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THE RIGHT OF EXPRESSIVE ASSOCIATION AND PRIVATE UNIVERSITIES' RACIAL PREFERENCES AND SPEECH CODES

David E. Bernstein*

The reaction to Boy Scouts of America v. Dale has divided along ideological lines. Conservatives generally support Dale because in their eyes it prevents the government from taking sides in the culture wars. "Progressives," including many liberals who otherwise have strong civil libertarian instincts, oppose Dale because it inhibits the enforcement of antidiscrimination laws in some contexts. The underlying issue in Dale was whether a private, nonprofit expressive association has a First Amendment right to discriminate to prevent dilution of its message. Despite the ideological rancor over Dale, this right does not favor groups with any particular perspective, but protects any group when its right to expressive association is threatened by an antidiscrimination law. Indeed, despite general liberal opposition to Dale, the opinion may protect some of the left's favorite causes.

Dale recognizes that private, nonprofit expressive associations have a First Amendment right to discriminate when necessary to prevent dilution of their message. For example, to the chagrin of civil rights activists, both white and black racist and racialist groups will have a right to exclude members of other races from membership and events sponsored by the groups. However, Professor Bernstein asserts that the most significant nonprofit organizations with an ideological commitment to discrimination are not racist organizations, but elite private universities that engage in racial preferences in favor of minority applicants. Private universities faced with reverse discrimination lawsuits may find constitutional respite in the right to expressive association if they are willing to admit that they engage in racial preferences.

More generally, Dale stands for a robust right of expressive association. One way organizations protect their ability to express a particular message is by banning their opponents from speaking in their organizations. California's Leonard Law makes university speech codes illegal, and several state constitutions arguably do the same. Professor Bernstein concludes that private university speech codes—a cause typically favored by elements on the political left—are protected against hostile regulations by the expressive association right recognized in Dale.

* * *

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INTRODUCTION

In *Boy Scouts of America v. Dale*,¹ the Supreme Court ruled that the Scouts has a First Amendment expressive association right to exclude gay adult volunteers.² The reaction to *Dale* has divided along ideological lines. Conservatives generally support *Dale* because in their eyes it prevents the government from taking sides in the culture wars. "Progressives," including many liberals who otherwise have strong civil libertarian instincts, oppose *Dale* because it seems to deal a blow to gay rights. Progressives also fear that organizations that wish to discriminate against other groups will rely on *Dale* for constitutional exemptions from antidiscrimination laws.

As a legal matter, however, *Dale* was not about the Kulturkampf between gay rights activists and their conservative opponents, nor was it about a general "right to discriminate."³ Rather, the underlying issue in *Dale* was whether a private, nonprofit expressive association has a First Amendment right to discriminate to prevent dilution of its message.⁴

Support for the right of expressive association naturally varies depending on whose ox is being gored in a particular case. For example, the Supreme Court first explicitly recognized the right of expressive association in protecting the NAACP against harassment by southern state governments. In *NAACP v. Alabama ex rel. Patterson*,⁵ the Court quashed Alabama's attempt to subpoena the state NAACP's membership list, which would have been used by the White Citizens Council to punish activists.⁶ However, when civil rights activists later had the upper hand, they persuaded a federal district court to require segregated private schools to supply to the Internal Revenue Service a list "of incorporators, founders, board members; listing of donors of land or buildings, whether individual or corporate; and a statement as to whether any of the foregoing have an announced identification as officers or active members of an organization having as a primary objective the

¹ 530 U.S. 640; 120 S. Ct. 2446 (2000).

² *Id.*

³ *Id.* at 2476.

⁴ *Id.* at 2446.

⁵ 357 U.S. 449, 460 (1958).

⁶ The Court stated "that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.* at 460. The Court added that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 460-61; see also *NAACP v. Button*, 371 U.S. 415, 428-29 (1963).

maintenance of segregated school education.”⁷ More recently, at the same time a gay rights organization in Massachusetts was fighting to force the organizers of Boston’s St. Patrick’s Day Parade to allow a gay organization to march under its own banner, a San Diego gay rights organization was fighting a petition by an anti-gay organization calling itself “Normal People” seeking to march in the city’s annual gay pride parade.⁸

While the right of expressive association can protect organizations on either side of the political spectrum, for the last two decades the right has primarily been raised as a defense to antidiscrimination claims by African Americans, women, and especially homosexuals. Not surprisingly, left-leaning organizations have sought to limit strictly the scope of the right, while conservatives have been more supportive of the right of private associations to autonomy from the state. As discussed below, however, the left may find that the right to expressive association will save some of its favorite causes from interference by the government.

Part I of this Article briefly discusses the history of the expressive association right and its relationship to antidiscrimination law. Part II argues that in some contexts *Dale* provides a constitutional defense to antidiscrimination laws by nonprofit organizations when the organizations’ ideology requires discrimination. As discussed in Part II, both white and black racist and racialist groups have a right to exclude members of other races.

The rest of this Article shows that despite the political left’s hostility to *Dale*, two causes associated with the left may ultimately be among the most significant beneficiaries of *Dale*. Part III explains that the most significant nonprofit organizations with an ideological commitment to discrimination are not overtly racist organizations, but elite private universities that engage in racial preferences in favor of minority applicants. Private universities faced with reverse discrimination lawsuits may find constitutional respite in the right to expressive association if they are willing to admit that they engage in racial preferences.

Part IV opines that private university speech codes may also be protected by

⁷ *Green v. Connally*, 330 F. Supp. 1150, 1176 (D.D.C.), *aff’d sub nom.*, *Coit v. Green*, 404 U.S. 997 (1971). In 1969, attorneys for the Lawyers’ Committee for Civil Rights and the NAACP Legal Defense Fund sued the Internal Revenue Service in United States District Court for the District of Columbia for granting tax-exempt status to racially exclusionary private schools in Mississippi. *See id.* Acting at the behest of the plaintiffs, the court issued the order quoted in the text above. *Id.* The Lawyers’ Committee and the Legal Defense Fund were willing to subject their enemies to the possibility of reprisals from one of the most powerful and feared federal agencies.

⁸ *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 555, 557 (1995); K. L. Billingsley, *Judge Bars Opposition from Gay Parade*, WASH. TIMES, July 16, 1994, at 43.

Dale. California's Leonard Law⁹ essentially makes such speech codes illegal,¹⁰ and several state constitutions arguably do the same.¹¹ When Stanford University defended its speech code on expressive association grounds, the court relied on *Roberts* in upholding the constitutionality of the Leonard Law.¹² After *Dale*, however, state regulations banning private schools from enforcing speech codes should be invalidated on expressive association grounds.¹³

I. A BRIEF OVERVIEW OF *DALE* AND THE RIGHT OF EXPRESSIVE ASSOCIATION

As noted in the Introduction, the Supreme Court first explicitly recognized the right to expressive association in the 1950s, when state harassment threatened the viability of civil rights organizations in the South. The right was ill-defined for the next several decades; for example, it was unclear whether the right originated in the First Amendment or was part of a more general right to association derived from the Due Process Clause or elsewhere. In the 1980s, litigants aggressively asserted the right of expressive association as a defense to public accommodations statutes.¹⁴ This forced the Supreme Court to clarify the origins and scope of the right.

The most important expressive association case was *Roberts v. United States Jaycees*.¹⁵ The national Jaycees organization threatened two Minnesota chapters with expulsion for admitting women as full members. The state chapters sued, claiming that the national organization's policy violated Minnesota's public accommodations law.¹⁶ The national Jaycees defended its membership policy on First Amendment grounds. After a short-lived victory for the national Jaycees in the Eighth Circuit, the Supreme Court reversed.¹⁷

The Court stated that the right to associate for expressive purposes was implicitly protected by the First Amendment's guarantee of the rights to freedom

⁹ CAL. EDUC. CODE § 94, 367 (West Supp. 2001).

¹⁰ See *infra* notes 105-107 and accompanying text.

¹¹ See *infra* note 105.

¹² See *infra* notes 108-110 and accompanying text.

¹³ In fairness, at least one left-wing organization, the ACLU, generally opposes campus speech codes. See *infra* notes 101-03 and accompanying text.

¹⁴ See, e.g., *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 7-8 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 543 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 615 (1984); *Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 220 (Cal. 1985).

¹⁵ 468 U.S. 609 (1984).

¹⁶ *United States Jaycees v. McClure*, 305 N.W.2d 764, 766 (Minn. 1981).

¹⁷ *United States Jaycees v. McClure*, 534 F. Supp. 766 (D. Minn. 1982), *rev'd*, 709 F.2d 1560, 1561 (8th Cir. 1983), *rev'd subnom.*, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

of expression, assembly, and to petition government.¹⁸ However, the Court found that the national Jaycees could not assert successfully a First Amendment right to expressive association because there was no evidence that the compelled acceptance of women as Jaycees would “change the content or impact of the organization’s speech.”¹⁹ The Court argued that admitting women required no change in the organization’s central purpose: “promoting the interests of young men.”²⁰ Moreover, even if Minnesota’s public accommodations law infringed on the Jaycees’ right to expressive association, it did so to advance compelling interests, i.e., eliminating gender discrimination and ensuring “equal access to publicly available goods and services.”²¹ Because the law served compelling government interests, it trumped the Jaycees’ First Amendment rights.

Although the interest in forcing the Jaycees to admit women was purportedly compelling, federal law did not (and still does not) forbid public accommodations to discriminate on the basis of sex. The Court justified its decision by citing the Minnesota Supreme Court’s finding that Minnesota had a “strong historical commitment to eliminating discrimination.”²² The Court failed to explain how a federal constitutional right could be overridden by a single state’s claimed compelling interest, an interest not even protected by federal statute.²³

Between *Roberts*’ narrow interpretation of what would interfere with the Jaycees’ right of expressive association, and its languid compelling interest test, *Roberts* suggested that expressive association need not be taken seriously, especially when enforcement of an antidiscrimination law was in jeopardy.²⁴ *Boy*

¹⁸ *Roberts*, 468 U.S. at 618.

¹⁹ *Id.* at 627-28. In fact, Rotary International’s amicus brief pointed to the “gender gap” in political views. See Amicus Curiae Brief of Rotary International at 18, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (No. 83-724).

²⁰ *Roberts*, 468 U.S. at 627.

²¹ *Id.* at 624.

²² *Id.*

²³ For criticism of the notion that a single state’s law can create a compelling interest for First Amendment purposes, see *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692, 716 (9th Cir. 1999) (“Nor, would it seem, can a single state’s law evince—under any standard—a compelling government interest for federal constitutional purposes.”), *rev’d on other grounds*, 220 F.3d 1134 (9th Cir. 2000). For the contrary view, see *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 46 (1987) (Newman, J., concurring) (“an interest need not be national in scope to be compelling”). See generally *Boos v. Barry*, 485 U.S. 312 (1987) (holding that the District of Columbia’s compelling interest in suppressing speech cannot trump First Amendment rights).

²⁴ In fact, the Court soon rejected two other expressive association challenges to public accommodations laws. *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

*Scouts of America v. Dale*²⁵ marks the end of the *Roberts* era.

In *Dale*, the Supreme Court clearly held for the first time that the right of expressive association trumps an antidiscrimination law. James Dale, an openly gay individual, had sued the Scouts under New Jersey's public accommodations law when the Scouts refused to employ him as a scoutmaster. The Court found that because the Boy Scouts had a viewpoint opposed to homosexual activity that it sought to impart to its members, the Scouts had a constitutional right to exclude Dale from the organization.

The contrast with *Roberts* is evident. First, the majority declined the dissent's invitation to find that New Jersey's public accommodations law did not infringe upon expressive association rights.²⁶ Chief Justice Rehnquist's majority opinion noted that the Scouts claimed to have an anti-homosexual activity ideology, that there was evidence in the record to support that claim, and that the organization's ability to promote that message would be undermined inherently if it was required to employ an open and active homosexual.²⁷

The Court concluded that application of the New Jersey law to the Scouts "would significantly burden the [Scouts'] right to oppose or disfavor homosexual conduct."²⁸ "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."²⁹ This was sufficient to support an expressive association claim, and New Jersey's antidiscrimination law therefore violated the Scouts' First Amendment rights.

Moreover, despite lip service paid to *Roberts* and its weak compelling interest test, neither the majority opinion nor the dissent discussed whether the government has a compelling interest in eradicating discrimination against homosexuals.³⁰ *Dale* therefore suggests that the Court has reached a consensus both that the right to expressive association receives the same level of protection as other elements of the right to freedom of expression, and that there is no antidiscrimination law exception

²⁵ 530 U.S. 640; 120 S. Ct. 2446 (2000).

²⁶ The dissent argued that the Boy Scouts did not really promote an anti-homosexual activity message, *id.* at 2460-72, and, moreover, allowing Dale to serve as a scoutmaster would not undermine any such message the Scouts sought to send. *Id.* at 2472-77.

²⁷ *Id.* at 2452-54.

²⁸ *Id.* at 2457.

²⁹ *Id.* at 2454. A better way of formulating the specific problem raised in *Dale* is that employing Dale would have inhibited the Scouts' ability to send a clear message that homosexual activity is not a legitimate form of behavior, given that Dale's acknowledged behavior openly contradicts that message.

³⁰ The majority, in fact, treated the part of *Roberts* which applies the compelling interest test as dicta because the *Roberts* Court had found that the right of expressive association had not been infringed in that case. *Id.* at 2456; see David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. (forthcoming 2001).

to the right of expressive association.³¹

Thus, *Dale* is significant in two respects. First, the Court has signaled that it wants to rejuvenate the right to expressive association, and will no longer try to bend the facts of cases so as to avoid recognizing the right when enforcement of an antidiscrimination law is at issue. Moreover, the Court interpreted the right of expressive association broadly. The Court held that the right could be successfully asserted by an organization that does not associate for the express purpose of disseminating the particular message at issue, that propounds the message only implicitly by example, and that tolerates dissenting views.³² Second, once the infringement upon the right to expressive association has been recognized, the party asserting the right will win, unless the government can assert the type of truly compelling interest that (almost never) trumps First Amendment rights in other contexts.

II. RACIST ORGANIZATIONS AND THE RIGHT OF EXPRESSIVE ASSOCIATION

Dale raises the issue of whether associations that are ideologically committed to race discrimination may discriminate on the basis of race. In *Runyon v. McCrary*,³³ the United States Supreme Court rejected a freedom of association defense to an antidiscrimination claim against a private school. The Court explained that although invidious private discrimination may be characterized as an exercise of freedom of association, it is not accorded affirmative constitutional protection. Applying an antidiscrimination statute to prohibit private, nonsectarian schools from denying admission to African American students would not violate their right of free association where “there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.”³⁴ In the absence of a valid First Amendment claim, “the Constitution . . . places no value on discrimination, and . . . [i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections.”³⁵

³¹ However, the four dissenting Justices apparently would still give antidiscrimination laws a bit of what looks like special treatment. Justice Stevens, writing for the four, argued that in expressive association cases, unlike in other First Amendment contexts, courts should not take defendants’ purported beliefs at face value, but should investigate whether these beliefs are merely a cover for status-based discrimination. *Dale*, 120 S. Ct. at 2471. The only rationale they gave for this distinction was the potential negative effect on antidiscrimination laws of adopting the contrary position. *Id.* at 2471-72.

³² *Id.* at 2454-55.

³³ 427 U.S. 160 (1976).

³⁴ *Id.* at 176 (alteration in original) (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1087 (4th Cir. 1975)).

³⁵ *Id.* (first and third alterations in original) (citation omitted) (quoting *Norwood v.*

Many scholars read *Runyon* as rejecting a well-developed expressive association claim.³⁶ Indeed, Dale's attorney relied heavily on *Runyon*,³⁷ and the Boy Scouts' reply brief took pains to explain how the Court could find for the Scouts while leaving *Runyon* undisturbed.³⁸ Some would argue that *Runyon* could only be squared with *Dale* if claims of race discrimination in education get different treatment under the First Amendment than a sexual orientation discrimination claim such as Dale's.³⁹

In fact, however, *Runyon* does not conflict with *Dale*. First, *Runyon* involved a for-profit, commercially-operated school.⁴⁰ In a concurrence in *Roberts*,⁴¹ Justice O'Connor, a member of the five-Justice majority in *Dale*, found that the right of expressive association applies only to primarily expressive, non-commercial organizations. For-profit businesses presumably may not claim the right. Until there are five votes on the Court to extend protection for expressive association rights to for-profit organizations,⁴² the holding of *Runyon* will survive *Dale*.

Even more important, a close reading of *Runyon* and the briefs filed in it reveal that *Runyon* was not an "expressive association" case. The defendants in

Harrison, 413 U.S. 455, 469-70 (1973)).

³⁶ This Author, relying on the conventional wisdom, made this mistake. See David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 167.

³⁷ Brief for Respondant, *Boy Scouts of Am. v. Dale*, 530 U.S. 640; 120 S. Ct. 2446 (2000) (No. 99-699).

³⁸ Reply Brief for Petitioners at 19 n.17, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446 (2000) (No. 99-699).

³⁹ Some have suggested that the Reconstruction Amendments grant special privileges to laws banning discrimination against African Americans (and perhaps other groups that get special suspect class or quasi-suspect class treatment under the Fourteenth Amendment) that do not apply to other groups. Protecting the former groups from discrimination would be a compelling government interest, but protecting homosexuals would not be. Cf. William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2458-60 (1997) (suggesting that the Supreme Court is less willing to defer to antidiscrimination laws when the protected group is homosexuals than in other contexts). However, there is no indication in *Dale* that the Court for First Amendment purposes would distinguish laws that protect different groups. The question *Dale* requires courts to answer is whether the law at issue interferes with an organization's ability to promote its message. Given that the Court did not even bother to apply the compelling interest test, it appears that whether the group being discriminated against gets a given level of protection from state action under the Fourteenth Amendment is irrelevant.

⁴⁰ See *Runyon*, 427 U.S. at 161 (noting that the school in question was "commercially-operated").

⁴¹ *Roberts v. United States Jaycees*, 468 U.S. 609, 632-38 (1984) (O'Connor, J., concurring).

⁴² So far, no Justice in the *Dale* majority has stated that for-profit organizations are protected by the right of expressive association.

Runyon made what amounts to a short, throw-away argument that their right to “freedom of association,” floating somewhere in the penumbral ether of the Constitution, was violated by compelled integration. However, the defendants did not make an expressive association claim grounded in the First Amendment. They did not argue in their briefs that the school’s ability to promote segregation would be compromised, nor did they provide evidence at trial on that issue.⁴³ The *Runyon* Court ruled that the defendants failed to allege that their First Amendment expressive association rights were violated, not that a racist organization could never establish such a claim.⁴⁴

Most courts have therefore ignored *Runyon* in cases involving conflicts between expressive association rights and antidiscrimination laws, and instead focused on the *Roberts* test. For example, in *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*,⁴⁵ the Klan sued after being denied a parade on the grounds that the parade was a public accommodation, but would not be open to members of minority groups as required by law. The Klan argued that its white supremacist message would be diluted if its parade was open to a public that for the

⁴³ Petitioner’s Brief, *Runyon v. McCrary*, 427 U.S. 160 (1976) (No. 75-62).

⁴⁴ *Runyon*, 427 U.S. at 175-76. It is true that the brief of the Southern Independent School Association, at 26-27, argued:

If the SISA parents have a right to select a school for their children that expresses their own preferences and beliefs, is that right invaded by the decisions below? Clearly so. Every parent who selects a SISA school because of a belief that ‘segregation is desirable in education’ has lost any opportunity of expressing that belief if by the Thirteenth or any other amendment all public or private schools must become desegregated.

Brief of Southern Independent Sch. Ass’n 26-27, *Runyon v. McCrary*, 427 U.S. 160 (1976) (No. 75-62). Moreover, the Reply Brief adds:

[T]he . . . proposals to eliminate or integrate the SISA schools are directly related to the restriction of communication by the SISA parents—to the point of eliminating the last refuge in which their belief can presently find expression. The responding briefs claim that SISA parents will remain free to believe in the value of segregation in education—but argue the contradictory provision that this belief must only be expressed in an integrated private school.

Reply Brief of Southern Independent Sch. Ass’n 8, *Runyon v. McCrary*, 427 U.S. 160 (1976) (No. 75-62). However, these are not *Dale*-style arguments that the schools’ ability to teach that segregation is good would be diminished. Rather, they are broad freedom of association arguments that the parents could not express their beliefs in segregation by sending their kids to a segregated school. The SISA’s argument would apply just as well to a restaurant patron who claimed that the 1964 Civil Rights Act prevents him from expressing his belief in segregation by going to a segregated restaurant. *Dale* stands for the principle that the government cannot force association that would dilute an organized group’s message, not that individuals have a right to associate with whom they please because otherwise they will not be able to express their belief in segregation.

⁴⁵ 700 F. Supp. 281 (D. Md. 1988).

most part violently disagrees with the Klan's ideology.

The district court recognized that *Roberts* and not *Runyon* was the governing precedent. Even under *Roberts*, however, it was not at all clear that the Ku Klux Klan had the right to exclude African Americans from its march. Indeed, *Roberts* suggests that because the government has a compelling interest in eradicating discrimination against African Americans and Jews, the Klan's right of expressive association would have to yield to the law. The district court resolved this dilemma by ignoring the majority opinion in *Roberts*, and relying instead on Justice O'Connor's concurrence. The court noted that forcing the Klan to allow African Americans to march in its parade would "change the primary message which the KKK advocates."⁴⁶ As a nonprofit, primarily expressive association, the Klan had a First Amendment right to discriminate to avoid this harm.

Similarly, in *City of Cleveland v. Nation of Islam*,⁴⁷ a federal district court held that Cleveland acted improperly when it refused to rent a public building to the Nation of Islam. The Nation planned to hold a men-only meeting in the Cleveland Convention Center in violation of Ohio's public accommodations statute. On motion for a declaratory judgment from the city, the court found for the Nation of Islam on what amounts to expressive association grounds. The court found that "[i]f the City is allowed to make the public accommodation law requiring Minister Farrakhan to speak to a mixed audience, the content and character of the speech will necessarily be changed."⁴⁸ This court avoided considering the city's compelling interest in eradicating discrimination, as seemingly required by *Roberts*, by couching its holding in general freedom of speech terms, rather than more specifically relying on the expressive association right.⁴⁹

By contrast, in *Southgate v. United African Movement*,⁵⁰ the New York City Commission on Human Rights rejected the idea that a Black separatist organization had a constitutional right to exclude whites from its otherwise public meetings. The commission acknowledged that United African Movement⁵¹ proved "that there is a nexus between its racially discriminatory membership policies and the group's message that Caucasians and people of African descent should not mix."⁵² Forcing the Movement to admit whites to its meetings diluted the group's message, which

⁴⁶ *Id.* at 289.

⁴⁷ 922 F. Supp. 56 (N.D. Ohio 1995).

⁴⁸ *Id.* at 59.

⁴⁹ See Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. REV. 1243 (1997).

⁵⁰ No. MPA 95-0851, PA 95-0031, 1997 WL 1051933 (N.Y.C. Com. Hum. Rts. June 30, 1997).

⁵¹ For background on the United Africa Movement, see Shawn M. Larsen, *For Blacks Only: The Associational Freedoms of Private Minority Clubs*, 49 CASE W. RES. L. REV. 359 (1999).

⁵² *Southgate*, 1997 WL 1051933.

infringed upon its right to expressive association.⁵³ The commission concluded, however, that under *Roberts* New York had a compelling interest in eradicating discrimination on the basis of race, and that this interest trumped the Movement's First Amendment rights.⁵⁴

Dale resolves all of these cases on the side of the right of expressive association. To force separatist groups to integrate themselves, or even their audiences, would inhibit the ability of such organizations to preach separatism at least as much as forcing the Boy Scouts to employ Dale would have interfered with the Scouts' anti-homosexual activity message. Regardless of statutory law, the Constitution protects the right of a nonprofit segregationist school to exclude African Americans, of the Ku Klux Klan to discriminate against African Americans and Jews, of the Nation of Islam to exclude women, and of the United African Movement to limit its members and audiences to African Americans.

III. EXPRESSIVE ASSOCIATION AND RACIAL PREFERENCES IN PRIVATE UNIVERSITIES

Overtly racist and sexist organizations are not the only private, nonprofit, primarily expressive groups that have an ideology that leads them to discriminate. Many private universities seek to instill in their students an appreciation of the importance of racial diversity at the highest levels of society. These universities

⁵³ *Id.* Cf. Alexis Chiu, *Woman Sues Nation of Islam*, Associated Press, Aug. 6, 1999, available at 1999 WL 22031085. Marceline Donaldson, a sixty-something, African American, former civil rights worker, closed her antique shop early to attend a speech by Louis Farrakhan at Boston's Strand Theater with her husband. "Being turned away at the door by a black man was overwhelming. When he moved me aside, my blood pressure started to go up." *Id.* Nation of Islam security turned her away, explaining that the meeting was for men only. The Donaldsons sued for compensatory and punitive damages for the emotional stress they suffered and also injunctive relief to prevent the Nation of Islam from discriminating in who it admits to public meetings. "'My life has been about fighting for civil rights,' Donaldson said. 'I have lived through 'Colored only' signs, 'Whites only' signs. Then, in Boston, in 1994, to be turned away at the door by a black man . . . it was overwhelming.'" Bryan Robinson, *African-American Couple Takes Nation of Islam and Farrakhan to Court Over Alleged Discrimination*, Court TV Online, at http://www.courtstv.com/trials/farrakhan/080499_ctv.html (Aug. 4, 1999) (ellipses in original). A state court judge eventually dismissed the case, stating that "[f]reedom of religion and freedom of religious expression, which traditionally will exempt a religion from certain discrimination laws, is applicable here." *Suit Against Nation of Islam Tossed*, Associated Press, Aug. 10, 1999, available at 1999 WL 22032294.

Ms. Donaldson failed to notice an obvious irony—she was eager to attend a talk given by the leader of a racist and anti-Semitic organization, but became angry only when the organization discriminated against *her*.

⁵⁴ *Southgate*, 1997 WL 1051933.

consider the promotion of “diversity”⁵⁵ so important that they use racial preferences—often massive racial preferences⁵⁶—in their admissions process to achieve diverse student bodies.

Few schools directly admit that they engage in racial preferences.⁵⁷ Instead, their representatives hem and haw, expressing their commitment to diversity and affirmative action while also claiming that the minority students they accept are just as well-qualified as the white students.⁵⁸ Consider Dean Herma Hill Kay of Boalt

⁵⁵ I put “diversity” in quotation marks because at many schools the concept seems limited to racial diversity, and even then non-left-wing members of racial minority groups are not thought to contribute to “diversity.” See generally Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059 (1996).

⁵⁶ Some have argued that racial preferences are basically limited to the top twenty percent of American universities that have selective admissions policies. See Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 OHIO ST. L.J. 971 (1998). The gaps in SAT scores between white and African American students at these schools can be substantial. See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 408 tbl. 9 (1997) (reporting large gaps at several elite universities). The gaps may be even greater at schools that are selective, but not at the Ivy League or equivalent level. One scholar estimates that the average “plus” given to African American and Hispanic applicants at such schools is worth approximately 400 SAT points. See Kane, *supra*, at 991. A recent study of state universities suggests that while the most selective schools have the strongest racial preference programs, almost all schools utilize such preferences to some degree. Robert Lerner & Althea K. Nagai, *Pervasive Preferences: Racial and Ethnic Discrimination in Undergraduate Admissions Across the Nation* (Feb. 2001), available at <http://www.ceousa.org/html/multi.html>.

⁵⁷ See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 14 (1991) (“it sometimes seems as though the [affirmative action] programs are not supposed to have any beneficiaries”); Lerner & Nagai, *supra* note 56 (stating that while there has been grudging acknowledgment that preferences are used, “very little information has been disclosed to the public”).

⁵⁸ Professor Samuel Issacharoff mockingly refers to this as the “Georgetown defense.” See Samuel Issacharoff, *Can Affirmative Action be Defended?*, 59 OHIO ST. L.J. 669, 672 n.9 (1998). A decade ago, Georgetown Law Center was rocked with controversy when a student employee in the admissions office revealed that African American students at Georgetown Law had significantly lower test scores and GPAs than did white students. See Ken Myers, *Georgetown Battle Is Concluded, But War of Words Doesn't Let Up*, NAT'L L.J., June 10, 1991, at 4; Ken Myers, *Article in Georgetown Newspaper Sparks Investigation at University*, NAT'L L.J., Apr. 29, 1991, at 4. Anyone who paid attention to law school admissions statistics was well aware that the only way Georgetown could have a class with eleven percent African American representation was to engage in significant racial preferences, indeed preferences almost certainly far more significant than any given to any other discreet group, such as children of alumni. See, e.g., Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 16 tbl. 5 (1997). Dean Judith Areen refused to defend forthrightly Georgetown's policy of racial preferences, instead penning a defense of Georgetown's policies that can only be

Hall Law School's response when she was asked on national television in April 1995 why there was "a widespread perception that the minorities who are admitted with those special considerations are the result of standards being lowered."⁵⁹ Kay responded that law schools do not lower standards to admit minorities. Rather, when schools "choose between two equally qualified persons,' . . . [they] pick the 'person of color' in order to 'do something about the really fundamental problem of racial prejudice in this society.'"⁶⁰

described as a masterful example of lawyerly evasion and circumlocution. See Judith C. Areen, *Affirmative Action: The Benefits of Diversity*, WASH. POST, May 26, 1991, at D7. While Areen claimed that the student employee's claims were misleading and tendentious, she refused to reveal the actual underlying statistics. See also Stephan Thernstrom, *Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education,"* 15 CONST. COMM. 11, 21 (1998). Thernstrom stated:

[N]one of those who claimed that McGuire's information was 'incomplete and distorted' saw fit to release complete and undistorted data that might have refuted his charges. If he had been all wrong, it should have been easy to demonstrate it. The magnitude of the preferences being given to minority applicants to law schools remained a closely guarded secret.

Id.

Dean Jeffrey S. Lehman of the University of Michigan Law School, which is currently defending itself from a reverse discrimination lawsuit, hedges somewhat in his defense of racial preferences. Jeffrey S. Lehman, A Statement from the Dean, *available at* <http://141.211.44.51/newsandinfo/lawsuit/statement.htm> (defending racial preferences as a means of ensuring crucial diversity while claiming that "racial diversity is a secondary interest," but not revealing the relevant statistical disparities between students admitted for diversity reasons and other students). As this Article went to press, a federal district court found that Michigan's racial preferences amounted not to a "secondary interest" but to racial quotas. *Gutter v. Bollinger*, No. 97CV75928-DT, 2001 WL 293196, *25 (E.D. Mich. Mar. 27, 2001) ("The practical effect of the law school's policy is indistinguishable from a straight quota system").

⁵⁹ Thernstrom, *supra* note 58, at 19-20.

⁶⁰ *Id.* at 20. Also consider this memorandum, sent from Yale Law School Associate Dean Stephen Yandle to Yale law students, after admissions data had been released to a student writing a research paper on affirmative action:

[I]n light of the rumors that are circulating that certain individuals and groups—minority students and groups—have subpar credentials, I do want to say a bit about what could have been discovered from the information if a recipient had compromised confidentiality. One of the reports contains a grid with LSAT scores in small bands on one axis and GPA's in small bands on the other. "Cells" are produced for the possible GPA and LSAT combinations. There are no minority students in the Law School whose credentials occupy a cell that is not also occupied by non-minority students or not adjacent to a cell occupied by non-minority students. In short there are no minority students whose individual credentials are statistically different from non-minority students. That is not to say that there are no differences among the credentials of students in this law school

In fact, like elsewhere in academia, racial preferences are rampant in American law school admissions. According to a study conducted by Linda Wightman, a supporter of affirmative action/racial preferences, based on their LSAT score and GPAs eighty percent of law school offers of admission to African American applicants in 1990-91 were the result of racial preferences.⁶¹ Moreover, preferences were particularly dramatic at elite law schools. Among the schools Wightman tagged as most selective and prestigious, 17.5 times as many African American students were admitted as would have been the case if academic qualifications alone had been taken into account.⁶² On the lower end of things, approximately half of all African American matriculants to law school in 1991 would not have been admitted to any law school based purely on their numbers.⁶³ These statistics exaggerate the role of racial preferences to some degree, because even race-neutral admissions officers would take into account factors other than tests scores and GPA, such as overcoming adversity, which would likely disproportionately benefit African Americans. Nevertheless, "Professor Wightman is doubtless correct that

(although the differences are remarkably small), but to say that the range of credentials among minority students is congruent with the credential range of non-minority students. Another report shows mean credentials for students by ethnic group. It reveals that the mean LSAT for minority student is within the LSAT's standard error of measurement of the mean for non-minority students. When separate ethnic groups are broken out the variance changes only slightly in spite of the potential for greater variance as groups become quite small. The GPA differences among groups are similar in magnitude.

Memorandum from Stephen D. Yandle to Yale Law School Students, April 6, 1990 (reprinted with permission).

The point of this memo is to argue that any differences between minority and non-minority students are inconsequential. In fact, however, a close reading reveals that no non-minority students share the same admissions cell with the least-credentialed minority students, and the memo does not say how many students are in each cell. Moreover, while the overall mean for minority students compared to white students is within the standard measurement of error for the LSATs (currently 2.7 points, see <http://www.powerscore.com/scale.htm>), the gap is greater than that for some minority groups' median. The most significant omission in the memo, however, is that Yale, as the most selective school in the country, gets the very best minority students, some of whom would be admitted regardless of race. Therefore, discussion of means (averages) significantly obscures the likelihood that the gap between the minority students with the lowest numbers—the ones who benefit most from racial preferences—and the class mean is quite large, and significantly larger than the gap between the mean and the lowest-numbered non-minority students. The racial preferences in admission might be even more dramatic if medians rather than means were considered. Note that Dean Yandle, like Dean Areen, could have settled the controversy by releasing any relevant statistics that would not have revealed confidential information.

⁶¹ See Wightman, *supra* note 58, at 16 tbl.5.

⁶² *Id.* at 30 tbl. 6.

⁶³ *Id.* at 22 tbl. 5.

strong racial preferences were given in the law school admissions process in the 1990-91 application cycle.”⁶⁴ At Boalt Hall, admissions of African American students precipitously dropped once the school stopped using racial preferences.⁶⁵

The main reason universities lie about their racial preference programs is because many such programs are at least arguably illegal. In the famous *Bakke* case,⁶⁶ four Justices concluded that racial preferences always violate Title VI, which bans discrimination by federally funded schools.⁶⁷ Justice Powell, concurring in reversing the University of California’s quota system, concluded that racial preferences were legal only if they were used as a plus factor along the lines of other plus factors universities use to diversify their student bodies.⁶⁸ Many universities, however, treat racial minorities, especially African Americans, as members of a special category that gets far more favorable treatment than any other discrete category. Even making the controversial assumption that Justice Powell’s concurrence in *Bakke* is the holding of the case,⁶⁹ and assuming that this holding has not been overridden by later Supreme Court decisions on racial preferences,⁷⁰ many schools still violate the law.⁷¹ Making less heroic assumptions, all racial preference programs by public or private universities violate federal law. For a school to admit it engages in racial preferences would be to invite litigation by disgruntled white students rejected by the school.

While public university racial preference programs have suffered stinging political and legal defeats over the last several years,⁷² private universities largely

⁶⁴ Thernstrom, *supra* note 58, at 16.

⁶⁵ See Lynda Gorov, *Affirmative-Action Ban Alters Terrain in Calif.*, BOSTON GLOBE, Dec. 23, 1997, at A1.

⁶⁶ Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

⁶⁷ *Id.*

⁶⁸ *Id.* at 314, 317-18 (Powell, J., concurring).

⁶⁹ A dubious assumption. See, e.g., Alan J. Meese, *Reinventing Bakke*, 1 GREEN BAG 2d 381 (1998).

⁷⁰ See Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (finding that Justice Powell’s opinion in *Bakke* is not binding precedent). *But cf.* Smith v. Univ. of Wash. Law School, 233 F.3d 1188, 1200 (9th Cir. 2000) (stating that the court will treat Justice Powell’s opinion in *Bakke* binding until the Supreme Court instructs otherwise).

⁷¹ See Alan J. Meese, *The Constitution Under Clinton: A Critical Assessment: Bakke Betrayed*, 63 L. & CONTEMP. PROBS. 479 (2000) [hereinafter Meese, *Bakke Betrayed*] (discussing how many university affirmative action programs violate federal law); Meese, *Reinventing Bakke*, *supra* note 69, at 386.

⁷² The Third Circuit has held that non-remedial preferences in the employment of public high school faculty is illegal. See *Taxman v. Bd. of Educ. of Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (en banc). The Fourth Circuit has outlawed state university scholarships reserved for members of minority groups. See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994). The Fifth Circuit has held that racial preferences at state universities are unconstitutional. See *Hopwood*, 78 F.3d at 944. California and Washington have enacted

have carried on with their preference programs without interference. The opponents of racial preferences—most prominently The Center for Individual Rights, which litigated the *Hopwood* case—have refrained from suing private schools for libertarian ideological reasons.⁷³ Eventually, however, private schools will be sued for discriminating against white and/or Asian applicants. A plaintiff could bring a case against a private university under Title VI,⁷⁴ 42 U.S.C. § 1981, which outright bans discrimination in educational and other settings,⁷⁵ and state antidiscrimination laws.

Universities could respond to an anti-racial preferences lawsuit with a variety of First Amendment defenses, the most promising of which post-*Dale* would be an expressive association defense. Just as employing Dale would have diluted the Boy Scouts' anti-homosexual activity message, forcing private universities to adopt race-neutral admissions policies would dilute their pro-diversity message. Not unreasonably, the administrators of elite universities believe that if the law prohibits them from utilizing racial preferences, instead in effect requiring them to have an overwhelmingly white (and, increasingly, Asian American) class, it will be far more difficult to promote to their students the ideals of racial diversity and assistance to disadvantaged minorities.⁷⁶

referenda that ban government racial preferences, CAL. CONST., art. I § 31 (2001) (Prop. 209), Rev. Code Wash. § 49.60400 (2000) (Wash. Initiative 200), and Florida is dismantling its university affirmative action program. See *Equity in Education-Executive Summary* at http://www.myflorida.com/myflorida/government/learn/one_florida/educationSummary.html.

⁷³ See Terry Carter, *On a Roll (back)*, 84 A.B.A. J. 54, 56 (1998).

⁷⁴ See generally *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99 (1983) (finding that the Title VI prohibitions on racial discrimination mirror those of the Equal Protection Clause). However, there is some ambiguity as to whether a Title VI lawsuit could be successful, given current federal regulatory guidance to universities. Well-established precedent suggests that Spending Clause statutes "must give potential recipients of federal funding unambiguous notice of the conditions they assume when such funds are accepted before liability under such a statute may be allowed." Issachoroff, *supra* note 58, at 673 n.11. The Department of Education's implementing regulations allow for racial preferences well beyond what a reasonable interpretation of *Bakke* allow. See generally Meese, *Bakke Betrayed*, *supra* note 71, at 493.

⁷⁵ See *Runyon v. McCrary*, 427 U.S. 160 (1976). Section 1981 has been held to apply to a white person who suffers discrimination, even though the statutory language also seems to preclude this possibility. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976). However, the statutory language clearly applies only to state and not private discriminatory action. Once the Supreme Court decided to ignore the statutory language in one regard, it apparently saw no reason to adhere to the language in other contexts.

⁷⁶ It will also, of course, become more difficult to aid minority students directly by admitting them, but this is not an interest protected by the expressive association right, but rather seems more like the general right of association that the *Runyon* Court held cannot justify discrimination. See *Runyon*, 427 U.S. at 175-76.

Moreover, having a racially homogenous class inherently sends a negative or at best indifferent message about the importance of diversity. Engaging in racial preferences on behalf of under represented minorities, by contrast, sends a message to both students and the world at large that the university rejects applying dubious "meritocratic" standards in a society that has what many argue amounts to an entrenched racial hierarchy.⁷⁷ Recall that in *Dale* the Court held that the Boy Scouts had a First Amendment right to teach "by example."⁷⁸ Similar arguments could be made to protect a university's right to engage in racial preferences in hiring.

There are no barriers to a school's asserting an expressive association defense to Section 1981 or state antidiscrimination laws that simply prohibit race discrimination.⁷⁹ A First Amendment defense to Title VI, however, is a trickier matter. In *Grove City College v. Bell*,⁸⁰ the Supreme Court held that the paperwork requirements of Title IX, an amendment to the 1964 Civil Rights Act, do not conflict with the First Amendment because private colleges are free to avoid Title IX's dictates by refusing federal funds.⁸¹ Courts could rule that by analogy Title VI does not conflict with the First Amendment because schools could evade its strictures by eschewing government money.

However, as this Author has discussed elsewhere,⁸² *Grove City* should be overruled, and in any event the case may very well be of limited precedential value because of its very narrow facts. *Grove City*, for example, involved a minor loss of funding and a minor, tangential infringement on First Amendment rights. By contrast, a successful Title VI case against racial preferences would involve both a major infringement on the right of expressive association, and, because of the Civil Rights Restoration Act of 1990, jeopardize all of a university's federal

⁷⁷ For a passionate defense of affirmative action on these and other grounds, see Jamin B. Raskin, *Affirmative Action and Racial Reaction*, at <http://www.zmag.org/zmag/articles/may95raskin.htm>. Unfortunately, among other weaknesses in this article, Raskin cannot resist what appears to be the common urge among proponents of racial preferences to accuse those who disagree with them of being racists. See *infra* note 86.

It would aid the universities' case that basing admissions primarily on test scores and GPA is dubious if they refrained from applying this standard to all students but under-represented minority students.

⁷⁸ *Boy Scouts of Am. v. Dale*, 530 U.S. 640; 120 S. Ct. at 2455.

⁷⁹ Note, however, that a litigant probably would argue that universities are closer to the primarily non-expressive, commercial Jaycees organization than to the primarily expressive Boy Scouts. See *Roberts v. Jaycees*, 468 U.S. 609, 631-40 (1984) (O'Connor, J., concurring). On the one hand, it is difficult to argue that universities are not primarily expressive. On the other hand, a university degree does confer economic advantages on its recipients that leadership in the Boy Scouts does not.

⁸⁰ 465 U.S. 555 (1984).

⁸¹ *Id.* at 575-76.

⁸² See Bernstein, *supra* note 36, at 152.

funding, including federally guaranteed student loans.⁸³ Since almost no colleges are able to survive without federal funding, the unconstitutional conditions doctrine may very well apply.⁸⁴

The end result of private universities successfully asserting expressive association defenses to lawsuits challenging racial preferences would be that racial preferences in admissions would continue, but in a much more honest and healthy way than is the case today. Because universities fail to acknowledge that they engage in racial preferences, many otherwise well-informed people, including many of the beneficiaries of racial preferences, are unaware of their existence and scope. Many students, especially minority students, at best take universities' official position of non-discrimination (or, as Dean Hill claimed, their use of race merely as a tie-breaker) at face value, and at worst suspect invidious discrimination in admissions against minorities. Consider that the official web site of the Law School Admissions Council states: "We often hear . . . in the Office of Minority Affairs at Law School Admission Council: 'Is it okay to say I'm a minority student when I apply to law schools? I've heard it's better not to tell.'"⁸⁵ Ironically, those who correctly point out that African Americans are heavily favored in admissions are dismissed as racist cranks.⁸⁶

Ultimately, having universities successfully defend racial preferences on expressive association grounds would be a win-win situation. First, the right of private schools with an ideological commitment to promoting racial diversity to engage in racial preferences would be secure. Second, the litigation would force the universities to admit that they engage in racial preferences. Ideally, the schools would also provide details regarding the scope of their preferences so that the debate on affirmative action could proceed openly and honestly.⁸⁷

School officials repeatedly tell African American students that as a group they are just as qualified academically as their white classmates. Yet, when grades come in, it becomes clear that on average African American students get significantly lower grades than whites.⁸⁸ Given the counterfactual spin by university

⁸³ See *id.*

⁸⁴ See *id.* at 153.

⁸⁵ [Http://www.lsac.org/minorities-in-legal-education-selected-articles.asp#Showing Your Color: Minority Applicants and Law School Admission](http://www.lsac.org/minorities-in-legal-education-selected-articles.asp#Showing Your Color: Minority Applicants and Law School Admission).

⁸⁶ See, e.g., D'SOUZA, *infra* note 101, at 194-200 (recounting that students denounced as "racist" a professor who defined affirmative action as "preferential treatment in hiring, promotion, and college admissions"); Anthony T. Pierre, Leslie M. Turner, & Steven M. Hilton, Editorial, *Degrees of Success*, WASH. POST, May 8, 1991, at A31 (dismissing the student who started the Georgetown Law Center controversy as a racist crank).

⁸⁷ See CARTER, *supra* note 57, at 14-15 (arguing that universities should be open about their racial preferences).

⁸⁸ For example, an early 1980s study of the nation's top ten law schools found that the average African American student's GPA was at the eighth percentile of his class. ROBERT

spokespeople that various student populations have equivalent academic credentials, this anomaly could only be explained if universities are institutionally racist, and hidden racism is rampant.⁸⁹ In the atmosphere of mistrust that is engendered, all sorts of pernicious and foolish notions thrive.⁹⁰ More honesty about admissions policy would go a long way toward reducing this mistrust.

Some would no doubt argue that schools that acknowledged their racial preferences publicly would be not be able to successfully defend themselves in the court of public opinion. In some cases, that may be true. But if a particular school's racial preferences cannot be defended publicly, perhaps the school should rethink the scope of its preferences.⁹¹ On the other hand, if universities were more forthright in their acknowledgment and defense of racial preferences in admissions, they might be able to develop a much stronger constituency in favor of the preferences. Moreover, a forthright acknowledgment by elite universities of the difficulty in finding African American (and to a lesser extent, Latino) students with the schools' standard required credentials⁹² might lead to some useful national soul-

KLITGAARD, CHOOSING ELITES 162-63 (1985). A late 1980s study showed that the mean law school GPA of African American students in California was at "around the 15th percentile." See Stephen P. Klein, *Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications*, 16 T. MARSHALL L. REV. 517, 524 (1991). At elite undergraduate institutions, a recent book shows that "the cumulative grade-point average of the African-American students . . . puts them at the 23rd percentile (i.e., in the bottom quarter) of their class." Even that figure is "deceptively rosy," because it does not differentiate "between black students admitted regularly and those admitted preferentially." Stephan Thernstrom & Abigail Thernstrom, *Racial Preferences: What We Now Know; Affirmative Action in University and College Admissions*, COMMENT., Feb. 1999, at 44.

⁸⁹ This is not to deny that racism, institutional and otherwise, still exists on university campuses. Rather, I am arguing that at most schools, especially elite schools, such racism is not the primary cause of the academic difficulties faced by African Americans.

⁹⁰ For example, pseudo-scientific Afrocentricism is rampant in American universities, see MARY LEFKOWITZ, *NOT OUT OF AFRICA: HOW AFROCENTRISM BECAME AN EXCUSE TO TEACH MYTH AS HISTORY* (1997), and African Americans are the only group in America whose level of anti-Semitism is positively correlated with youth and education. See, e.g., Henry Louis Gates, Jr., Editorial, *Black Demagogues and Pseudo-Scholars*, N.Y. TIMES, July 20, 1992 at A15 (condemning this trend of "top-down anti-Semitism, in large part the province of the better-educated classes").

⁹¹ Cf. Issacharoff, *supra* note 58, at 672-73 (arguing that while University of Texas admitted the extent of its racial preferences only in response to litigation, "it behooves any institution of higher education . . . to account for how it confers this important societal benefit").

⁹² For example, in 1996-97 only 103 African Americans and 224 Hispanics had a college GPA of 3.25 or above and LSAT scores at or above the 83.5 percentile, and only sixteen African Americans and forty-five Hispanics achieved the 92.3 (164 LSAT) percentile with a 3.50 or higher GPA. See John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AM. LAWYER, Nov. 1997, at 4.

searching regarding the educational opportunities given minority students.

III. EXPRESSIVE ASSOCIATION AND SPEECH CODES

Modern universities generally have portrayed their primary mission as pursuing truth.⁹³ Anything that could interfere with that mission, such as restrictions on freedom of speech on campus, has been considered anathema. More recently, some colleges explicitly have "enunciate[d] special educational goals that are understood to be inherently incompatible with racist expression."⁹⁴ For example, Mount Holyoke has announced that "[o]ur community is committed to maintaining an environment in which diversity is not only tolerated, but celebrated."⁹⁵ The goal of Mary Washington College, meanwhile, "is to help all students achieve academic success in an environment that nurtures, encourages growth, and develops sensitivity and appreciation for all people."⁹⁶

To promote respect for diversity, many universities have restricted through speech codes certain types of expression in order to create a more open and inclusive atmosphere for minority students. Advocates claim that speech codes express a university's opposition to hate speech and demonstrate commitment to the creation of a non-discriminatory educational environment in which all views can be heard, if expressed collegially.⁹⁷ Moreover, even ineffectual speech codes are said to send a symbolic message that minorities' interests will be taken into account.⁹⁸

⁹³ For example, the motto of my alma mater, Brandeis University, founded in 1947, is "Truth Even Unto Its Innermost Parts."

⁹⁴ Robert Post, *Racist Speech, Democracy, and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 117, 121 (Henry Louis Gates Jr. et al., eds. 1994).

⁹⁵ *Id.*

⁹⁶ *Id.* at 122.

⁹⁷ See Henry Louis Gates, Jr., *Let Them Talk*, *NEW REPUBLIC*, Sept. 20 & 27, 1993, at 37, 42-43; see also Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *MICH. L. REV.* 2320, 2371 (1989) (speech codes protect the values of "inclusion, education, development of knowledge, and ethics that universities exist and stand for."). As Professor Randall Kennedy puts it:

If a group of people want to get together and say, "We're tired of people going on campus and saying all sorts of things which in our view degrade a community of scholars. We don't think it's good for scholarship for people to go around using the word 'nigger' or the word 'kike.' If you're on this campus, you use that word and you're off it. We don't want that." Why isn't it consonant with your principles to let a thousand flowers bloom, and for those people to be able to speak by a creating a campus that is to their liking. There are a lot of other campuses.

SPEECH AND EQUALITY: DO WE REALLY HAVE TO CHOOSE? 75 (Gary LaMarche, ed. 1996).

⁹⁸ See Matsuda, *supra* note 97.

In practice, speech codes are often not so innocuous. Instead of being sincere efforts to create a campus climate of tolerance and understanding, speech codes are frequently written and/or enforced in such a way as to empower left-wing, "politically correct" elements of the university community to censor their ideological opponents.⁹⁹ As one expert notes, "too often, campus hate speech policies and those responsible for their enforcement are not interested in free speech or a level playing field, they are interested in retribution and competitive advantage in winning the minds of incoming students by silencing and punishing their opponents."¹⁰⁰

Indeed, in the early 1990s some conservatives, enraged by what they perceived as political correctness run amok on college campuses,¹⁰¹ advocated banning speech codes at private universities.¹⁰² Their unlikely bedfellow was the ACLU, which saw an opportunity to achieve its dual goals of expanding freedom of expression and weakening the public-private distinction that normally shields private organizations from being subject to constitutional restraints.

An effort by the ACLU and Representative Henry Hyde to pass a law requiring federally funded universities to protect freedom of speech on campus eventually died,¹⁰³ as did a similar effort by Senator Larry Craig.¹⁰⁴ California, however,

⁹⁹ See, e.g., RICHARD BERNSTEIN, *DICTATORSHIP OF VIRTUE* 112-15 (1994); ALAN C. KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* (1998); JONATHAN RAUCH, *KINDLY INQUISITORS* 26 (1993); Michael S. Greve, *Civil Rights and Uncivil Speech*, 1994 PUB. INT. L. REV. 1, 16 (1994). On the incredible variety of (mostly) non-racist comments that have been denounced as racist, and thus potentially actionable under many campus speech codes, see Paul Trout, *Racist as an Epithet of Repression*, at <http://mtprof.msun.edu/Fall1995/trout.html>.

¹⁰⁰ TIMOTHY C. SCHIELL, *CAMPUS HATE SPEECH ON TRIAL* 62-63 (1998). Such a goal may be defensible at a private university, if the university publicly enunciates its goal to exalt what its governing authorities believe to be the "good and true, which means suppressing the bad and the false in the process of constructing hierarchies of intellectual virtue." Randall Kennedy, *Should Private Universities Voluntarily Bind Themselves to the First Amendment? No!*, *CHRON. OF HIGHER EDUC.*, Sept. 21, 1994, at B1. Much of the harm caused by speech codes results from universities claiming to believe in free expression and the unhampered search for truth, but not following that stated goal in practice.

¹⁰¹ The most prominent book documenting political correctness on campus was DINESH D'SOUZA, *ILLIBERAL EDUCATION* (1991).

¹⁰² Many conservatives, however, opposed such measures as unjustified intrusions on private conduct. See, e.g., L. Gordon Crovitz, *Henry Hyde and the ACLU Propose a Fate Worse than PCness*, *WALL ST. J.*, May 1, 1991, at A15. For a left-wing critique of the hypocrisy of conservatives who supported the Hyde Bill, see Kimberle Crenshaw, *Comments of an Outsider on the First Amendment*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH* 174 (Laura J. Lederer & Richard Delgado eds., 1995).

¹⁰³ See Collegiate Speech Protection Act of 1991, H.R. 1380, 102d Cong. (1st Sess. 1991); Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 *HARV. C.R.-C.L. L. REV.* 339, 341 (1992) (referring to ACLU's "virtual

passed the "Leonard Law," which requires public and private schools to follow First Amendment strictures when determining whether to regulate speech. In other words, if speech would be protected by the First Amendment if the government tried to punish the speaker, a private school also may not punish a member of the school community who engages in such speech.¹⁰⁵

Stanford University found that its (relatively mild) speech code¹⁰⁶ ran afoul of

co-sponsorship" of the bill).

For an apology, see Henry J. Hyde & George M. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469 (1991).

¹⁰⁴ Freedom of Speech on Campus Act of 1991, S. 1484, 102d Cong. (1st Sess. 1991).

¹⁰⁵ It should be noted that California's Leonard Law is not the only state law that bars speech codes. Many states have constitutions that grant an affirmative right of freedom of speech, rather than simply preventing the government from regulating speech as the First Amendment does. Courts in some of these states have held that such constitutional language grants protection of rights to free expression against large nongovernmental authorities that sometimes serve as public forums, such as shopping malls or universities. The New Jersey Supreme Court, for example, has ruled that Princeton University violated a non-student's free expression rights when it ejected him from the campus for distributing political information. See *State v. Schmid*, 84 N.J. 535 (1980). If a university like Princeton is considered a public forum for uninvited visitors, a fortiori it would also be a public forum for the students at the school with whom the university voluntarily associates. Speech codes, then, would not be permissible unless the university could mount an expressive association defense under *Dale*.

¹⁰⁶ As summarized by the California Superior Court, the speech code was "intended to clarify the point at which free expression ends and prohibited discriminatory harassment begins." As defined by the Speech Code, prohibited harassment includes "discriminatory intimidation by threats of violence and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."

Speech or other expression constitutes harassment by personal vilification if it:

- (a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
- (b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
- (c) makes use of insulting or "fighting" words or non-verbal symbols.

The Speech Code defines insulting or "fighting" words or non-verbal symbols as those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace, and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."

Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995), available at <http://www.law.stanford.edu/library/special/corrym.shtml> at 2.

the Leonard Law. Stanford defended itself in state court on First Amendment grounds,¹⁰⁷ arguing, among other things, that the Leonard Law violated its right to expressive association. The court ruled against Stanford, reasoning that *Roberts* required the university to prove: (1) state-sponsored viewpoint discrimination; (2) that observers are likely to believe that offensive speech by Stanford's students was endorsed by Stanford; or (3) that Stanford did not have adequate means at its disposal to rebut or separate itself from any offensive speech by its students.¹⁰⁸

Regardless of whether this test was an appropriate extrapolation from *Roberts*, this opinion is clearly not good law after *Dale*.¹⁰⁹ The Scouts were not required to meet such a test, and, in fact, almost certainly could not meet such a test. All the Scouts needed to prove was that the organization promoted, to some small degree, a particular view of homosexual activity, and that obeying the law in question would interfere with its ability to promote this point of view. A university that can show that it is committed to maintaining a harmonious campus environment, even at the expense of free speech, thus has an expressive association right to disobey state law and enforce rules banning speech offensive to certain groups.¹¹⁰

CONCLUSION

One commentator, writing before *Dale*, suggested that "under the First Amendment, discrimination of any kind in choosing one's fellows in the conscience-forming enterprise must be viewed as protected expression."¹¹¹ At least

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.*

¹⁰⁹ The opinion may also be incompatible with *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) ("*GLIB*"). See Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1609 (1998). However, the *GLIB* opinion did not clearly rest on the right of expressive association. See *id.*; Bernstein, *supra* note 30.

¹¹⁰ Ironically, if Stanford were to reestablish its speech code, it may not be able to defend itself on expressive association grounds. In the litigation just discussed, Stanford claimed to be unreservedly "committed to the principals of free inquiry and free expression." The speech code itself stated that students have a "right to hold and vigorously defend and promote their opinions Respect for this right requires that students tolerate even expression of opinions which they find abhorrent." Corry, *supra* note 106, at 37.

Even after *Dale*, it will be difficult for a school to win an expressive association case against the Leonard Law or similar litigation if the school refuses to argue that it believes that freedom of expression should be sacrificed to other ends. Many schools that have speech codes seem unwilling to admit that they are in fact suppressing speech, instead claiming they are simply trying to obey Title VI or Title IX. To be entitled to a *Dale* defense, however, these schools will have to publicly acknowledge that their speech codes in fact restrict speech.

¹¹¹ Andrew R. Varcoe, *The Boy Scouts and the First Amendment: Constitutional Limits*

with regard to nonprofit, expressive associations, this is now the law of the land.

Left-wingers have expressed dismay at the result in *Dale*, and the potential consequences of the decision. Not only did *Dale* deal a blow to the gay rights movement, but any nonprofit, primarily expressive group with a discriminatory ideology may now have a First Amendment right to discriminate. Many organizations with opprobrious ideas will evade antidiscrimination laws using *Dale* as a defense. If the Ku Klux Klan were to start an exclusionary university devoted to promoting segregation and white supremacy,¹¹² *Dale* would provide constitutional protection.

But protecting the liberty of those whose views one hates also protects one's own liberty. *Dale* provides protection for private universities that engage in affirmative discrimination in favor of students of color. Elite universities and graduate schools are a strong redoubt of American leftism, and racial preferences at these universities are an integral part of the left's agenda. The legality of these preferences, however, is open to serious question, and political and legal trends are not favorable. Ironically, to save their own preferred version of discrimination from legal attack, the left may ultimately need to rely on the same constitutional doctrine of expressive association that protected the reviled Boy Scouts from New Jersey's antidiscrimination law.

Moreover, *Dale's* rejuvenation of the right of expressive association renders laws banning speech codes by private universities unconstitutional. Because of *Dale*, not only will private universities likely have a constitutional right to engage in racial preferences in admissions, but also a right to punish criticism of such preferences as racist.¹¹³ A university that forbids criticism of its controversial racial

on the Reach of Anti-Discrimination Law, 9 LAW & SEX 163, 276 (1999-2000).

¹¹² Even Randall Kennedy, a particularly cogent "progressive" scholar on these issues, could not when asked countenance the possibility that "Ku Klux Klan University" should be permitted to operate in defiance of antidiscrimination laws. See SPEECH AND EQUALITY, *supra* note 97, at 80-82.

¹¹³ See CARTER, *supra* note 57, at 176. Carter argues:

Very often, these [campus speech] codes are written in language easily broad enough to cover—that is, forbid—the speech of students who want to argue that other students, admitted because of explicit racial preferences, are less capable than students who were admitted without them. Many students, and not a few professors, have argued that the codes should be adopted with that idea in mind.

Id.; see generally D'SOUZA, *supra* note 101, at 238-29 (On many campuses "there is a de facto taboo against a free discussion of affirmative action . . . and efforts to open such a discussion are considered presumptively racist.").

To some, criticizing racial preferences is itself inherently racist and should be censored. For example, the Chicago City Colleges' Board of Trustees sued a teachers' union for printing a satirical critique of affirmative action in its newsletter, and thus allegedly creating an illegal hostile environment. See Eugene Volokh, *Is Criticizing Affirmative Action Illegal in Chicago?*, JEWISH WORLD REV., Aug. 30, 1999. At California State University in

preference policies is hardly everyone's ideal institution of higher learning, and in stifling free expression such a school would run the risk of sacrificing educational excellence to political correctness.¹¹⁴ But, then again, liberals of all stripes could boycott such universities and give their talents to universities that uphold liberal values. Permitting illiberal behavior to go unregulated can be infuriating. Paradoxically, however, as the Court recognized in *Dale*, tolerating illiberal behavior is the price we pay for living in a liberal society.¹¹⁵

Northridge, one student editor was suspended for running a cartoon making fun of affirmative action. A second student was then suspended for criticizing the university's action against the first student. BERNSTEIN, *DICTATORSHIP OF VIRTUE*, *supra* note 99, at 209. Another controversy over an affirmative action cartoon erupted at the University of New Mexico, with attendant cries of racism. See <http://www.contumacy.org/4NHNT.html>. As noted previously, see *supra* note 86, the student who initiated the controversy over racial preferences at Georgetown Law Center was denounced as a racist. See also <http://mtprof.msun.edu/Fall1995/trout.html> (citing various articles in which this student was denounced as a racist).

Of course, the fact that a private university has the right to make and enforce a speech code would not insulate that university from liability if it contractually bound itself to protect freedom of expression on campus.

¹¹⁴ But cf. Kennedy, *supra* note 100 ("I can easily imagine a vibrant, rigorous, intellectually distinguished college whose governing authorities reject" the idea that the purpose of a university is to serve as an open marketplace of ideas.).

¹¹⁵ Illiberal behavior may also have its benefits. See NANCY ROSENBLUM, *MEMBERSHIP AND MORALS* 327 (1999). Rosenblum asserts:

I have highlighted the positive moral uses of incongruent associations that do not conform (and do not wish to conform) to liberal democratic norms. They may cultivate virtues, even if not peculiarly liberal or democratic ones, still moral dispositions that are appreciated in liberal democracy. They may contain vices, allowing them relatively safe expression. Where the conditions for shifting involvement exist, membership may compensate for a deficit of social experience in other areas.