

113. *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring).

114. *Id.* at 633 (O'Connor, J., concurring).

mercial and noncommercial associations because of the tradition of broad state regulation of commercial matters.[115]

Justice O'Connor would limit an association's constitutional protection "when, and only when, the association's activities are not predominantly of the type protected by the First Amendment."[116] Consequently, she added, "[a]n association must choose its market"; "[o]nce it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[117] For example, she noted, law firms and labor unions had previously been held not to have the right to discriminate in their choice of members.[118] Because recruiting and sale of memberships was the most important activity of the Jaycees (often encouraged as a way of learning business skills), she concluded that the Jaycees were a commercial rather than an expressive association.[119]

This commercial/noncommercial distinction arguably might be justified on various grounds: because economic activities are seen as primarily instrumental rather than expressive,[120] or perhaps (as Justice Brennan's opinion in *Roberts* suggests) because the government has a particularly compelling interest in assuring nondiscriminatory access to goods and services in the market.[121] Or perhaps noncommercial organizations, because they do not obtain substantial financing from sales or from capital markets, are particularly fragile and in

115. *Id.* at 634 (O'Connor, J., concurring).

116. *Id.* at 635 (O'Connor, J., concurring).

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

118. *Id.* at 637-38 (O'Connor, J., concurring).

119. *Id.* at 639 (O'Connor, J., concurring). George Kateb argues that "[t]he trouble is that by sleight of hand, O'Connor transforms the Jaycees into a 'non-expressive' association." George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION, *supra* note 18, at 56. For criticism of Justice O'Connor's views, see *id.* at 51-60; Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91, 98 (1987) ("For most people economic rights . . . are more important than whether the Jaycees admit women or whether a political party must seat the delegates selected in a primary rather than a caucus.").

120. *See* McGowan, *supra* note 95, at 19 n.2 (manuscript).

121. *See Roberts*, 468 U.S. at 628 (stressing that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent").

need of protection from heavy-handed government regulation.[122]

At best, however, the commercial or noncommercial character of an enterprise is only a rough proxy for its expressive nature. There is an imperfect correlation between expressiveness and non-commerciality. A newspaper may be expressive though commercial.[123] In contrast, a children's soccer league is non-expressive even though it is noncommercial, so application of anti-discrimination laws to its selection of referees might be appropriate. Presumably, Justice O'Connor would be willing to recognize the existence of such noncommercial, non-expressive groups. In short, as Justice O'Connor conceded, "[t]he considerations that may enter into the determination of when a particular association of persons is predominantly engaged in expression are therefore fluid and somewhat uncertain."[124]

After *Dale*, the major effect of a finding of expressiveness is to trigger strong presumptions about the scope of the organization's message and the relationship between that message and its choice of members and leaders. Such presumptions seem most justified when the organization's message is highly value-laden, like "moral straightness" for the Boy Scouts. Such messages are difficult for outsiders such as judges to define and are often communicated through role modeling by leaders. We might be most skeptical of the intervention of government on such highly value-laden issues. In contrast, where an organization's purposes are primarily instrumental and its ultimate values (like making a profit) are not in question, we may have more confidence in a court's ability to discern the meaning of its message and the connection between the message itself and the choice of speaker. In short, the business skills stressed by the Jaycees may be more amenable to judicial analysis than the moral straightness avowed by the Scouts. For this reason, the Scouts may be more aptly classified as an expressive association than the Jaycees, for purposes of the *Dale* presumptions.

122. For further discussion of the commercial/non-commercial distinction, see Carpenter, *supra* note 2, at 1564-80.

123. In some sense, the press is composed of expressive associations formed to engage in protected speech. Although the Court has not yet drawn the connection, the press does raise some problems akin to those of political associations.

124. *Roberts*, 468 U.S. at 637.

B. INTERNAL AFFAIRS: THE ASSOCIATION'S MANAGEMENT AND MEMBERS

As *Dale* indicates, expressive associations have at least some constitutional right to control membership decisions. They may also have some right to be free from interference with internal procedures and leadership prerogatives. The law in this area, however, is still in flux.

Dale holds at least that expressive organizations have wide power to control the choice of their leaders. *Hurley* emphasizes the right of those leaders to select the people who are actually doing the speaking on behalf of the group. Both cases are less than clear, however, on the right of the association to control membership selection completely.[125]

This right received somewhat more emphasis in a case decided two days before *Dale*, *California Democratic Party v. Jones*.[126] *Jones* involved the California blanket primary, which allowed every voter to participate in the primary contest of either party for any office. According to Justice Scalia's opinion for the Court, this law forced parties "to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party," and "[s]uch forced association has the likely outcome . . . of changing the parties' message."[127] Thus, in the political party context, where membership mostly entails a role in choosing candidates, the organization's rights to control membership selection is strongly protected.

Because cases to date have involved a fairly strong nexus between membership and the choice of speakers, they may not be decisive in situations where the nexus is weaker. Thus, the right of political and social organizations to discriminate in pure membership decisions is unclear. The Scouts' right to exclude a gay scout remains unclear. The situation may be different, however, for religious associations. Churches, though they receive special treatment under the religion clauses, are also classic expressive associations, being groups whose main purpose is to engage in protected First Amendment activities.

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125. *See generally* Hunter, *supra* note 2. Martin Redish and Christopher McFadden suggest that non-expressive organizations and individuals should have broad power to select whom they will associate with, even in business settings. *See generally* Redish & McFadden, *supra* note 2.

126. 120 S. Ct. 2402 (2000).

127. *Id.* at 2412. For a critique of *Jones*, see Richard L. Hasen, *Do the Parties or the People Own the Political Process?*, 149 U. PENN. L. REV. 815, 826-37 (2000).

In the religious context, it is hard to conceive that the government could ever force a church to accept a member against its wishes.

Expressive associations also have some autonomy regarding relationships between members and the leadership. In *Cousins v. Wigoda*,[128] Illinois had attempted to make political parties more democratic by requiring national parties to select their Illinois delegates through primary elections. The Court invalidated the Illinois law to avoid the risk of inappropriate and potentially conflicting regulation of political parties by the states. Justice Brennan's opinion for the Court concluded that "this is a case where 'the convention itself [was] the proper forum for determining intra-party disputes as to which delegates [should] be seated.'"[129] Some observers conclude more generally that party leaders should have the power to "broker interest group influence in the candidate selection process or even . . . the power to define what the party is."[130]

The right to autonomy seems stronger—or at least more clearly established—in religion cases. Indeed, to some extent, the Court may be using religious organizations as a model for other expressive associations. In matters of "ecclesiastical appointment and church organization," churches seem to enjoy complete autonomy under religion clauses.[131] The rules for resolving disputes over church property are less clear, but at a minimum, the government cannot decide property disputes on the basis of its interpretation of church doctrine.[132] As Kent Greenawalt has recently explained,

> If the reason a religious group discriminates relates substantially to its basic tenets, its privilege to choose members and officers should be absolute, as courts would certainly say. Suppose the connection of

128. 419 U.S. 477 (1975).

129. *Id.* at 491.

130. Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 801 (2000).

131. *See* Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1395 (1981).

132. *See* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445-46 (1969); *see also* Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 120 (1952). Under some circumstances, at least, state courts must defer to ecclesiastical organs in resolving property issues. *See* Jones v. Wolf, 443 U.S. 595, 608-09 (1979).

> discrimination and belief or practice is not apparent. Even for secular officials to judge whether purported religious reasons suffice to sustain practices of discrimination presents a real danger to religious liberty and separation of church and state. Choices of members and officers lie too close to the core of internal practice of churches to permit intervention. In other words, religious groups should have an absolute right to discriminate even when others deem their grounds for doing so to be flimsy.[133]

Since the government is in no position to judge whether the church's action is or is not doctrinally justified, the *Dale* presumptions about the meaning of the church's actions and the appropriate speakers for the church should be at their strongest. Indeed, the Establishment Clause might forbid a court from delving into such matters at all.

IV. DANGEROUS LIAISONS: UNDUE INFLUENCE BETWEEN ASSOCIATIONS AND GOVERNMENT

The Court's modern jurisprudence has drawn heavily on the tradition of celebrating association as an aid to freedom. But there is an equally venerable American tradition that takes a more jaundiced view of associations. This view was reflected in George Washington's Farewell Address, which condemned "all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities."[134] Thus, rather than the fear of government oppression, this tradition stresses the power of associations and their potential for undue influence on government. This Part will explore the potential for interactions between government and the private association to turn too friendly, distorting either the governmental policy or the competition between expressive associations. We begin by considering the economics of expressive associations and their relationship with government.

133. Kent Greenawalt, *Freedom of Association and Religious Association*, *in* FREEDOM OF ASSOCIATION, *supra* note 18, at 118.

134. Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, *in* FREEDOM OF ASSOCIATION, *supra* note 18, at 100.

A. THE INDUSTRIAL ORGANIZATION OF EXPRESSIVE ASSOCIATION

Why do we care about expressive association? The answer is that two people can join forces and communicate more effectively than they could separately. There are economies of scale in communication. A thousand people cannot separately buy millimeter-sized ads in the newspaper, but collectively they can buy a full page advertisement. People in a group can encourage each other's activities; to the extent that their expression is aimed at each other instead of outsiders, they may value the expression more because it is shared by other group members.

Economists have devoted considerable attention to the effect of similar factors in what may seem, at first blush, the quite dissimilar arena of international trade.[135] Recent trade models typically assume that some industries are subject to increasing returns to scale—that it is more efficient to produce large amounts of something rather than small amounts.[136] This assumption in turn implies deviations from purely competitive markets, permitting governments to benefit from fostering local industry and thereby seize control of global markets.[137] Industries with increasing returns will be concentrated in certain countries, perhaps in a single country if one is big enough to supply world demand.[138]

Rather than economies of scale in production, some industries such as computer software involve economies of scale in consumption, or what are now called network externalities.[139] Some of these externalities simply arise because a

135. The traditional economic theory of trade was based on comparative advantages. The theory of comparative advantage, though a great success in many respects, does not account for some important features of the modern global economy. For explanations of the theory of comparative advantage and its implications for trade policy, see ROBERT J. CARBAUGH, INTERNATIONAL ECONOMICS 17-50 (5th ed. 1995); Christopher R. Drahozal, *On Tariffs v. Subsidies in Interstate Trade: A Legal and Economic Analysis*, 74 WASH. U. L.Q. 1127, 1142-60 (1996).

136. Such returns to scale might arise either within individual firms, because of the technology used, or because of spillover effects between firms, as when innovation is fostered by a concentration of firms in a small area such as Silicon Valley. *See* PAUL R. KRUGMAN, RETHINKING INTERNATIONAL TRADE 64, 85 (1994).

137. *See id.* at 3-4, 11-22.

138. Here, the benefits of trade largely take the form of increased specialization and lower production costs. *Id.* at 59.

139. *See* Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 551-61 (1998).

network is more valuable, all other things being equal, the more people it connects.[140] These network externalities also create the possibility of concentrated markets. The government can potentially obtain a favored position for its preferred firms by subsidizing them at an early stage. Such subsidies allow firms to enter a feedback loop in which their initial size allows them to gain more customers, increasing their size and thereby attracting more customers, and so forth.

Similar effects can occur with expressive associations. If there were no returns to scale, we would expect to see dozens of scouting organizations for boys, catering to different parent preferences. But economies of scale and network externalities discourage new entrants and limit consumer choice. For example, parents wishing to organize another scouting organization as an alternative to the Boy Scouts would lack the advantages of large-scale national operation enjoyed by the Scouts. At least in the start-up phase, members of competing new organizations would also lose the benefits of belonging to an organization with millions of members nationwide and broad membership in their own communities. And no less importantly, they would lack the considerable advantages that the government has conferred upon the Boy Scouts of America as an organization.[141]

As particular expressive associations such as the Scouts grow, their ability to influence government and obtain even more favorable treatment also grows. Thus, for example, a youth group that obtains government sponsorship can reach more potential members and offer them more services, attracting new members who find the group attractive partly because of each others' presence. Increased membership in turn makes it possible to expand services and outreach further, creating a growth cycle. The growth cycle also increases the political payoff to politicians for aligning themselves with the increasingly popular group. One might expect to find similar effects of gov-

140. Thus, a larger phone system is better than a smaller one. Similarly, a posting on the Internet can reach more people, for about the same cost, as a posting on an internal company network. These network externalities provide an incentive to technical standardization and wide availability. Other externalities arise because people are sociable and like to hook up with others who share their particular interests; these externalities represent the value of community to individuals.

141. For a discussion of these government benefits, see text accompanying *infra* note 157.

ernment support for other expressive associations, such as particular churches or political parties.

Although these feedback loops are potentially powerful, they do have limits. Groups may suffer from diseconomies of scale, as their increased size adds to organizational headaches. Moreover, the loss of product differentiation needed to attract a large membership may limit further expansion—a group that is too encompassing may find that its message is becoming increasingly bland, creating the opportunity for new groups with more focused messages to attract away members. Because politicians find it easier to support non-controversial groups, the desire to obtain or maintain government support may exacerbate the difficulty of maintaining an appealingly sharp message. In addition, network externalities have their limits; people may sometimes prefer smaller or more exclusive groups, and find it distasteful to be associated with strangers or individuals with characteristics they regard as undesirable. Thus, government support has the ability to change market shares substantially, but only within limits.[142]

With respect to some groups, such as youth organizations or magazine publishers, these feedback loops may not seem particularly troublesome. With other organizations, such as churches and political parties, we may be more concerned about possible feedback loops between government support and organizational success. We now turn to an examination of the Court's efforts to grapple with these problems.

B. THE ASSOCIATION'S INFLUENCE ON GOVERNMENT

As Washington's Farewell indicates, the possibility that associations would unduly influence government was not unknown to the Framers. As Putnam explains,

> Many of America's Founding Fathers, however, didn't think much of voluntary associations. They were famously opposed to political parties and local political committees, as well as to any other group whose members might combine to threaten political stability. James

142. Even if the government has no particular desire to favor specific messages, its policies will almost inevitably have disparate effects on different groups and will thereby shape the mix of messages produced by expressive associations. For example, postal rules that lower the cost of mailing periodicals may favor wealthier groups that can afford high-quality periodicals, over smaller groups which use irregular newsletters or rely on personal interaction. These large established organizations are in a position to lobby vigorously to maintain their favored mailing status while also favoring restrictions concerning frequency of mailing, labeling, and sorting that disfavor smaller groups.

> Madison called groups organized around particular interests or positions "mischiefs of faction," whose presence must be tolerated in the name of liberty, but whose effects must be controlled. Madison's fear, which reverberates among today's critics of Washington lobbyists and special interest groups, was that elected representatives, swayed by these "factions," would sacrifice the good of the whole for the pet projects of the few.[143]

This fear finds support in modern public choice theory, which stresses the disproportionate influence of concentrated interests on the political process.[144] Findings that organized groups tend to be more extremist and polarized than the public at large[145] reinforce this concern.

This concern has surfaced in some of the modern campaign finance reform cases, as Richard Briffault points out.[146] Probably the clearest example is *Austin v. Michigan Chamber of Commerce*,[147] where the Court upheld a regulation on corporate contributions or expenditures. The Court acknowledged a fear of corruption of the political process by "the corrosive and distorting influence of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[148] More recently, in *Nixon v. Shrink Missouri Government PAC*,[149] Justice Souter's opinion stressed the potential for large political contributions to unduly influence government: "While neither law nor morals equate all political contributions, without more, with bribes . . . the perception of corruption 'inherent in a regime of large individual financial contributions' to candidates for public office [is] a source of concern 'almost equal' to *quid pro quo* improbity."[150] The Court has upheld similar restrictions on contributions by political action groups.[151] Similarly, in the political party context, four

143. PUTNAM, *supra* note 7, at 337.

144. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-37 (1991).

145. *See* PUTNAM, *supra* note 7, at 340, 342.

146. Briffault, *supra* note 3, at 1763-64. For a recent overview of the debate over campaign reform, see William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335, 356-76 (2000).

147. 494 U.S. 652 (1990).

148. *Id.* at 660.

149. 528 U.S. 377 (2000).

150. *Id.* at 390.

151. *See* Cal. Medical Ass'n v. FEC, 453 U.S. 182, 184 (1981). Richard Hasen's contribution to this Symposium addresses possible methods of using disclosure and other regulations to restrict the ill-effects of spending by political

Justices in *California Democratic Party v. Jones*[152] would have upheld a blanket primary law designed to increase public confidence in the political process by opening up the party nomination process and making the party more responsive to the general public.[153]

Although it has waxed and waned as a factor in the Court's jurisprudence under the religion clauses, the Court has also expressed concern about the potential for certain government benefits to foment church participation in the political process.[154] Such concerns about the influence of religious groups on the political process are voiced in Steven Gey's contribution to this Symposium.[155] While these concerns are surely not universally shared, they do have a long pedigree in American life, and are unlikely to disappear completely from judicial discourse.[156]

C. THE RISK OF GOVERNMENT FAVORITISM

One reason for organizations to seek political influence is that government can often provide them desirable benefits. In *Dale*, for instance, the Boy Scouts organization had been the recipient of a remarkable degree of governmental support. As the New Jersey Supreme Court pointed out, the national organization was federally chartered and has received supplies and services from the federal government, including preferred access to federal facilities. Many scout units are chartered by local police and fire departments or by public schools. The President of the United States even serves as honorary president of the association.[157]

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action groups. Hasen, *supra* note 3, at 1799-1804.

152. 120 S. Ct. 2402 (2000).

153. In another case, the Court did uphold legislation seeking to prevent the use of party convention fees to limit participation by racial minorities, on the ground that the party's role in the election process made it a state actor. *See* Morse v. Republican Party, 517 U.S. 186, 205-07 (1996).

154. *See* Laycock, *supra* note 131, at 1292. For some discussions of this issue by the Court, see Meek v. Pittinger, 421 U.S. 349, 365 n.15 (1975); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 795-98 (1973).

155. Gey, *supra* note 4, at 1909-15.

156. *See* Agostini v. Felton, 521 U.S. 203, 232 (1997) (stating that excessive entanglement "has consistently been an aspect of our Establishment Clause analysis"). Consider, for example, the Court's holding in *Larkin v. Grendel's Den*, 459 U.S. 116, 121-22 (1982), striking down a provision giving a church the right to veto nearby liquor licenses, even though a secular institution could clearly have been given such a right.

157. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1212 (N.J. 1999), *rev'd*, 120

Other organizations run summer camps or after-school programs for children, but how many enjoy this degree of government support? Would government provide similar support to a spin-off, "gay tolerant" scouting association? Almost inevitably, this degree of government sponsorship must affect the Scouts' competitive position at the expense of rivals whose expressive positions are less politically congenial.

The Court has been particularly concerned about the risk of government favoritism regarding religious organizations.[158] This seems to be the key point of *Board of Education of Kiryas Joel v. Grumet*.[159] A community of ultra-traditionalist Jews, the Satmar Hasidim, sent most of their children to parochial schools, but sent disabled children to surrounding public schools in order to obtain federally funded special education. The Hasidic children, however, were subjected to harassment in the public schools. As an accommodation, New York passed special legislation creating a village school district, so that the children would not need to attend school in the outside community.[160] The Court held that this special legislation violated the Establishment Clause. There was no assurance that a similarly situated group with a more unconventional religion would receive similar treatment.[161] As government increasingly uses religious organizations to help distribute social services,[162] the risk of open or covert favoritism toward particular groups will inevitably rise.

The Court has been, on the whole, less concerned about favoritism toward particular political parties. State legislatures are dominated by the major political parties. Perhaps not coincidentally, state election laws often make life difficult for independent candidates, write-ins, and new parties. The Court's early decisions seemed skeptical of such legislation. For example, the Court struck down an Ohio law requiring new parties

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S. Ct. 2446 (2000).

158. For criticisms of the Court's earlier efforts in this regard, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 183-94 (1992).

159. 512 U.S. 687 (1994).

160. *Id.* at 692.

161. *Id.* at 702. The Court's equality rationale is critiqued in Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 57-82 (1996).

162. *See* Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1063-75 (2000).

to obtain petitions signed by fifteen percent of qualified voters and requiring independent candidates for President to file seven months before the election.[163] But more recent decisions seem much more sympathetic to state efforts to reinforce the two-party system.[164]

In *Burdick v. Takushi*,[165] the Court upheld a Hawaii statute prohibiting write-in votes in general elections. The motivation for a write-in campaigns was apparent: a third of all elections for state legislator were unopposed, and many voters preferred to cast blank ballots rather than endorse the unchallenged candidate. Nevertheless, because Hawaii provided other ways to get on the ballot, the Court considered the write-in restriction ban relatively mild, and found the state's interest in preventing post-primary factionalization to be a sufficient justification.[166] Preventing factionalization of social clubs or churches, in contrast, would probably not be considered a legitimate state interest.

More recently, in *Timmons v. Twin Cities Area Party*,[167] the Court upheld a ban on "fusion" ballots, a practice going back to the nineteenth century in which new parties agree to list another party's nominee as their own. The Court found a number of interests behind the ban, including prevention of voter confusion.[168] The most notable portion of the *Timmons* opinion discusses the constitutional status of the two-party system:

> States also have a strong interest in the stability of their political system. This interest does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence, nor is it a paternalistic license for States to protect political parties from the consequences of their own internal disagreements. That said, the States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system, and that temper the destabilizing effects of party-splintering and excessive factionalism. The Constitution per-

163. Anderson v. Celerezze, 460 U.S. 780 (1983); Williams v. Rhodes, 393 U.S. 23, 27 (1968).

164. For a discussion of current doctrine, see Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 660-68 (1998).

165. 504 U.S. 428 (1992).

166. *Id.* at 434-45.

167. 520 U.S. 351 (1997).

168. *Id.* at 355-56.

> mits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.[169]

One can hardly imagine the Court finding a similarly legitimate interest in maintaining "social stability" by limiting the number of social clubs, let alone fostering "religious stability" by reinforcing the positions of the major churches.

Probably the trickiest issues regarding expressive associations will involve conditions on government benefits.[170] One crucial example, discussed in depth by John Nagle, involves the government's ability to use public funding and other benefits to obtain voluntary limits on campaign expenditures.[171] Discrimination by recipients of government benefits is also problematic. Current law allows the government to insist on some degree of nondiscriminatory access as a precondition for government benefits.[172] The government may well have a legitimate interest in ensuring that its aid flows only to groups open equally to all members of the public. But the doctrine of unconstitutional conditions is notoriously wavering and uncertain, and how the line will be drawn for expressive associations remains unclear. The challenge will be to leave scope for legitimate state interests while preventing discrimination between associations that could distort the marketplace of ideas.

CONCLUSION

Michael Paulsen's contribution to this symposium sets forth the logic of freedom of association. The logic is both simple and powerful. Speech encompasses many forms of activity; association is necessary to effectuate speech; autonomy is necessary to effectuate association. Consequently, since speech is protected by the Constitution, the Constitution must offer the same full protection to the autonomy of expressive associations. And since the First Amendment prohibits content discrimination, it must offer the same level of protection to all associations, civic, religious, or political.[173]

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169. *Id.* at 366-67 (citations omitted).

170. The constitutional problems raised by such conditions are explored in Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 662-68 (1996).

171. Nagle, *supra* note 3, at 1815-30.

172. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 582 (1983) (upholding denial of tax-exempt status to racially discriminatory religious school).

173. Paulsen, *supra* note 4, at 1919-22.

This logic, as we have seen, does much to unite a developing jurisprudence that covers such diverse organizations as churches, political parties, PACs, and the Boy Scouts. As Part II showed, *Dale* illustrates the extent to which the Court has come to focus on expressive associations and their autonomy, rather than thinking more directly about the associational and expressive interests of their members. It also illustrates how the Court has become prone to draw indiscriminately on precedent concerning all sorts of organizations. Moreover, as we saw in Part IV, a similar economic logic applies to all forms of expressive association and suggests a basis for similar legal treatment.

But this logic can also be misleading. As Frank Easterbrook observes in his discussion of freedom of association, such chains of logic may lose touch with their own premises. "The problem," he stresses, "is not the first step but the successive steps—extensions in which the first step rather than the Constitution is the premise."[174] The result can be "a form of constitutional rumor chain, in which the conclusions bear no resemblance to the original rules."[175] Autonomy may be important to associations, and associations may be important to free expression, but this does not necessarily mean that identical rules should govern group autonomy and free expression. Nor does it require that both should receive equally strong constitutional protection. And the economic logic governing all forms of expressive association does not necessarily imply identical treatment, for the variables (such as the extent of economies of scale or network effects) may be quite different. Thus, the argument for a unified framework is better than the argument for identical treatment.

The Court's rhetoric may sometimes embody the strong logic of associational autonomy. Yet, as we have seen, the Court's rulings have not been so unequivocal. The Court has protected the autonomy of expressive association, but it has not done so unambiguously or without regard to context. The Court has also not been wholly unaware of the potentially powerful alliances that may form between expressive associations and government—alliances that may sometimes be socially beneficial (as the Court apparently believes of the two major parties) but other times may be constitutionally unacceptable

174. Easterbrook, *supra* note 119, at 99.
175. *Id.*

(as in church-state alliances). In short, at least to date, the case law remains tentative and uneven, despite some of the Court's bold language about associational autonomy.

The structural similarities among different types of expressive associations, which are highlighted in recent decisions such as *Dale*, are important. But the constitutional and functional differences among associations are also significant. If we ever do have a general theory of expressive association, it will have to do justice to both the similarities and the differences. In the meantime, we do well to remember that associations are in the end merely groups of people, and that it is their rights (and ours)—not those of abstract entities called expressive associations—which the Constitution ultimately seeks to protect.