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Introduction to Perspectives on Constitutional Exemptions to Civil Rights Laws: Boy Scouts of America v. Dale

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PERSPECTIVES ON CONSTITUTIONAL EXEMPTIONS TO CIVIL RIGHTS LAWS: *BOY SCOUTS OF AMERICA V. DALE*

INTRODUCTION

The *Bill of Rights Journal* is a scholarly publication of professional and student articles and is edited and operated by students at the College of William & Mary School of Law. As its name suggests, the *Journal* is dedicated to the exploration of issues related to the Constitution and the Bill of the Rights. The *Journal* embraces a broad view of this mandate, encompassing nearly all constitutional and human rights issues, nationally and globally. The *Journal* is a forum for students, professionals, and practitioners. Academicians, lawyers, historians, journalists, government officials, sociologists, political scientists, economists, philosophers, and experts in other fields are encouraged to submit articles.

An effective way to fulfill the mission of the *Journal* is by publishing symposia issues. The *Journal* actively solicits authors in the legal and academic community who have an interest and expertise in a chosen subject matter and who will provide a wide array of perspectives. We are committed to allowing authors wide latitude in developing their topics in order to publish the most well-written and probing articles. Our goal is that this method of article selection will continue to add to scholarly debate for years to come.

Topics are chosen to yield scholarly discourse in an area of constitutional analysis, a particular Supreme Court decision, or a general theme involving significant constitutional issues or policy matters of the day. In keeping with the *Journal*'s practice of inviting distinguished authors to contribute either in symposia or other similar formats, our current issue features two perspectives from constitutional scholars on the *Boy Scouts America v. Dale* decision.

I. THE CONFLICT BETWEEN FREEDOM OF EXPRESSIVE ASSOCIATION AND FREEDOM FROM DISCRIMINATION

The *Boy Scouts of America v. Dale* case[1] presented the Court with the time-honored conflict between two very significant principles: the First Amendment freedom of expressive association and the compelling state interest to insure freedom from discrimination.[2] Freedom of expressive association is a fundamental

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[1] 530 U.S. 640, 120 S. Ct. 2446 (2000).

[2] The Court has dealt with this conflict in prior decisions. *See, e.g.*, Hurley v. Irish-Am. Gay Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Roberts v. United States Jaycees, 468 U.S. 609

right[3] derived from the First Amendment.[4] Freedom of expressive association enables a group to choose its company. The right permits a group to associate with those individuals with which the group favors and not to associate with those individuals with which the group disfavors.[5]

Freedom from discrimination mandates that groups avoid considering those individual characteristics that are deemed irrelevant by the state.[6] Ultimately, the state has a compelling interest in insuring equality. Generally, the state assures equality through public accommodation statutes.[7] These statutes cover a variety of areas and vary from state to state, but they generally prohibit discrimination based on sexual orientation, race, color, creed, disability, and religion.[8]

At times, a group's right to choose its associates conflicts with the individual's right to equality. Selecting the former could violate the due process rights of the individual and prevent that individual equal access to goods and services.[9] Choosing the latter could stifle the First Amendment rights of the excluding group.[10]

II. THE SUPREME COURT'S BALANCING TEST

Apropos of constitutional analysis, the Supreme Court has developed a test to determine when a group's First Amendment association rights outweigh the state's

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(1984); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1984).

[3] *See* NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 460 (1958) ("[I]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment.").

[4] *See Roberts*, 468 U.S. at 618 (discussing that the freedom of expressive association derives from the First Amendment's right to petition the government for redress of grievances, right to free speech, and right to freedom of assembly).

[5] *See* Cara J. Frey, Note, *Hate Exposed to the Light of Day: Determining the Boy Scouts of America's Expressive Purpose Solely from Objective Evidence*, 75 WASH. L. REV. 577, 582 (2000).

[6] *See* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000).

[7] For example, the public accommodation statute at issue in Dale provided that "all persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation." N.J. STAT. ANN. § 10:5-4 (1999).

[8] *See, e.g.*, CAL. CIV. CODE § 51 (West 1999) (covering sex, race, color, religion, national origin, and disability); D.C CODE ANN. § 1-2501 (West 1992) (providing for race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, political affiliation, source of income, and place of residence or business).

[9] *See* Paul Varela, Note, *A Scout is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 WM. & MARY L. REV. 919, 926 (1989).

[10] *See id.* at 932.

interests in preventing discrimination.[11] The test, as enumerated in *Roberts*, rests on the notion that an individual's statutory freedom from discrimination trumps a group's constitutional freedom of expressive association unless that group can establish a nexus between its exclusionary policy and its expressive association.[12] Accordingly, a group may exclude an individual when inclusion of that person would impede the group's expressive purpose.

Generally, when the Court has applied this test, it has held that the individual's freedom of discrimination rights have taken precedence over the group's freedom of association.[13] *Dale*, however, held that the Boy Scouts' freedom of association interest trumped Dale's freedom from discrimination interest.

III. PAPERS PRESENTED

Two articles in this issue present different perspectives on the *Dale* opinion. In a contemplative analysis, Professors Erwin Chemerinsky and Catherine Fisk present a strong critique of the *Dale* decision. Chemerinksy and Fisk assert that *Dale* broadens the right of freedom of association for any group that wants to discriminate. Specifically, the authors contend that the Court employed the wrong analysis in determining the Boy Scouts' expressive message. Additionally, assuming that the Boy Scouts did have a right to expressive association, the Court failed to recognize adequately the state's compelling interest in preventing discrimination.

Professor David Bernstein writes in support of the decision because it "stands for the robust right of expressive association."[14] Bernstein argues that *Dale* provides a defense for organizations to associate with those individuals who will be supportive of the group's ideology and message. Essentially, *Dale* breathes new life into the constitutional right to expressive association. After providing a brief history of expressive association and an overview of the *Dale* decision, Bernstein argues that the forces opposed to *Dale* ultimately may benefit from the decision. Specifically, *Dale* likely will protect university speech codes. Bernstein's thoughtful analysis demonstrates that *Dale* may reach beyond the particular subject matter of the case (gay rights) to other aspects of our society.

Despite the Court's prior holdings and in light of the *Dale* opinion, the conflict between freedom of expressive association and freedom from discrimination

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[11] *See id.* at 919-24.

[12] *See* Frey, *supra* note 5, at 583 (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

[13] *See, e.g.*, *Roberts*, 468 U.S. at 609; Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1984).

[14] David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 619 (2001).

remains an issue that likely will be brought before the Court again. The two perspectives presented demonstrate the inherent tension between the two principles. Hopefully, as groups, individuals, government officials, and legal and policy scholars continue to evaluate this issue,[15] these articles and other contributions to the *Bill of Rights Journal* will provide them with meaningful and effective instruments to improve their understanding of the tension between the First Amendment right of expressive association and the right to freedom from discrimination.

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[15] For instance, several groups such as the Lambda Legal Defense and Education Fund have stressed that the Dale decision has caused financial and public relation problems for the Boy Scouts. *See* Jennifer Grissom, *All Tied Up in Knots: Boy Scouts' Anti-Gay Policy Drives Away Many Supporters*, LAMBDA UPDATE, Fall 2000, at 10.