New Protections after *Boy Scouts of America v Dale*: A Private University’s First Amendment Right to Pursue Diversity

*David P. Gearey†*

In *Boy Scouts of America v Dale*, the Supreme Court held that the Boy Scouts of America, in contravention of a New Jersey antidiscrimination law, could discriminate against a gay adult leader under its First Amendment right of expressive association. The Court concluded that the New Jersey law materially infringed the Boy Scouts’ First Amendment right of expressive association by requiring it to admit and retain members who did not conform to its stated standards.

Prior to *Dale*, few constitutional impediments inhibited state legislatures from enacting content-neutral laws prohibiting discriminatory practices or policies. The only organizations exempt from such statutory mandates were organizations whose political nature required exclusionary policies and groups whose existence or goals would be eviscerated by application of certain laws. Yet despite the fact that the Boy Scouts is not a political association, and including *Dale* would arguably not have undermined the existence of the organization or its purposes, the Court ruled in its favor. Consequently,

1 530 US 640 (2000).
2 Id at 644.
3 See *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 US 557, 572 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”); *New York State Club Association v City of New York*, 487 US 1 (1988); *Board of Directors of Rotary International v Rotary Club of Duarte*, 481 US 537 (1987).
4 See *California Democratic Party v Jones*, 530 US 567 (2000) (holding that the Democratic Party could withhold the right to vote in a Democratic primary from individuals registered to other parties, in order to protect the party’s First Amendment right of freedom of association).
5 See *NAACP v Alabama*, 357 US 449 (1958) (holding that Alabama could not require the NAACP to release membership records, which included names and addresses of all members and agents, because this placed a substantial burden on the NAACP’s freedom of association).
6 See *Hurley*, 515 US at 559 (holding that the application of a public accommodation law to the plaintiff, which essentially required the organization to alter the expressive content of its parade, violated the First Amendment).
7 See *Dale v Boy Scouts of America*, 160 NJ 562, 734 A2d 1196, 1223 (1999) (“Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral.”), revd, 530 US 640.
after Dale, states likely now face First Amendment restrictions in applying antidiscrimination statutes to private organizations engaging in particular expressive activity.8 In light of this development, this Comment addresses whether the application of a statutory or regulatory restriction on a private university’s decision to use affirmative action in selecting its students violates a university’s First Amendment right of expressive association as defined by the Supreme Court in Dale.

This Comment argues that, if the reasoning of Dale is taken seriously, its principled protection of an organization’s freedom of expressive association grants private educational entities the right to employ discriminatory affirmative action policies. Part I provides a brief overview of relevant First Amendment case law. In particular, it addresses a state’s ability to implement generally applicable laws against expressive associations such as the Boy Scouts. Part II examines Dale, attempting to clarify both the principles upon which it relies and the intended breadth of its application. Additionally, Part II analyzes other cases that arguably limit the scope of Dale. Part III discusses the extent to which the principles in Dale apply to private universities, particularly those seeking to implement affirmative action policies.

I. CONTENT-NEUTRAL REGULATION AND THE FIRST AMENDMENT RIGHT OF FREEDOM OF ASSOCIATION

In Dale, the Supreme Court held that the Boy Scouts, despite its ostensible violation of a content-neutral antidiscrimination law, could expel a long-time Scout and Scout leader because of his sexual orientation. The Court’s holding discussed both the concept of content neutrality and the contours of the right of expressive association. Thus, before turning to the specifics of Dale, it is important to examine these ideas.

A. Generally Applicable Content-Neutral Regulations

The First Amendment provides: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”9 Although the text of the First Amendment seems to forbid any congressional restriction on speech,10 the “prohibi-

8 See Dale, 530 US at 648 (“The First Amendment’s protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.”).
9 US Const Amend I.
10 When the Bill of Rights was ratified, the First Amendment did not apply to the states. However, the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to prohibit state governments from passing any law that interferes with their citizens’ fundamental rights. In Gitlow v New York, 268 US 652, 666 (1925), the Court concluded
tion on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons. One such permissible restraint is a regulation that is content neutral (that is, a law that limits expression but not on the basis of its content) and only incidentally affects expressive activity. A clear example of a content-neutral regulation, which only incidentally affects speech, is a law prohibiting assault. Though assaults and other acts of violence carry with them expressions of disdain for their victims, laws punishing such conduct do not raise First Amendment issues because they only minimally affect speech. In contrast, a state law that prohibited certain commercial advertising or certain types of pornographic material would not be content neutral because it would be aimed directly at suppressing a certain type of speech. Furthermore, many generally applicable content-neutral laws place nonminimal burdens on expressive activity. In certain circumstances, a generally applicable law so unduly burdens an association’s ability to continue its expressive behavior that application of the law to the organization is unconstitutional.

B. Content-Neutral Laws and the Right of Expressive Association

Several landmark Supreme Court cases elaborate on the relationship between content-neutral laws and the right of expressive association. In *NAACP v Alabama*, the Court invalidated a content-neutral Alabama statute as applied to the NAACP. The Court reasoned that the statute, which required the release of the names and addresses of all NAACP members, was unconstitutional because it placed a substantial burden on the group’s freedom of association. Since Alabama’s application of the law to the NAACP would expose members to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility” in the racially troubled South, the law fundamentally interfered with the group’s ability to express its views and conduct its business. The Court recognized in

---

that the First Amendment protected a fundamental right and, thus, could be incorporated against the states.


12 See *Wisconsin v Mitchell*, 508 US 476, 484 (1993) (noting that while an assault carries with it communicative impact, “a physical assault is not by any stretch of the imagination [the type of] expressive conduct protected by the First Amendment”).

13 See *Metromedia, Inc v City of San Diego*, 453 US 490 (1981) (invalidating on free speech grounds a law forbidding all outdoor advertising display signs and suggesting that a hypothetical content-neutral and generally applied law would also have been unconstitutional). See also *American Booksellers Association v Hudnut*, 771 F2d 323, 328 (7th Cir 1985) (holding unconstitutional as “thought control” an ordinance that bans speech that “subordinates” women while permitting speech that “portrays women in positions of equality”).


15 Id at 467.

16 Id at 462.
NAACP, as it has elsewhere, that in certain situations, generally applicable laws could not be constitutionally enforced.\(^{17}\)

After NAACP, the extent to which an expressive association could be sheltered from generally applicable laws under the First Amendment was unclear. In Roberts v United States Jaycees\(^{18}\) and other cases,\(^{19}\) the Court attempted to clarify its reach. In Roberts, the state of Minnesota sued a men’s organization under a sex discrimination statute because it prevented women from becoming regular members.\(^{20}\) The Court first analyzed the group’s claim under the First Amendment and then asked whether the state had a compelling interest in overriding the organization’s expressive association right. Although the Jaycees had a right of expressive association, a unanimous Court held that state law overrode this right. On balance, requiring the Jaycees to admit women as permanent members had only a minimal effect on its expression, and the state had a compelling interest in ending gender discrimination.\(^{21}\) The decision to force the Jaycees to comply with state law qualified the right of freedom of association, yet the Court simultaneously construed that right broadly. With the possible exception of commercial entities,\(^{22}\) the Court suggested that most ex-

\(^{17}\) See California Democratic Party v Jones, 530 US 567, 568 (2000) (invalidating a California statute creating the so-called “blanket primary,” despite its general application); Gremillion v NAACP, 366 US 293 (1961). See also Green v Connally, 330 F Supp 1150, 1179 (D DC 1971) (holding that the Internal Revenue Code “does not provide a tax exemption for, and ... does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students”), affd, Coit v Green, 404 US 997 (1971) (affirming without opinion).


\(^{19}\) See, for example, New York State Club Association v City of New York, 487 US 1 (1988); Board of Directors of Rotary International v Rotary Club of Duarte, 481 US 537 (1987).

\(^{20}\) See Minn Stat § 363.03(3) (1982). See also Roberts, 468 US at 613:

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

\(^{21}\) See Roberts, 468 US at 628 (“[E]ven 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.”).

\(^{22}\) Id at 634 (O’Connor concurring) (“[T]here is only minimal constitutional protection of the freedom of commercial association.”). Justice O’Connor would distinguish between groups that engage in expressive, as compared with commercial, association, and extend First Amendment protection to only the former. Thus, in Roberts, Justice O’Connor determined that the Jaycees was a commercial organization and on that ground found no infringement on its right of expressive association. Id. The number of justices accepting this argument is uncertain; although no one joined Justice O’Connor in Roberts, in New York State Club Association Justice Kennedy joined Justice O’Connor’s concurring opinion noting this distinction. See New York State Club Association, 487 US at 19-20.
pressive organizations are guaranteed a certain level of First Amendment protection.23

II. BOY SCOUTS OF AMERICA V DALE: EXPANDING THE CONCEPTION OF CONTENT-NEUTRAL LAWS THAT INFRINGE ON EXPRESSIVE ASSOCIATION

With NAACP and Roberts as precedent, the Supreme Court nevertheless delivered an expansive First Amendment holding in Dale. Part II.A briefly reviews the essential facts of Dale and outlines the Court's expressive association test. This analysis will later prove valuable in determining whether the reasoning in Dale can be extended to a private university's claim of an expressive association right to pursue diversity. Part II.B then considers some other Supreme Court precedent that could bear on such a claim.

A. Review of the Facts and the Emergence of a Concrete Expressive Association Test

James Dale, a member of the Boy Scouts since the age of eight, applied for adult membership upon turning eighteen.24 Dale's adult membership was initially approved, but was soon terminated. His termination letter explained that "the standards for leadership established by the Boy Scouts of America . . . specifically forbid membership to homosexuals."25 Dale received the letter a few weeks after being interviewed by a local newspaper for an article in which he affiliated himself with the Rutgers University Lesbian/Gay Alliance and discussed the need for gay role models.26

In Dale, the Court applied a two-step test to determine whether an organization will receive First Amendment protection for expressive association. First, one must determine whether the organization in question participates in expressive association.27 Second, one must decide whether the inclusion of an individual "significantly burden[s]" an

23 See Roberts, 468 US at 622:

[We] have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. In view of the various protected activities in which the Jaycees engages, that right is plainly implicated in this case.

24 Dale, 530 US at 644. Individuals over the age of eighteen who wish to hold leadership positions within the Boy Scouts must apply for adult membership. Dale applied for adult membership and was given a position as an Assistant Scoutmaster in Troop 73. See id. See also Boy Scouts of America—National Council, available online at http://www.scouting.org/nav/enter.jsp?s=ba (visited June 22, 2004) (explaining how adults may join the Boy Scouts).

25 Dale, 530 US at 665 (internal citation omitted).

26 Id at 645.

27 Id at 648.
organization's ability to advance the ideas it intends to promote. In analyzing these questions, one evaluates (i) whether the group adheres to the ideology in question, (ii) whether evidence in the record supports this claim, and (iii) whether the inclusion of a particular person within the group would materially impair the organization's ability to express its message. Additionally, when analyzing these steps, one should "give deference to an association's assertions regarding the nature of its expression [as well as] give deference to an association's view of what would impair its expression."

The Court's assessment of the Boy Scouts' claim illustrates the extent of this test. First, in analyzing whether the Boy Scouts was an expressive association, the Court turned to the Boy Scouts' mission statement. Chief Justice Rehnquist, writing for the majority, noted that the general goal of the Boy Scouts was clear: "to instill values in young people." Such a commitment, Rehnquist wrote, unquestionably signified that the Boy Scouts "engage[d] in expressive activity." As the Boy Scouts is a nonprofit group, this case did not raise the concerns that Justice O'Connor expressed in Roberts regarding for-profit or commercial organizations.

Having found the Boy Scouts to be an expressive organization, the Court addressed the question of whether reinstating Dale would unconstitutionally burden the organization. As illustrated above, the Court first needed to determine whether the Boy Scouts took an ideological stand against homosexuality. The Boy Scouts argued that the Scout Oath and Law's reference to the requirement that all Scouts be "morally straight" and "clean" represents its position opposing homosexuality. Although it recognized the ambiguity of these terms, the Court nevertheless deferred to the Boy Scouts' interpretation of its standards. As one possible interpretation of "morally straight" and "clean" was at odds with a gay lifestyle, the majority reasoned that this was sufficient to establish that the Boy Scouts opposed homosexuality. Additionally, when the Boy Scouts was asked to clarify its position on openly gay Scout leaders, it pointed to a 1978 statement in which it had declared that it did not "believe homosexuality and leadership in Scouting are appropriate." Thus, Rehnquist concluded that the or-

---

28 Id at 653.
29 Id.
30 Id at 649.
31 Id at 650.
32 See note 22.
33 Dale, 530 US at 650.
34 Id at 652. But see id at 667-71 (Stevens dissenting) ("[I]t is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality.").
ganization was sincere in its opposition to homosexuality.\textsuperscript{35} Rehnquist emphasized, however, that such an inquiry was not necessary; evidence in favor of the Scouts would merely be "instructive" in determining the validity of the Boy Scouts' claim.\textsuperscript{36}

Rehnquist at last moved to the central issue of the case: whether the inclusion of Dale in the Scouts would materially impair the Boy Scouts' ability to promote its ideology. After initially noting that the First Amendment could not be used to "erect a shield" exempting an organization from a conflicting state statute,\textsuperscript{37} the majority concluded that, if the Boy Scouts reinstated an openly gay advocate of gay rights, it would "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."\textsuperscript{38} The majority thought the Boy Scouts' predicament was analogous to the concerns raised by the plaintiffs in Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston.\textsuperscript{39} In Hurley, a unanimous Court held that the application of a state law to the organizers of a private St. Patrick's Day parade, requiring them to allow a gay rights group to march in their parade with a group banner, violated the plaintiffs' free association rights by altering the expressive content of the parade.\textsuperscript{40} The organizers of the parade could not be legally forced to "propound" the message of the group in their parade. The plaintiffs in Hurley did not desire to keep out gays per se, but wished to exclude the particular expression (gay rights) that the group wanted to promote with its banner. The Boy Scouts terminated Dale's membership because he openly advocated his sexuality and, as a Scout leader, his presence would send the message that the Boy Scouts accepts such behavior.

Rehnquist made three additional points in clarifying what claims could garner expressive association protection. First, he stated that organizations do not have to associate for the "purpose" of propagating a specific message—the message with which the state regulation interferes—to get First Amendment protection.\textsuperscript{41} In other words, the Boy Scouts did not have to be organized around an anti-gay principle, as the New Jersey Supreme Court had implied.\textsuperscript{42} The mere fact that an

\begin{itemize}
\item \textsuperscript{35} Id at 653.
\item \textsuperscript{36} Id at 651.
\item \textsuperscript{37} Id at 653.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} 515 US 557 (1995). See Dale, 530 US at 659 n 4 ("We anticipated this result in Hurley when we illustrated the reasons for our holding in that case by likening the parade to a private membership organization.").
\item \textsuperscript{40} Hurley, 515 US at 566.
\item \textsuperscript{41} Dale, 530 US at 655.
\item \textsuperscript{42} See Dale v Boy Scouts of America, 160 NJ 562, 734 A2d 1196, 1223 (1999) ("Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is im-
organization's expressive activity is impaired, in any regard, is enough to raise First Amendment concerns.

Second, the First Amendment also protects an organization's ability to choose its "method of expression." The lower court had held that, because the Boy Scouts guidebook mandates that Scout leaders refrain from addressing sexual topics, the fact that Dale was openly gay would not affect his ability to continue to instill the values that the Boy Scouts sought to advance. For Rehnquist, however, the fact that the Boy Scouts specifically discouraged Scout leaders from discussing sexual topics was immaterial. Although a conflict between Dale's sexual orientation and his leadership position might not arise, the Boy Scouts had a right to ensure, on its own terms, that its beliefs were not diluted.

Third, Rehnquist established that "the First Amendment simply does not require that every member of a group agree on every issue for the group's policy to be 'expressive association.'" Furthermore, Rehnquist continued, the First Amendment does not require that an organization "trumpet its views from the housetops." Rehnquist thus made clear that disagreement within an expressive group over aspects of its ideology, and the absence of a loud and unequivocal statement of this ideology, would not impede a group from asserting that its associative rights had been unconstitutionally violated.

In sum, the Boy Scouts is an expressive association because it attempts to instill certain values in its members and it outwardly expresses (though perhaps in contradictory ways) these values. Second, with regard to its ideology, the Boy Scouts had established a position on homosexuality, a position demonstrated by evidence in the record. Third, as the New Jersey antidiscrimination law forced the Boy Scouts to reinstate Dale into a leadership role, and thereby forced the Boy Scouts to express ideas contrary to its moral ideology, the law unduly infringed on the Boy Scouts' right of freedom of association.

B. Roberts and Runyon v McCrory as Roadblocks to a Private University's First Amendment Right to Pursue Diversity

While the language of Dale broadens First Amendment protections, other cases might narrow these protections. This Part anticipates this possibility by analyzing a handful of cases, arguably distinguish-
able from *Dale*, that make uncertain the extension of the right of freedom of association to discriminatory private universities.

1. The compelling interest test as a defense against a private university’s First Amendment right to pursue diversity.

Recall that in *Roberts* the Supreme Court held that a compelling state interest, such as sex equality, could trump expressive association rights if the law only minimally burdened an organization. Thus, the Court could distinguish *Dale* and invoke the compelling interest test of *Roberts* to justify denying a private university the ability to implement a race-based affirmative action program. This is unlikely for two reasons. First, the majority in *Dale* emphasized that *Roberts*, and the compelling interest test it discusses, should not be viewed as allowing a state interest to prevail over an association’s First Amendment rights when such rights are materially burdened. Chief Justice Rehnquist stated:

> We recognized in cases such as *Roberts* . . . that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express.

This characterization of *Roberts* led Rehnquist to conclude that, having determined that the Boy Scouts was seriously burdened by Dale’s reinstatement, a state interest could not overcome this constitutional violation. This is true regardless of the importance of the state’s interest. In short, *Dale* has shifted the focus in expressive association claims. The Court will now focus primarily on the extent of the burden placed on an organization by a state law rather than on the legitimacy of the state’s interest.

---

49 468 US at 626.
50 This Comment does not take a position on whether a state interest in preventing discrimination against homosexuals is more or less important than a state interest in ending racial discrimination. *Hurley* and *Dale* have subsequently undermined the importance of determining the compelling nature of a state’s interest since it is relevant only if associational rights are minimally affected.
51 *Dale*, 530 US at 657.
52 Id at 659. Rehnquist stated:

> We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization’s right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.

53 In *Roberts*, the Court’s central point was that provided a state demonstrates a compel-
Second, in analyzing a case in which the state sought to prohibit discriminatory affirmative action policies, the state’s compelling interest in promoting a colorblind society would be countered by a similarly compelling interest in promoting diversity as recognized in *Grutter v Bollinger*.<sup>54</sup> In other words, in *Roberts*, the question raised was whether a state’s interest in ending discrimination could trump an organization’s belief in maintaining discriminatory policies; however, in the affirmative action context, the state interest in creating colorblind admissions is matched by a similarly compelling interest in creating a diverse student body.

The case that embodies the Court’s current position on expressive associational rights is *Hurley*. Rehnquist noted *Hurley*s importance in *Dale*: “Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have [ ] concluded that [the] state[‘s] requirement . . . would significantly burden the [Boy Scouts].”<sup>55</sup> Indeed, according to Rehnquist, the Court’s decision in *Hurley* anticipated, and was specifically tailored to resolve, a case such as *Dale*.<sup>56</sup> As a result, the compelling interest test will be relevant only if the state regulation minimally intrudes on associational rights. Such a question is wholly distinct from whether the interests of the state prove more important, on balance, than the autonomy of an organization.

2. Does *Runyon v McCrary* forbid discriminatory admission standards by private universities?

In *Runyon v McCrary*,<sup>57</sup> the Supreme Court held that a private school violated a federal civil rights statute<sup>58</sup> when it denied admission to African-American children. One argument the school advanced was that forcing it to admit African-American students violated its First Amendment associational rights.<sup>59</sup> As a result, many scholars read *Runyon* as a clear rejection of a private university’s ability to deny

---

<sup>54</sup> 539 US 306 (2003) (recognizing that diversity is a compelling state interest and upholding a state university’s affirmative action admissions policy).

<sup>55</sup> *Dale*, 530 US at 659.

<sup>56</sup> Id.

<sup>57</sup> 427 US 160 (1976).


<sup>59</sup> *Runyon*, 427 US at 175–76.
admission based on race under the First Amendment. 60 By this line of thought, the only reading of Dale that is reconcilable with Runyon is that discrimination based on race is sufficiently dissimilar to the Boy Scouts’ anti-gay position. However, a closer reading of Runyon indicates that the Court went out of its way to emphasize that it was not ruling on the First Amendment claim. The majority stated:

It is worth noting at the outset some of the questions these cases do not present. They do not present any question of the right of a private social organization to limit its membership on racial or any other grounds. They do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. . . . Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied. 61

In other words, the issue of whether a private institution can claim a freedom of expressive association right to use discriminatory admission procedures has not been addressed. Additionally, the Court, although referring to Norwood v Harrison 62 as supportive of an argument that “[i]nvinduous private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment,” clarified that this type of discrimination had yet to be granted clear constitutional protections. 63 Thus, whether a First Amendment claim exists regarding private discrimination is, at best, unsettled. Finally, in relation to the issue of this Comment, because the private schools in Runyon were commercial, for-profit institutions, a claim of freedom of expressive association of nonprofit institutions was not addressed.

In short, although Roberts and Runyon arguably impose limits on the ability of private educational institutions to employ discriminatory policies, they are only minimally relevant to whether the Court’s expansive understanding of the freedom of association in Dale can be applied to private universities advancing affirmative action programs. 64

---

60 David E. Bernstein, The Right of Expressive Association and Private Universities’ Racial Preferences and Speech Codes, 9 Wm & Mary Bill of Rts J 619, 626 (2001) (“Many scholars read Runyon as rejecting a well-developed expressive association claim.”).
61 Runyon, 427 US at 167–68.
62 413 US 455 (1973) (holding that state aid to racially discriminatory private schools is constitutionally infirm).
63 Runyon, 427 US at 176, citing Norwood, 413 US at 470.
64 A troubling implication of recognizing a First Amendment right to pursue diversity is
III. THE SCOPE OF EXPRESSIVE ASSOCIATION AFTER DALE: A PRIVATE UNIVERSITY'S FIRST AMENDMENT RIGHT TO PURSUE DIVERSITY

In recent decades most colleges and universities have sought to counter racial prejudice by creating diverse student bodies through affirmative action programs. In the public education context, the Supreme Court addressed the constitutionality of affirmative action programs under the Fourteenth Amendment in the recent cases of Grutter v Bollinger65 and Gratz v Bollinger.66 While the specific decisions in these cases are limited to public institutions by the Fourteenth Amendment's state action requirement, in practice the federal government's ability to withhold federal school grants forces both public and private universities to comply with the Court's demands.67 Withholding of federal funds—funds accepted by nearly all academic institutions—seemingly makes academic the determination of whether private universities can discriminate under Dale because universities

that it seemingly also allows an educational institution to promote discrimination against minorities. For example, if a school believes that students perform better in racially or ethnically homogeneous environments, this too could be protected. However, discrimination against minority or ethnic groups may be unconstitutional under the Thirteenth Amendment. In Jones v Alfred H. Mayer Co, 392 US 409 (1968), the Court considered whether 42 USC § 1982 prohibits private discrimination on the basis of race and, if so, whether the statute is constitutional. The Court held that § 1982 bars private as well as public racial discrimination. Thus, if a private educational institution discriminated against a historically oppressed group in a manner that bears "the badges and the incidents of slavery," the Thirteenth Amendment would prohibit such action. Id at 440.65

539 US 306 (2003) (holding that a public university could use race as one factor in its admissions policy in order to promote diversity).

539 US 244 (2003) (holding that a public university could not give certain races a predetermined number of admission points in an effort to create a diverse student body).

66 The Fourteenth Amendment states that "[n]o State shall . . . deny any person within its jurisdiction the equal protection of the laws," thus limiting its application to actions by the states. US Const Amend XIV, § 1. Some have suggested that because of the large government contributions received by almost all private universities, in addition to previous Supreme Court decisions creating a broad state action doctrine, see, for example, Burton v Wilmington Parking Authority, 365 US 715 (1961) (applying the Fourteenth Amendment to the actions of a restaurant located in a publicly constructed and operated parking garage), discussion of whether "private" universities can discriminate in pursuit of diversity against a state regulation barring affirmative action programs is meaningless. If private universities were deemed state actors, they would need to abide by the Equal Protection Clause of the Fourteenth Amendment. Several cases, however, undermine this argument. Most notable is Rendell-Baker v Kohn, 457 US 830 (1982). In that case, petitioners were employees of the New Perspectives School, a privately owned institution specializing in "problem" students, which was heavily regulated by public authorities and obtained between 90 and 99 percent of its operating budget from public funds. Id at 831–32. The Supreme Court stated that the lower court "concluded that the fact that virtually all of the school's income was derived from government funding was the strongest factor to support a claim of state action . . . [b]ut we conclude that the school's receipt of public funds does not make the discharge decisions acts of the State." Id at 840. More importantly, the Court stated that while "the school . . . is not fundamentally different from many private corporations, . . . [a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." Id at 841.
will be financially compelled to comply. Yet the impact of *Dale* on a private university's ability to implement affirmative action programs is not simply an academic exercise. The broad definition of expressive association adopted in *Dale* arguably inhibits *both* federal and state governments from applying burdensome restrictions to private academic organizations. This Part analyzes whether the application of a state statutory restriction to a private university's decision to use affirmative action in selecting students violates the university's First Amendment right to expressive association as defined by the Supreme Court in *Dale*.

A. Do Private Universities Satisfy *Dale*'s Test for First Amendment Protection?

1. Are private universities expressive associations?

   In *Dale*, the Court noted that, to be considered an expressive association, "a group must engage in some form of expression, whether it be public or private." The Court took particular note of the Boy Scouts' mission statement, which spoke of "instilling values" and preparing Scouts to make ethical choices, in ruling that the Boy Scouts had engaged in the requisite amount of expressive activity. Moreover, the Court noted that such clearly expressive conduct is not required; rather, training in certain skills such as "outdoor survival skills," or participation in community service, might be sufficient. The Boy Scouts' mission statement is strikingly similar to those commonly used by colleges and universities. First, like the Boy Scouts' mission statement, school mission statements indicate a school's core values; a desire to increase diversity is often among these. Second, when schools

---

68 For example, a private institution could raise a First Amendment claim, in line with *Dale*, if the federal government attempted to withhold funding because a particular educational institution employed discriminatory admissions policies in pursuit of diversity. But see *Bob Jones University v United States*, 461 US 574 (1982) (holding that a private university's religious rights under the First Amendment do not prevent the government from denying tax-exempt status to such universities if they racially discriminate on account of the state's compelling state interest in ending racial discrimination). Arguably, the reasoning of *Dale* and *Hurley* weakens the precedential value of *Bob Jones*.

69 530 US at 648.

70 Id at 649.

71 Id at 650 (citing Justice O'Connor's concurrence).

72 For example, the University of Michigan Law School's admissions policy stated as its goal to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Grutter*, 539 US at 315. See also Grinnell College's mission statement, online at http://www.grinnell.edu/offices/president/missionstatement (visited June 22, 2004) ("The College exists to provide a lively academic community of students and teachers of high scholarly qualifications from diverse social and cultural circumstances.").

73 See Charlotte Hawkins Johnson, *Keeping the Door Open: The Fight to Keep Race-
do not provide explicit mission statements, some nevertheless factor race into their admission decisions. Such factoring is analogous to the Boy Scouts’ illustrating a commitment to instill values in Scouts through “outdoor activities.” Third, the Court seemingly recognized educational institutions as expressive associations in Dale when it noted that “activities protected by the First Amendment [include] a wide variety of political, social, economic, educational, religious, and cultural ends.” While the Court may have used “educational” to indicate that the teaching of particular ideas—rather than education in general—merits protection, this is nonetheless further evidence that the Court will construe most universities as “expressive associations.”

Still, whether private universities are expressive associations is unclear. First, it is debatable whether all or even some universities promote any ideology. Perhaps more accurately, schools merely create a forum for the expression of ideas and values to take place. Indeed, it may be precisely contrary to a university’s express purpose to advance certain values, since universities often pride themselves on open-mindedness and tolerance. In short, the argument goes, university students and faculty do not usually congregate to outwardly promote ideas such as diversity or to “instill values”; they associate to discuss ideas and, as a result, are not expressive associations under the First Amendment.

This objection is flawed for two reasons. First, it misunderstands a university’s position on diversity. Universities promote diversity not simply to create a forum of ideas or to encourage a diversity of views, but because they believe that diversity will benefit students by undermining stereotypes. A university, similar to the Boy Scouts, pursues diversity to instill core values in its members. Diversity is good, in other words, not simply because it allows for the propagation of ideas; rather it is important who is promoting different ideas and how these actions undermine social ills. Second, the fact that a university may organize for the express purpose of providing a forum for ideas—rather than to advance specific ideas—does not undermine its First

Conscious Admissions in Higher Education, Natl Bar Assn Mag 20 (July–Aug 2001) (stating that after Regents of the University of California v Bakke, 438 US 265 (1978), most schools have incorporated diversity into their mission statements).

Further evidence of this contention is demonstrated by the amicus curiae brief filed in Grutter by eight universities, indicating their use of race as a means to promote diversity. See Brief of Harvard University, et al, as Amici Curiae Supporting Respondents, Grutter v Bollinger, No 02-241 (US S Ct filed Feb 18, 2003) (available on Westlaw at 2003 WL 399220).

530 US at 647, quoting Roberts, 468 US at 622 (emphasis added).

This forum, of course, is not to be confused with a “public forum,” a term of art in First Amendment law.

If propagation was the sole concern, universities might be content assigning reading espousing these views or promoting them in other ways.
Amendment claim. The majority in *Dale*, in fact, refuted this type of argument when it stated that “[t]he First Amendment’s protection of expressive association is not reserved [solely] for advocacy groups . . . . [T]o come within its ambit, a group must [merely] engage in some form of expression.”[78] Thus, even if a school does not advocate specific values, as the above critique maintains, the fact that it provides for debate and encourages open-minded thought amounts to engaging in expressive activity.

Moreover, a university may through its activities demonstrate expressive activity. The promotion of open-mindedness and the exchange of ideas, themselves, instill and encourage values. *Dale* does not so much require an organization to advocate specific ideas to be recognized as an expressive association as it requires that ideas and values be encouraged. Indeed, the First Amendment’s principal purpose is to promote a “marketplace of ideas,” a function for which schools are particularly well suited. As Justice O’Connor noted in *Grutter*, “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and

---

[79] This second contention is potentially less convincing in light of *Rosenberger v University of Virginia*, 515 US 819 (1995), and *Legal Services Corp v Velazquez*, 531 US 533 (2001). In *Rosenberger*, the Court held that when the government does not itself speak and the primary purpose of the program receiving benefits is to “encourage a diversity of viewpoints,” denying subsidies to a particular group is unconstitutional. 515 US at 834. Similarly, in *Velazquez*, the Court held that Congress could not limit the types of cases attorneys could argue in order to receive federal funding. The Court reasoned that

although the LSC [Legal Services Corporation] differs from the program at issue in *Rosenberger* in that its purpose is not to “encourage a diversity of views,” the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to provide a governmental message . . . . [A]n LSC-funded attorney speaks on the behalf of the client in a claim against the government . . . . The lawyer is not the government’s speaker.

531 US at 542. Notably this applies only when private speakers are speaking on their own behalf and not on behalf of the government. See *Rosenberger*, 515 US at 833 (“When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that the message is neither garbled nor distorted by the grantee.”). In short, the common thread to finding an unconstitutional condition on a governmental denial of a subsidy relates to whether the governmental program in question is designed to facilitate private speech. This is in contrast to situations where the government is refusing to fund programs because the government, as speaker, refuses to support an institution promoting a specific message. See *Rust v Sullivan*, 500 US 173, 186 (1991) (holding that government may regulate content of a message (by withholding funds) when it is the speaker). See also *Boy Scouts of America v Wyman*, 335 F3d 80 (2d Cir 2003) (holding that the state did not violate the Boy Scouts’ First Amendment rights by terminating its participation in a state workplace charitable campaign due to its discriminatory membership policy). Because a private university is advancing its own private message, however, and not that of the government, there is a colorable argument that a government regulation cannot impose a restriction on funding the viewpoint diversity created by affirmative action programs.
thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”

In short, the above criticism deviates from a fair reading of Dale. A more faithful reading of Dale suggests that private universities do engage in the requisite amount of expressive activity. Universities provide a forum for students to encounter ideas, and universities arguably promote the advancement of ideas generally. Most importantly, as noted earlier, Dale simply requires that a group “engage in some form of expression.” Thus, it is not even necessary for an organization to promote a specific view, such as diversity; all that is required is that schools participate in the expressive activities protected and encouraged by the First Amendment. As universities clearly provide, at minimum, a forum for the pursuit of ideas, they satisfy these requirements.

2. Does a private university’s policy promoting diversity constitute an “expressive ideology”?

The first question under the second part of the Dale test is whether a pro-diversity admissions policy amounts to an expressive ideology. At first glance, a school’s policy choice in admitting a diverse student body is as much an ideology as the Boy Scouts’ anti-gay position. Schools and universities, through affirmative action policies, take an affirmative and ideological stance on the benefits of diversity—

---

80 539 US at 329. The passage notably qualifies this position by using the word “public.” This is not a refutation of my argument, however, since I argue only that the principle used in Dale, if consistent, should be applied to private universities.

81 Another objection against finding private universities to be expressive associations involves drawing a distinction between private universities as “expressive associations” and private universities as “primarily” expressive associations. This objection arises from Justice O’Connor’s belief that some groups, mainly commercial organizations, should not be granted First Amendment expressive association protection. See Roberts, 468 US at 634 (O’Connor concurring). The task of determining whether an organization is “primarily” expressive, as she noted in Roberts, is not always clear. Id at 635 (“Many associations cannot readily be described as purely expressive or purely commercial.”). According to Justice O’Connor, an organization is not primarily expressive “when, and only when, the association’s activities are not predominately of the type protected by the First Amendment.” Id. In testing private universities against this standard, one could argue that due to the financial benefits that arise for private universities in forming their student bodies, universities do not “primarily” engage in noncommercial expressive activity. This objection has several flaws. First, and most importantly, this criticism conflates financial activities (about which every organization must worry) with commercial activities. While universities do engage in monetary activity, all such activity is intended to enhance the overall experience of students. Second, because universities promote ideas beyond those that are commercially motivated—answering the main concern expressed in Roberts—universities are “primarily” expressive. A school’s emphasis on diversity is a good example—it directly relates to a school’s ability to educate properly. Institutions believe that, by undermining preconceived stereotypes, diversity provides an ideal learning environment.

82 Dale, 530 US at 649 (emphasis added).
they argue that diversity undermines racial stereotypes and creates a better educational environment.  

At least three arguments against treating diversity as an ideology can be advanced. First, one could argue that a university’s belief in diversity is wholly distinct from the express ideology protected in Dale. While the Boy Scouts maintains an anti-gay ideology—a discriminatory position that expresses an idea central to the organization—schools do not believe that the discrimination in which they are engaging is intrinsically a good thing; it is simply a means to an end. Indeed, support for affirmative action, unlike discrimination against minorities, is not based on antipathy toward a group, but rather on the belief that a diverse student body enhances the educational experience of all students. In other words, because diversity is not integral to the message of a university, the First Amendment protections afforded in Dale should not be extended.

While plausible, this argument—that the centrality of the Boy Scouts’ discriminatory position makes it distinct from the discrimination effectuated in pursuit of diversity—fails under the language of Dale. To rephrase the critique, one could argue that there is a critical difference between a private organization expressing a discriminatory view (for example, “our members are straight”) and a university expressing a view on diversity (“look at our diverse student body”). In the former, the organization is advancing a discriminatory view that is critical to its existence, whereas in the latter, a university is simply promoting a belief with discriminatory repercussions. Chief Justice Rehnquist, in fact, notes this concern in Dale: “This is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”

Despite Rehnquist’s recognition of this critique, the majority in Dale thought this distinction to be insignificant. For Rehnquist, Hurley answered the objection: “the purpose of the St. Patrick’s Day parade in Hurley was not to espouse any views about sexual orientation [that is, an explicitly discriminatory message], but we held that the parade organizers had a right to exclude certain participants nonetheless.”

More specifically, in Hurley the Court held:

The parade’s organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing

83 See, for example, Grutter, 539 US at 315 (noting the University of Michigan’s argument that diversity “enrich[es] everyone’s education”).
84 530 US at 654.
85 Id at 655.
to keep [the group’s] message out of the parade. But whatever
the reason, it boils down to the choice of a speaker not to pro-
pound a particular point of view, and that choice is presumed to
lie beyond the government’s power to control.86

This reasoning can also be applied to private universities pursuing
diversity. While the race-sensitive discrimination employed by univer-
sities may simply be a means to an end (since universities do not fun-
damentally believe in discrimination), the university’s choice in ad-
vancing its message of diversity lies “beyond the government’s power
to control.”87

Supposing affirmative action programs or mission statements
could be seen as advocating an ideology, an additional argument
against extending First Amendment protection to universities is that
by promoting diversity a university may, in fact, undermine its ability
to demonstrate a uniform principle. Because many private schools are
large, and their students, staff, and faculty have various views, schools
necessarily cannot express the coherence of belief in diversity re-
quired to constitute an expressive ideology.88 According to one scholar,
“[T]he diversity of a large private institution might mitigate against
recognizing an expressive association defense for a preference ration-
ized on diversity grounds; the argument would be that the institu-
tion’s very diversity precludes the kind of coherent, self-defining point
of view that the expressive association defense is meant to protect.”89

In short, this argument suggests that a private university cannot con-
tend that it has a expressed, unified ideology on diversity because,
ironically, its diverse constituency cannot speak in the coherent collect-
ive voice required of an expressive association.

The language of Dale again refutes this counterargument. The vari-
ety of viewpoints on homosexuality existing within the Boy Scouts
did not prevent the group from receiving First Amendment protec-
tion. The Court made clear that all members within an organization
did not have to agree on the organization’s stated beliefs.90 While stu-
dents and faculty may disagree on a university’s diversity position, the
First Amendment will nevertheless protect an organization no matter
how universally accepted the ideology is within the association.

86 Hurley, 515 US at 574–75.
87 Id.
1, 89 (2002).
89 Id.
90 The Court stated: “[T]he First Amendment simply does not require that every member
of a group agree on every issue in order for the group’s policy to be ‘expressive association.’”
Dale, 530 US at 655. This statement is in direct conflict with Professor Schuck’s argument.
A final potential argument against extending *Dale* to private universities states that a university’s pursuit of diversity cannot amount to an expressive ideology because it conflicts with the university’s message of merit. In other words, by granting certain students extra points based on criteria other than the expressed belief in rewarding academic excellence, schools maintain contradictory ideologies. Yet, the fact that certain ideological beliefs seem contradictory within an organization was deemed by the Court in *Dale* to be tolerable. The Boy Scouts looked to admit a representative variety of boys and to reach “all eligible youth” and still maintained an anti-gay position; this contradiction did not extinguish the organization’s First Amendment rights. Analogously, private universities can set up systems with conflicting ideals, such as merit and diversity. In *Grutter*, the Court specifically found that the pursuits of an elite law school and of diversity were not contradictory goals: “narrow tailoring does not require ... a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to all racial groups.” Most importantly, it is not the role of the Court to determine which more closely resembles the association’s ideology. As the Court noted in *Dale*, “[I]t is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.” If a university believes that these two goals can be reconciled, that is its choice.

In sum, although the above arguments against an expressive ideology in diversity are reasonable, the Court in *Dale* indicated that such arguments would not undermine the ability of an organization to claim First Amendment protection.

3. Does regulation of a private university’s affirmative action program hinder its ability to promote its ideology?

The final inquiry toward establishing First Amendment protection for private universities asks whether the regulation in question hinders the ability of an organization to promote its ideology. This, in fact, was the central question present in *Dale*. In defending itself under this final inquiry, a university can argue that state action that forbids affirmative action as a means toward creating a diverse class of students places a substantial burden on the ability of a university to express its belief in diversity. In other words, forbidding a university to

---

92 *Dale*, 530 US at 650.
93 539 US at 309.
94 530 US at 651.
consider race in making decisions that advance one of its core beliefs (the benefits of diversity) unquestionably hinders a school’s First Amendment right to convincingly implement this message.

Several arguments exist suggesting that a regulation forbidding discriminatory admission procedures does not substantially hinder a university’s ability to promote its belief in diversity. First, it is not clear that a small number of minority students will dilute or silence the ability of a school to promote a belief in diversity. In other words, state regulation of private universities is permissible because universities can still express a belief in diversity without employing discriminatory methods to ensure that diversity occurs. This objection, though sensible, again fails to adhere to the language of Dale. The Court stated: “The presence of an avowed homosexual and gay rights activist in a scoutmaster’s uniform sends a distinctively different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with [the Boy Scouts’ anti-homosexual] policy.”95 A university with a large number of diverse students “sends a distinctively different message” than a university that promotes diversity but does not employ the necessary tactics to achieve it.

Second, while the lack of affirmative action programs may hinder a school’s ability to create diversity, it does not entirely preclude a school from promoting diversity. Schools can continue to try to appeal to minority applicants without giving them preferential treatment. Schools can heavily recruit minority applicants or simply lower their standards. The Court, however, addressed and rejected this exact argument in Dale. The Court was not persuaded by the argument that because the Boy Scouts did not allow leaders to discuss sexual matters, the fact that Dale was openly gay would not cause a conflict between the Boy Scouts’ anti-gay belief and Dale’s presence.96 Nevertheless, the Supreme Court reasoned that the First Amendment is clear: it does not allow the judiciary to decide what methods an association should use in disseminating its message. If the Boy Scouts wants to teach “by example,” the First Amendment protects that choice, regardless of whether, in actuality, a conflict occurs.97 Similarly, the methods private universities employ are left to them. Such deference in the educational context was seen in Grutter, when Justice O’Connor noted that “[t]he Law School’s educational judgment that ... diversity is essential to its educational mission is one to which we defer as it keeps with our tradition of giving a degree of deference to a univer-

95 Id at 655–56.
96 Id at 655.
97 Id (noting that “the First Amendment protects the Boy Scouts’ method of expression” and that if the Boy Scouts wanted leaders to “teach only by example, this fact does not negate the sincerity of its belief”).
A Private University's Right to Pursue Diversity

A Private University's Right to Pursue Diversity

In other words, even assuming that schools could still promote diversity without employing race-sensitive measures, or that diversity could still occur without these measures, forbidding universities to consider race as a factor in admissions necessarily interferes with an organization's ability to choose which students to admit.

Third, while a regulation forbidding affirmative action policies might interfere with the ability of a university to promote its belief in diversity, perhaps First Amendment protection should nevertheless be denied. In other words, similar to the concerns expressed in NAACP, the argument is that the First Amendment should apply only when a regulation materially infringes on the central purpose of an organization, undermining the association's ability to function. Since diversity is not the central reason why educational institutions are founded, and since regulation of affirmative action programs would not undermine the purpose or existence of schools, the right of expressive association should not be granted.

Considering the third argument—that, because a university's central purpose is not to advance diversity, state interference is permissible—the Court emphasized that such an argument did not weaken an expressive association claim. The Dale Court emphatically rejected the assertion that the First Amendment will only protect organizations whose central purpose is infringed; organizations do not have to associate for the "purpose" of propagating a specific message in order to get First Amendment shelter. The Boy Scouts did not have to be organized around an anti-gay principle, nor do schools have to be organized around diversity; rather, the mere fact that an organization's expressive activity is impaired is enough to require First Amendment protection.

In sum, the language of Dale indicates a doctrinal criterion that most private universities could meet. Accordingly, in responding to the central question presented in this Comment—whether the application of a statutory or regulatory restriction on a private university's decision to use affirmative action in admission violates the university's First Amendment right to expressive association as defined by the Supreme Court in Dale—I suggest that the answer is yes.

CONCLUSION

Perhaps the reasoning in Boy Scouts of America v Dale amounts to an ad hoc justification allowing the Boy Scouts to discriminate against gays. In fact, taking Dale at face value may jeopardize a host of

98 539 US at 328.
99 See Dale, 530 US at 655.
civil rights legislation, legislation that America depends upon and now takes as established. The implications of the broad First Amendment rights granted in Dale make such questions reasonable and important. This Comment explores just one question: whether Dale can be extended to private universities arguably employing discriminatory practices in pursuit of diversity. It concludes that a fair reading of the majority position in Dale suggests that private universities should be afforded this protection.