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# NOTES

## ON BOY SCOUTS AND ANTI-DISCRIMINATION LAW: THE ASSOCIATIONAL RIGHTS OF QUASI-RELIGIOUS ORGANIZATIONS

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## INTRODUCTION

In June, 2000, the Supreme Court decided *Boy Scouts of America v. Dale*, upholding by a 5-4 margin the Boy Scouts of America's (BSA) right to refuse membership on the basis of an individual's sexual orientation.<sup>1</sup> Relying on the First Amendment's implied right of "expressive association,"<sup>2</sup> the Court held that requiring the BSA to accept openly gay individuals in leadership positions significantly interfered with the BSA's ability to express its viewpoint.<sup>3</sup> Although initially heralded as a victory for associational (and religious) freedom,<sup>4</sup> in the aftermath of *Dale* the BSA has had less cause to celebrate. During the five years since the Court's decision, the BSA has faced attack on numerous fronts. State and municipal governments across the country have retaliated against the BSA by refusing it access to public facilities,<sup>5</sup> rescinding outstanding contractual relations,<sup>6</sup> revoking privileges,<sup>7</sup> and barring the BSA from participating in state-sponsored charitable programs.<sup>8</sup> Private citizens have entered the fray as well, filing suits alleging that the BSA's use of school

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<sup>1</sup> 530 U.S. 640, 659 (2000) (holding that New Jersey's public accommodations law runs afoul of the BSA's constitutional right of expressive association).

<sup>2</sup> *See id.* at 648 ("[F]reedom of association . . . plainly presupposes a freedom not to associate." (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984))).

<sup>3</sup> *Id.* at 655-56 ("The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."). The policy in question was the BSA's stated "desire to not 'promote homosexual conduct as a legitimate form of behavior.'" *Id.* at 653 (quoting Reply Brief for Petitioners at 5, *Boy Scouts of America v. Dale*, 530 U.S. 640, No. 99-699 (2000)).

<sup>4</sup> *See* John C. Eastman, Op-Ed, *On Preserving Bedrock Rights*, WASH. POST, July 3, 2000, at A19 (celebrating *Dale* as a defense of "freedom of speech and freedom of association"); *see also* Harlan Loeb & David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. REV. 27, 42 n.94, 51 (2001) (analogizing freedom of association to free exercise and suggesting that federal courts post-*Dale* will favor free exercise over anti-discrimination laws should conflicts arise between the two.)

<sup>5</sup> *See* *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1297 (S.D. Fla. 2001) (explaining that the Broward County School Board cited the School's official anti-discrimination policy when terminating its five-year partnership agreement that had authorized the BSA's after-hour use of school facilities).

<sup>6</sup> *See* *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003).

<sup>7</sup> *See* *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696, 698 (Cal. Ct. App. 2002) (observing how the City of Berkeley referred to its official anti-discrimination policy when revoking the BSA's rent-free use of a public marina and how the City required the BSA to pay the fee that other members of the public must pay), *review granted*, 65 P.3d 402 (Cal. 2003).

<sup>8</sup> *See* *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 83-85 (2d Cir. 2003) (explaining that the Connecticut State Employee Campaign cited the state's Gay Rights Law when denying the BSA's participation in the annual workplace charitable campaign, in which state employees make voluntary contributions to charities selected from a list of participating organizations), *cert. denied*, 541 U.S. 903 (2003).

facilities and receipt of government funding violates the Establishment Clause.<sup>9</sup> While BSA membership has not declined significantly,<sup>10</sup> numerous organizations have retracted existing funding or have refused to contribute to the BSA.<sup>11</sup>

The BSA likely never intended its victory in *Dale* to propel it toward the front lines of the culture wars. But for many, the BSA has become a symbol of discrimination and a lightning rod for public debate over anti-discrimination laws, gay rights, religion, and morality.<sup>12</sup> As a result, some governmental bodies do not want to risk alienating a voting majority opposed to discrimination by appearing allied with the BSA.<sup>13</sup> Similarly, some private charities, themselves beneficiaries of the same associational freedoms invoked by the BSA, may fear alienating donors by supporting discriminatory organizations.<sup>14</sup> Finally, many private citizens, both as parents and taxpayers, object to contributing funds to discriminatory groups.<sup>15</sup> *Dale*'s social legacy,

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<sup>9</sup> See *Winkler v. Chi. Sch. Reform Bd. of Trs.*, No. 99C2424, 2005 WL 627966, at \*1 (N.D. Ill. Mar. 16, 2005) (taxpayers suing various state and federal agencies for expending tax funds in support of BSA); *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1263-64 (S.D. Cal. 2003) (lesbian and agnostic parents asserting that twenty-five-year lease between City of San Diego and the BSA for use of public parkland is an unconstitutional establishment of religion); *Scalise v. Boy Scouts of Am.*, 692 N.W.2d 858, 864-66 (Mich. Ct. App. 2005) (humanist father and son alleging that the BSA's distribution and posting of recruitment flyers in and use of school facilities, with the permission of public school, constituted excessive entanglement); *Powell v. Bunn*, 108 P.3d 37, 37 (Or. Ct. App. 2005) (atheist mother and son arguing that school district's community access policy, as applied to permit BSA to make in-school membership presentations to students during their lunch hour, violated state's religious anti-discrimination statute).

<sup>10</sup> See Year in Review: 2003, <http://www.scouting.org/media/review/2002.html> (last visited Feb. 6, 2006) (reporting a 5.4% drop in total youths served and a 2.5% drop in total adult volunteers).

<sup>11</sup> See Lyle Denniston, *Embattled Scouts Struggle to Maintain Funding, Ideology*, BOSTON GLOBE, Sept. 14, 2003, at A12, available at [http://www.boston.com/news/nation/washington/articles/2003/09/14/embattled\\_scouts\\_struggle\\_to\\_maintain\\_funding\\_ideology/](http://www.boston.com/news/nation/washington/articles/2003/09/14/embattled_scouts_struggle_to_maintain_funding_ideology/) (last visited Feb. 6, 2006) (observing that 350 school districts across ten states no longer sponsor BSA activities, and fifty United Way chapters have stopped making financial contributions).

<sup>12</sup> See, e.g., Christopher A. Norbury, Op-Ed, *Molding Faulty Model Citizens*, WASH. POST, July 3, 2000, at A19 (criticizing the BSA for conflating discrimination with allegiance to God and country).

<sup>13</sup> See cases cited *supra* notes 5-8.

<sup>14</sup> Numerous civic, philanthropic, and corporate organizations have severed ties with the BSA since *Dale*. See LAMBDA LEGAL DEFENSE & EDUCATION FUND, THE IMPACT OF THE BOY SCOUTS OF AMERICA'S ANTI-GAY DISCRIMINATION 2 (2003), available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/242.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/242.pdf) (reporting that Chase Manhattan Bank, Levi Strauss, Well Fargo, Fleet Bank, CVS, the Pew Charitable Trust, and various chapters of the United Way, among others, have stopped donating to the BSA).

<sup>15</sup> See cases cited *supra* note 9.

therefore, has been to foster further conflict and disagreement.

*Dale* suffers from two principal shortcomings. First, the Court left unresolved the tension between private individuals' constitutional right to form expressive associations predicated in part on discriminatory dogma, and the legislative power of the majority to express its disapproval of those beliefs by declining to fund such discrimination. Specifically, *Dale* failed to articulate when a governing body may pass anti-discrimination laws that do not directly affect a private association's membership, but instead attempt to influence membership policies by excluding the group from public forums and benefits. As a result, *Dale* fails to provide guidance as to whether a governing body may penalize a group like the BSA for its membership policies, in effect achieving indirectly what government may not achieve directly. Thus, *Dale* fails to anticipate the issues raised by the future application of the doctrine of unconstitutional conditions.<sup>16</sup>

Second, the *Dale* court implicitly rested its holding on the BSA's secular interest in private associational expression.<sup>17</sup> The BSA, however, is not strictly a secular organization. While non-denominational, the BSA requires its members to profess a belief in a theistic conception of God.<sup>18</sup> One of the

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<sup>16</sup> The doctrine of unconstitutional conditions bars government from conditioning one legal right, benefit, or privilege on the abandonment of another legal right, benefit, or privilege, the deprivation of which, standing alone, would have been unconstitutional. See *Perry v. Sinderman*, 408 U.S. 593, 597 (1972):

[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.”

(quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (second alteration in original); see also *Crawford-El v. Britton*, 523 U.S. 574, 589 & n.10 (1998) (“Retaliation is thus akin to an ‘unconstitutional condition’ demanded for the receipt of a government-provided benefit.”); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1922 (1995); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675, 679 (1992) (“[G]overnment may not condition benefits on the forfeiture of constitutional rights . . . .”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1413 (1989) (“The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”).

<sup>17</sup> The Court at no point mentions the BSA's potential religious values, but instead observes that the BSA aims to inculcate youth with “a positive moral code for living.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000).

<sup>18</sup> See BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK 9 (11th ed. 1998) (“On my honor I will do my best / To do my duty to God and my country . . . .”); Declaration of Religious Principle, *Bylaws of Boy Scouts of America*, art. IX, § 1, cl. 1 (“The Boy Scouts of America maintains that no member can grow into the best kind of citizenship without

dominant purposes of Scouting “is to equip youth of all races, colors and creeds to fulfill their duty to God.”<sup>19</sup> Thus, while the BSA is not an organized religion devoted exclusively to matters of faith, the value system the BSA seeks to instill in youth includes strong religious components. As an organization, then, the BSA lies between two poles. On one side are bona fide religious organizations such as the Catholic Church or the Nation of Islam; on the other are expressly secular organizations like the Jaycees<sup>20</sup> or Augusta National Golf Club.<sup>21</sup> The BSA inhabits a middle ground, neither religious nor secular as defined by law, but exhibiting both religious and secular characteristics. The *Dale* Court failed to anticipate the potential collision between anti-discrimination laws and the First Amendment rights of quasi-religious associations.

This Note argues that the BSA is a quasi-religious organization deserving greater associational protections than secular organizations. First Amendment law tends to view organizations in binary terms: an organization is either religious or secular.<sup>22</sup> But many organizations rely on both secular and religious teachings in articulating their expressive purpose. Examples include the YMCA, recovery groups like Alcoholics Anonymous, charitable organizations associated with organized religions, and employers who seek to provide employment to co-religionists with special employment needs.<sup>23</sup> Categorizing these groups as secular because they do not function as traditional religious organizations – for example, by proselytizing or managing the affairs of an organized religion – overlooks these groups’ religious character and thus marginalizes the role of religion in their affairs both legally and politically. The BSA is such an organization because it seeks to inculcate in youth a system of moral values that finds its roots in both secular and religious teachings. The *Dale* Court neither acknowledged nor discussed the BSA’s religiosity. This Note contends that courts examining claims by or against organizations exhibiting quasi-religious characteristics should acknowledge their religious character in order to better effectuate the underlying purposes of the religion clauses.<sup>24</sup>

The argument proceeds in five parts. Part I surveys post-*Dale* cases involving the BSA and its rights as a private expressive association. Part II synthesizes cases involving the religion and speech clauses of the First

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recognizing an obligation to God.”).

<sup>19</sup> *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1277 (7th Cir. 1993).

<sup>20</sup> See United States Junior Chamber Jaycees, About the Jaycees, [http://www.usjaycees.org/learn\\_more.htm](http://www.usjaycees.org/learn_more.htm) (last visited Feb. 6, 2006).

<sup>21</sup> See Wikipedia: Augusta National Golf Club, [http://en.wikipedia.org/wiki/Augusta\\_National\\_Golf\\_Club](http://en.wikipedia.org/wiki/Augusta_National_Golf_Club) (last visited Feb. 6, 2006) (defining “Augusta” as one of the most famous and exclusive golf clubs in North America).

<sup>22</sup> See discussion *infra* Part III.A.

<sup>23</sup> See discussion *infra* Part III.A.3.

<sup>24</sup> See discussion *infra* Part II.A.

Amendment and the doctrine of unconstitutional conditions in order to set out a general framework delineating the current scope of government control over private associations in terms of anti-discrimination laws and policy. Part II then applies this framework to the BSA and the cases discussed in Part I. Parts III and IV present the heart of the Note. Part III suggests that the framework outlined in Part II is inadequate to protect the associational rights of organizations that are neither purely religious nor secular. This Part then develops a tripartite analysis to classify private associations as religious, secular, or quasi-religious, and suggests that the BSA is a quasi-religious organization. Part IV discusses how the application of this three-part classification scheme comports with the legal framework set out in Part II, and argues that quasi-religious organizations like the BSA should receive greater associational and First Amendment protections than secular organizations. This Part also reviews the cases examined in Part I utilizing the heightened protections this Part advocates.

### I. THE BSA CASES SINCE *DALE*

#### A. Boy Scouts of America v. Dale

In *Boy Scouts of America v. Dale*, the Supreme Court reaffirmed the longstanding principle that the First Amendment protects the right of expressive association.<sup>25</sup> *Dale* involved the BSA's removal of James Dale from the position of assistant Scoutmaster in a New Jersey Scout troop and the revocation of his BSA membership following publication of a newspaper article that revealed Dale was a homosexual.<sup>26</sup> The BSA asserted that it forbade membership to homosexuals, and Dale filed suit alleging violation of New Jersey's public accommodation laws.<sup>27</sup> The New Jersey Supreme Court found that the BSA had violated those laws by revoking Dale's membership solely on account of his sexual orientation, holding "that Dale's membership does not violate [the] Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the BSA's] existing

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<sup>25</sup> 530 U.S. 640, 647 (2000) ("[I]mplicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984))); *see also* *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995) (upholding "the choice of a speaker not to propound a particular point of view, [as] that choice is presumed to lie beyond the government's power to control"); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988); *Roberts*, 468 U.S. at 622 ("The ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government.").

<sup>26</sup> *Dale*, 530 U.S. at 644-45.

<sup>27</sup> *Id.* ("New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation." (citing N.J. STAT. ANN. §§ 10:5-4, 10:5-5 (West 2000))).

members' ability to carry out their various purposes.'"<sup>28</sup> The U.S. Supreme Court reversed.<sup>29</sup>

The Court first remarked that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."<sup>30</sup> After finding that the BSA was an expressive association,<sup>31</sup> the Court determined that Dale's forced inclusion in the BSA would significantly burden the BSA's ability to oppose or disfavor homosexual conduct as part of its expressive message.<sup>32</sup> Applying strict scrutiny, the Court held that New Jersey's interest in enforcing its public accommodation law did not justify requiring the BSA to accept Dale as a member and that the First Amendment prohibited New Jersey from imposing a membership requirement on the BSA.<sup>33</sup> The Court concluded by stating that "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."<sup>34</sup>

Some scholars assumed that *Dale* provided expressive associations like the BSA absolute protection against state anti-discrimination laws in terms of selecting their members.<sup>35</sup> These commentators argued that after *Dale*, government could not intrude upon a private expressive association's ability to define its membership, articulate its message, decide which members will express the group's message on behalf of the group, or exclude competing

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<sup>28</sup> *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1225 (N.J. 1999) (quoting *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)).

<sup>29</sup> *Dale*, 530 U.S. at 661.

<sup>30</sup> *Id.* at 648 (citing *N.Y. State Club Ass'n*, 487 U.S. at 13).

<sup>31</sup> *Dale*, 530 U.S. at 648 ("To come within [the First Amendment's expressive associational] ambit, a group must engage in some form of expression, whether it be public or private."); *id.* at 649-50 ("[T]he general mission of the Boy Scouts is clear: '[T]o instill values in young people.' . . . It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.") (citation omitted).

<sup>32</sup> *Id.* at 659 ("[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.").

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 661 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995)).

<sup>35</sup> See, e.g., Andrew Koppelman, *Case Studies in Conservative and Progressive Legal Orders: Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67 LAW & CONTEMP. PROBS. 27, 27-28 (2004) (listing commentators supporting this view); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1932 (2001) (positing a broad view of *Dale* that would permit a group "to exclude views that may compete for attention, prominence, or dominance within a group, even if they do not conflict with an extant message of the group").

views from being forcibly intermingled with the group's chosen message.<sup>36</sup> These commentators argued that *Dale* provided private associations with absolute control not only over their actual expression, but also the conduct that necessarily precedes the formation and articulation of speech.<sup>37</sup> However, the apparent validity of such declarations was short-lived. Almost immediately following the Scout's victory in *Dale*, numerous governmental and private parties across the country took regulatory and legal action against the Scouts.<sup>38</sup> The gist of these actions was to sever governmental association with the BSA<sup>39</sup> and to punish the organization for its victory in *Dale* and its now publicly avowed discriminatory conduct.<sup>40</sup> The efforts focused primarily on excluding the BSA from public school facilities and public benefits, programs, and contracts.<sup>41</sup>

#### B. *Access to Public Facilities*

Efforts to exclude the BSA from public school facilities have mostly failed. In *Boy Scouts of America v. Till*, the Broward County School Board, citing its anti-discrimination policy, terminated its relationship with the BSA and refused the BSA access to school facilities after school hours.<sup>42</sup> The School Board granted dozens of organizations, including religious organizations with professed objections to homosexual conduct, access to school facilities for meetings,<sup>43</sup> but terminated only the Scouts' access pursuant to the Board's anti-discrimination policy.<sup>44</sup> The district court enjoined the School Board's

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<sup>36</sup> See Paulsen, *supra* note 35, at 1922.

<sup>37</sup> See Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1535-36 n.99, 1580-85 (2001); Paulsen, *supra* note 35, at 1922.

<sup>38</sup> See cases cited *supra* notes 5-9 and accompanying text.

<sup>39</sup> See Denniston, *supra* note 11, at A12 ("In general, there is a rising sensitivity within governments about appearing to be allied with the Scouts.").

<sup>40</sup> See *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003) ("[G]iven the procedural posture of this case, we must assume that the removal of the BSA from the Campaign was triggered at least to some extent by the BSA's exercise of what the Supreme Court has held to be a constitutionally protected right."), *cert. denied*, 541 U.S. 903 (2003); *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1262 (S.D. Cal. 2003) ("[L]awsuits like this one are the predictable fallout from the Boy Scout' victory before the Supreme Court."); *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001):

[T]he Boy Scouts have a First Amendment right to freedom of expressive association, which includes the right to exclude homosexuals as members or leaders in the organization. Yet it is because of the exercise of this right and publicity about the Supreme Court decision that the School Board seeks to bar the Boy Scouts from use of school facilities.

<sup>41</sup> See *supra* notes 5-9 and accompanying text.

<sup>42</sup> 136 F. Supp. 2d 1295, 1304 (S.D. Fla. 2001).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

actions.<sup>45</sup> Stating that the School Board had created a limited public forum, the court held that the Board's exclusion of the BSA was not reasonable in light of the purpose served by the forum and that it discriminated against the BSA on the basis of the BSA's viewpoint.<sup>46</sup> The court also found that the Board's exclusion of the BSA from school facilities failed strict scrutiny, as the exclusion did nothing to further the Board's professed interest in combating discrimination.<sup>47</sup> Thus the court required the Board to grant the BSA access to school facilities on terms equal to those that the Board provided other organizations.<sup>48</sup> State courts have held likewise, rebuffing litigants seeking to exclude the BSA from school facilities.<sup>49</sup>

C. *Access to Public Benefits, Programs, and Contracts*

The BSA has fared poorly in terms of maintaining its access to public facilities outside the context of public schools. In *Boy Scouts of America v. Wyman*,<sup>50</sup> the State of Connecticut excluded the BSA from a state-sponsored workplace charitable giving program on the grounds that the BSA's membership policy violated Connecticut's anti-discrimination laws.<sup>51</sup> The Second Circuit upheld the BSA's exclusion.<sup>52</sup> The court first observed that it "must assume that the removal of the BSA from the Campaign was triggered at least to some extent by the BSA's exercise of what the Supreme Court has held

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<sup>45</sup> *Id.* at 1311.

<sup>46</sup> *Till*, 136 F. Supp. 2d at 1308 (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 804-804 (1985)).

<sup>47</sup> The court observed that the Board's exclusion of the BSA did not in any way stop the BSA from excluding students and teachers as members. *Till*, 136 F. Supp. 2d at 1310 ("[W]hen government seeks to regulate speech based upon its content, the regulation must achieve the stated governmental purpose, it must be narrowly tailored, and it must be the least restrictive alternative available." (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989))).

<sup>48</sup> *Till*, 136 F. Supp. 2d at 1311 (enjoining the School Board from "preventing the Boy Scouts from using Broward County public school facilities and buses during the off school hours by reason of the Boy Scouts' membership policy").

<sup>49</sup> See *Scalise v. Boy Scouts of Am.*, 692 N.W.2d 858, 871 (Mich. Ct. App. 2005) (holding that granting the BSA access to school facilities, even during school hours, did not violate Michigan's establishment clause), *appeal denied*, 700 N.W.2d 360 (Mich. 2005); *Powell v. Bunn*, 59 P.3d 559, 579-580 (Or. Ct. App. 2002) (holding that allowing the BSA access to school facilities during school hours for recruitment purposes was not a violation of Oregon's establishment clause), *appeal denied*, 77 P.3d 635 (Or. 2003). But see *Powell v. Bunn*, 108 P.3d 37, 49-50 (Or. Ct. App. 2005) (interpreting an Oregon statute to hold that permitting the BSA to recruit during school hours constituted discrimination by the school against students who were not eligible for BSA membership).

<sup>50</sup> 335 F.3d 80 (2d Cir. 2003).

<sup>51</sup> *Id.* at 83-84.

<sup>52</sup> *Id.* at 98.

to be a constitutionally protected right.”<sup>53</sup> The court then drew from two independent areas of constitutional law – free speech and unconstitutional conditions – and created a test requiring the BSA’s exclusion to be both viewpoint neutral and reasonable to withstand constitutional scrutiny.<sup>54</sup>

In terms of viewpoint neutrality, the court held that the state’s charitable giving program was a nonpublic forum.<sup>55</sup> Acknowledging that Connecticut’s anti-discrimination law had a “differential impact” on the BSA,<sup>56</sup> the court nonetheless upheld the law, both facially and as applied to the BSA, as viewpoint neutral. Facially, the court found that the purpose of the state’s anti-discrimination law was to “discourage harmful conduct and not to suppress expressive association.”<sup>57</sup> As applied, the court held that Connecticut did not impermissibly target the BSA so as to negate viewpoint neutrality.<sup>58</sup> The court held this despite the fact that the BSA was the only organization removed from the program and that other arguably discriminatory organizations remained eligible to receive donations through the charitable giving program.<sup>59</sup>

In terms of reasonableness, the court held that Connecticut had reasonably concluded that its anti-discrimination law required the removal of the BSA from the program.<sup>60</sup> In so doing, the court relied on *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,<sup>61</sup> without regard for *Cornelius*’s command that “access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable *in light of the purpose served by the forum* and are viewpoint neutral.”<sup>62</sup> Unlike the court in *Till*, the Second Circuit ignored the purpose of the charitable giving program, focusing only on the purpose and application of Connecticut’s anti-discrimination law. The court also implicitly permitted Connecticut and other states to penalize the BSA for its membership choices, as opposed to simply withholding a benefit.<sup>63</sup>

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<sup>53</sup> *Id.* at 91. This assumption, in part, was due to the procedural posture of the case. *Id.*

<sup>54</sup> *Id.* at 92 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (articulating the concept of viewpoint neutrality in the free speech context); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983) (discussing the doctrine of unconstitutional conditions)); *see also infra* Part II.C.

<sup>55</sup> *Wyman*, 335 F.3d at 84.

<sup>56</sup> *Id.* at 93.

<sup>57</sup> *Id.* at 94-95.

<sup>58</sup> *Id.* at 95-97.

<sup>59</sup> *Id.* at 96 n.10 (listing organizations that retained access to the program, including the Girl Scout Council of Southwestern Connecticut, the Lambda Legal Defense and Education Fund, the Hartford Gay and Lesbian Health Collective, and the Greater Hartford Jewish Community Center).

<sup>60</sup> *Id.* at 98.

<sup>61</sup> 473 U.S. 788 (1985).

<sup>62</sup> *Id.* at 806 (emphasis added) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983)).

<sup>63</sup> *See Wyman*, 335 F.3d at 95 n.8 (“Connecticut has not prevented the BSA from

Two California cases further illuminate the BSA's post-*Dale* quandary. In 1998, the city of Berkeley, which up until that point had permitted the BSA<sup>64</sup> and other nonprofit organizations to dock their boats at the city's marina for free, threatened to revoke the BSA's free marina berth unless the BSA expressly abandoned its policy of discrimination against gays and atheists.<sup>65</sup> The BSA refused, and Berkeley responded by rescinding the BSA's free berth and requiring the BSA to commence paying a monthly fee.<sup>66</sup> The California Court of Appeals held that the city could constitutionally condition access to a public benefit on the BSA's voluntary relinquishment of its constitutional right to choose its own membership.<sup>67</sup> The Court cited several U.S. Supreme Court cases in support of its position that a decision not to subsidize the exercise of a fundamental right does not infringe that right.<sup>68</sup> However, much like in *Wyman*, Berkeley's actions seemed just as much a penalty as a withholding of a benefit, given that only the BSA was excluded from the subsidy.

Then, in 2003, a federal district court invalidated the BSA's lease of a public park from the city of San Diego on the grounds that the lease constituted an Establishment Clause violation.<sup>69</sup> The court first held that the BSA was a religious organization.<sup>70</sup> As such, the court applied the *Lemon* test,<sup>71</sup> holding that because San Diego did not use a religion-neutral process in leasing the property to the BSA, a reasonable observer would perceive an advancement of religion as a result, thus violating the Establishment Clause.<sup>72</sup> The court held thus despite the fact that the city leased public property to over one hundred

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exercising its First Amendment rights; it has instead set up a regulatory scheme to achieve constitutionally valid ends under which, as it happens, *the BSA pays a price* for doing so.") (emphasis added); *infra* Part II.C.2.

<sup>64</sup> The specific party involved was an association of Sea Scouts who were affiliated with the BSA. See *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696, 698 (Cal. Ct. App. 2002), review granted, 65 P.3d 402 (Cal. 2003). BSA is used here for simplicity's sake.

<sup>65</sup> See *id.* at 698-99.

<sup>66</sup> See *id.* at 699.

<sup>67</sup> See *id.* at 702-05 ("The case law from higher courts uniformly supports Berkeley's conditioning of a subsidy upon adherence to such nondiscrimination principles.").

<sup>68</sup> *Id.* at 703-04 (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983)).

<sup>69</sup> *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1276 (S.D. Cal. 2003).

<sup>70</sup> *Id.* at 1272-73.

<sup>71</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'") (citation omitted).

<sup>72</sup> See *Barnes-Wallace*, 275 F. Supp. 2d at 1269-76. The court concluded that a reasonable observer would view San Diego's exclusive negotiations with the BSA to be an endorsement of the BSA-DPC "because of [the organization's] inherently religious program and practices. *Id.* at 1276.

other nonprofit organizations,<sup>73</sup> and despite the fact that the city leased the land to the BSA for the express secular purpose of advancing the fiscal, educational, cultural, and recreational interests of the city.<sup>74</sup> Following the trial, the city of San Diego settled separately with the plaintiff, severing ties with the BSA and removing itself as a defendant in the case.<sup>75</sup>

#### D. Summary

In the five years since *Dale*, the BSA has found itself under attack in various jurisdictions across the country as a direct result of exercising the constitutional rights vindicated by the *Dale* Court. Some courts have upheld the BSA's right to access school facilities on equal terms, while other courts have upheld governmental exclusion of the BSA from state benefits and programs on the grounds that such exclusions do not force the BSA to give up its First Amendment rights. But these holdings obscure a more troubling concern. Many of the individuals and governmental bodies filing suit and excluding the BSA are motivated not only by a desire to combat discrimination, but also by an unspoken but nonetheless apparent urge to penalize the BSA for its policies. Whether this desire to penalize is the government's primary motive or not, it remains constitutionally suspect. Moreover, many courts, including *Dale*, fail to account for the BSA's unique character as an organization that reflects both secular and religious expressive objectives.

## II. APPLYING EXISTING LAW TO PRIVATE ASSOCIATION

Several strands of constitutional law—the religion clauses, free speech, and unconstitutional conditions—govern the rights of private associations in terms of their membership, compliance with anti-discrimination law, and access to state benefits, programs, and contracts. Not surprisingly, religious organizations retain greater leeway over the management of their internal affairs and membership criteria given their religious nature.<sup>76</sup> Secular organizations associating for the purpose of expressing a particular viewpoint receive somewhat less protection.<sup>77</sup> Secular organizations associating for reasons other than expressive conduct – like commercial activity – receive the

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<sup>73</sup> *Id.* at 1273-74.

<sup>74</sup> *Id.* at 1267.

<sup>75</sup> See Press Release, ACLU of San Diego Secures Landmark Settlement in Boy Scout Lease Case (Jan. 8, 2004), available at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=14694&c=100> (reporting that the city had settled with the BSA, terminated the Balboa Park lease, and ended its support of the BSA in the lawsuit); *San Diego Officials Agree to Sever Lease With the Boy Scouts*, CHRISTIAN EXAMINER, Feb. 2004, available at [http://www.christianexaminer.com/Articles/Articles%20Feb04/Art\\_Feb04\\_12.html](http://www.christianexaminer.com/Articles/Articles%20Feb04/Art_Feb04_12.html).

<sup>76</sup> See *infra* Part II.A-C.

<sup>77</sup> See *infra* Part II.B-C.

least amount of protection.<sup>78</sup>

A. *The Religion Clauses*

The past decade has witnessed a sea change in the Court's approach to the religion clauses. In 1990, the Court decided *Employment Division v. Smith*, holding that a neutral law of general applicability that affects religious exercise does not violate an individual's free exercise rights.<sup>79</sup> In 2002, the Court held, in *Zelman v. Simmons-Harris*, that a state voucher program that allowed parents to choose where to spend their voucher funds, thus permitting state funds to indirectly finance religious schools, did not violate the Establishment Clause.<sup>80</sup> And in 2004's *Locke v. Davey*, the Court held that a state could discriminate against religion by denying state scholarship funds to students pursuing devotional degrees.<sup>81</sup> Each of these cases affect religious associations. In terms of a religious organization's access to public facilities, programs, benefits, and contracts, *Smith* and *Locke* are most relevant.

1. Free Exercise

Until *Smith*, the Supreme Court tended to analyze free exercise claims using strict scrutiny.<sup>82</sup> *Smith* replaced the compelling interest test with a new rule, holding that a neutral law of general applicability that burdened religious practice did not violate an individual's free exercise rights.<sup>83</sup> The Court provided two exceptions to its neutrality rule. The first, known as the "hybrid rights" exception, provides that where a free exercise claim is coupled with some other constitutional claim, heightened scrutiny may be appropriate.<sup>84</sup>

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<sup>78</sup> See *infra* Part II.B-C.

<sup>79</sup> See 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment))).

<sup>80</sup> See 536 U.S. 639, 653, 663 (2002).

<sup>81</sup> See 540 U.S. 712, 725 (2004) (holding that a state may choose not to fund "the pursuit of devotional degrees").

<sup>82</sup> See *Smith*, 494 U.S. at 894-95 (O'Connor, J., concurring) (recognizing that, when confronting a substantial governmental burden on religious conduct, previous cases had applied the strict scrutiny paradigm of a compelling state interest coupled with a narrowly tailored means).

<sup>83</sup> See *id.* at 879. *Smith* involved an Oregon agency's refusal to provide unemployment compensation benefits to two Native Americans fired from their jobs at a drug rehabilitation center because they ingested peyote during a religious ceremony. Because peyote use constituted work-related misconduct under Oregon law, the agency argued that they had lost any right to unemployment benefits. See *id.* at 874. The Oregon Supreme Court held that the refusal to issue benefits constituted a violation of the Free Exercise Clause, but the United States Supreme Court reversed. *Id.* at 876, 890.

<sup>84</sup> See *id.* at 881-82 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (interpreting

The second, the “individualized exemption” exception, applies when a state’s facially neutral rule contains a system of individualized exemptions.<sup>85</sup> Where such exemptions exist, a state “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”<sup>86</sup> Three years later, in *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court articulated a third exception to *Smith*’s rule.<sup>87</sup> The Court observed that although a law might be facially neutral and generally applicable, if its object or purpose “is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it [must satisfy strict scrutiny].”<sup>88</sup>

These three exceptions to *Smith*’s rule are not easy to satisfy. The “hybrid rights” exception has proven the most controversial. The Court in *Smith* articulated two examples of hybrid-rights claims – free speech and the rights of parents to direct their children’s education.<sup>89</sup> Lower courts have generally been hostile to the concept of hybrid rights. Some courts have accepted hybrid claims where the non-free exercise right impinged would have been “colorable” if brought alone.<sup>90</sup> The majority of courts, however, have found for the claimants only where the non-free exercise claim would actually succeed on its own.<sup>91</sup> Others have rejected the concept outright,<sup>92</sup> and

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previous precedent as requiring a Free Exercise claim to be coupled with a second constitutional claim if the law challenged is neutral and generally applicable)).

<sup>85</sup> See *id.* at 884 (holding that relevant precedent requires a state to extend a “system of individualized exemptions” to “cases of ‘religious hardship’” unless a compelling reason exists not to do so (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986))).

<sup>86</sup> *Id.* (quoting *Bowen*, 476 U.S. at 708).

<sup>87</sup> 508 U.S. 520 (1993).

<sup>88</sup> *Id.* at 533 (citation omitted).

<sup>89</sup> *Smith*, 494 U.S. at 881-82.

<sup>90</sup> *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (quoting *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 703, 707 (9th Cir. 1999)); *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

<sup>91</sup> See *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid rights claim where the non-free exercise claim, the right to direct a child’s education, was not valid); *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 667 (S.D. Tex. 1997) (upholding a hybrid claim where a school prohibition, which banned, inter alia, wearing rosaries, implicated religiously-oriented free speech); *Alabama & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1323, 1334 (E.D. Tex. 1993) (upholding a hybrid rights claim where a school policy requiring short hair implicated the free speech rights of Native American students); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 88 (Cal. 2004) (“We are aware of no decision in which a federal court has actually relied solely on the hybrid rights theory to justify applying strict scrutiny to a free exercise claim.”); see also William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 242-43 (1998) (concluding that courts decide these types of cases on the strength or weakness of the “other” constitutional provision and not the Free Exercise Clause); Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1068 (2000) (observing that courts usually

commentators and Supreme Court Justices alike have charged that it swallows the *Smith* rule and thus makes little sense.<sup>93</sup>

The “individual exemptions” exception has met with a more favorable reception. The exception is triggered when a governing body responsible for granting exemptions performs a subjective, case-by-case inquiry into an individual’s conduct.<sup>94</sup> The system in place “need not be a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a ‘system.’”<sup>95</sup> For the most part, the exemption applies to employment situations,<sup>96</sup> but courts have applied it in other contexts as well.<sup>97</sup>

*Smith*’s third exception, governmental animus toward religious practices, was first developed in *Lukumi*.<sup>98</sup> In that case, the Court noted that “[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.”<sup>99</sup> However, facial neutrality is not alone determinative, as the Free Exercise Clause “forbids subtle departures from neutrality,” and ‘covert suppression of particular

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only find for the religious party “where the decision could stand on the independent constitutional right”) (citation omitted).

<sup>92</sup> *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (asserting that the Sixth Circuit will not apply a hybrid rights theory until the Supreme Court expressly recognizes such a claim).

<sup>93</sup> See *Lukumi*, 508 U.S. at 567 (Souter, J., concurring) (“If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . .”); Mitch W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) (opining that the hybrid rights claim suggested by the *Smith* Court cannot be taken seriously because it makes no logical sense).

<sup>94</sup> See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297-98 (10th Cir. 2004) (describing the range of situations potentially covered by the individualized exemptions doctrine).

<sup>95</sup> *Id.* at 1299.

<sup>96</sup> See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (applying the individualized exemptions doctrine to the choice between following religious precepts or accepting work), *overruled on other grounds by* *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999) (using heightened scrutiny to invalidate a police department’s “no beard” policy challenged by Sunni Muslim officers under the Free Exercise Clause).

<sup>97</sup> *Axson-Flynn*, 356 F.3d at 1298-99 (applying *Smith*’s individualized exemption doctrine and reversing summary judgment because a genuine issue of material fact existed as to whether defendant educational institution maintained a discretionary system of case-by-case exemptions from curricular requirements).

<sup>98</sup> *Lukumi* involved a Florida city’s ordinance barring animal sacrifice. See *Lukumi*, 508 U.S. at 524-30. The ordinance was passed in response to a religious sect’s desire to establish a church in the city. *Id.* The sect practiced Santeria, which included ritualistic animal sacrifice as part of its worship services. *Id.* The Court held that the ordinance was an impermissible suppression of religion in violation of the free exercise clause. *Id.* at 540.

<sup>99</sup> *Id.* at 533.

religious beliefs.”<sup>100</sup> Thus, according to *Lukumi*, where a religious organization is singled out for disparate treatment on the part of a governmental body, the religious organization’s free exercise right is violated.

*Locke*, however, altered this formulation, at least in the context of state funding of religious entities. The *Locke* Court upheld a discretionary funding decision made by Washington State, which singled out theology training as ineligible for state funding.<sup>101</sup> Washington established a scholarship fund to assist academically gifted students with college expenses.<sup>102</sup> In accordance with the Washington State Constitution’s religious protections,<sup>103</sup> students were precluded from using the scholarship for the purpose of pursuing a degree in devotional theology.<sup>104</sup> On its face, *Lukumi* would seem to govern the facts of *Locke*. Washington State singled out one type of religious study and refused to fund it. The Court distinguished *Lukumi*, however, commenting that Washington had neither imposed criminal sanctions on religious conduct nor forced religious adherents to choose between their religious beliefs and receipt of a government benefit.<sup>105</sup> Rather, the government had “merely chosen not to fund a distinct category of instruction.”<sup>106</sup> Thus, in the context of government decisions to fund religion, as opposed to decisions to regulate religion, the Court essentially held that the government may, but need not, fund religion on terms equal to those of other recipients of funds.<sup>107</sup>

In terms of the free exercise rights of religious associations, cases like *Smith*, *Lukumi*, and *Locke* paint a disparate, and sometimes confusing, tapestry of rights. What is clear is that the government generally can impose burdens on religious practice where such burdens are incidental to bona fide neutral laws of general applicability. What is also clear is that the regime of exceptions the Court articulated in *Smith* provides little protection for those asserting free exercise claims against neutral and general laws. Rather, such challenges tend to fail, barring unique circumstances. First, hybrid claims frequently succeed only where the right to which the free exercise claim is

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<sup>100</sup> *Id.* at 534 (citation omitted).

<sup>101</sup> See *Locke v. Davey*, 540 U.S. 712, 725 (2004) (upholding the Promise Scholarship program as applied to the State of Washington).

<sup>102</sup> *Id.* at 715.

<sup>103</sup> See WASH. CONST. art. I, § 11 (“No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment . . .”).

<sup>104</sup> *Locke*, 540 U.S. at 715.

<sup>105</sup> *Id.* at 720-21 (recognizing that the constitutional provision did not impose criminal or civil sanctions on religion and did not require students to choose between their religious beliefs and the receipt of a governmental benefit).

<sup>106</sup> *Id.*

<sup>107</sup> See *id.*; see also Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 156, 195-96 (2004).

attached could have stood alone.<sup>108</sup> Moreover, courts seem to have limited the hybrid exception to its bare text in *Smith*. That is, the only hybrid claims that seem to succeed are those attached to free speech claims.<sup>109</sup> The “individual exemptions” exception also is limited in scope, as it applies almost exclusively to the employment context.<sup>110</sup> Finally, governmental bodies, after *Lukumi*, are not likely to pass laws that blatantly target single religious organizations or practices. To the extent that governments do pass such laws, the laws are unlikely to be upheld.

It is unclear, however, to what extent *Smith*, *Lukumi*, and *Locke* affect the free exercise rights of *associations* as opposed to *individuals*. The Free Exercise Clause combats two distinct, pernicious effects of governmental imposition on religious practice – restrictions on an individual’s actions that are based on religious beliefs, and encroachments on the ability of a religious body to manage its internal affairs.<sup>111</sup> *Smith* itself, albeit implicitly, recognized this distinction:

We have never held that an *individual’s* religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate . . . . Subsequent decisions have consistently held that the right of free exercise does not relieve an *individual* of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’<sup>112</sup>

Lower courts have interpreted this language to reaffirm the freedom of a religious organization to decide how to manage its internal affairs and dogma, but not to guarantee members the right to practice what the organization preaches if that practice is forbidden by a neutral law of general application.<sup>113</sup> Moreover, while *Locke* limited *Lukumi’s* application in the context of

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<sup>108</sup> See *supra* notes 89-93 and accompanying text.

<sup>109</sup> See Esser, *supra* note 91, at 242-43 (concluding that courts decide these types of cases on the strength or weakness of the “other” constitutional provision and not the Free Exercise Clause); Kaplan, *supra* note 91, at 1068 (observing that courts usually only find for the religious party “where the decision could stand on the independent constitutional right”) (citation omitted).

<sup>110</sup> See *supra* notes 94-97 (discussing the limitations of the “individual exemptions” doctrine).

<sup>111</sup> See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996).

<sup>112</sup> *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (emphasis added) (citation omitted).

<sup>113</sup> See *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 349-50 (5th Cir. 1999); *Catholic Univ.*, 83 F.3d at 463. The court in *Catholic University* stated that

the Free Exercise Clause guarantees a church’s freedom to decide how it will govern itself, what it will teach, and to whom it will entrust its ministerial responsibilities, it does *not* guarantee the right of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application.

government funding decisions, it in no way weakened *Lukumi* and *Smith*'s applicability in the context of government regulation of religious organizations.<sup>114</sup>

Thus it seems entirely plausible that *Smith* does not significantly alter the regulatory landscape of religious associations in the context of free exercise. Individual adherents may have to suffer the burdens imposed by neutral and general laws, but organizations whose purpose revolves around religious beliefs and values retain the ability to seek court-mandated exceptions to such laws. The Supreme Court has long held that courts must defer to religious bodies on matters of "discipline, faith, internal organization, or ecclesiastical rule, custom, or law."<sup>115</sup> Nor may courts question the sincerity of a religious organization's religious doctrines or beliefs.<sup>116</sup> These two principles are known collectively as the "church autonomy doctrine,"<sup>117</sup> and courts have held that they survive *Smith*.<sup>118</sup> Similarly, courts hold that the so-called "ministerial exception," a court-created doctrine exempting religious organizations' employment decisions where employment requires some religious training, survives *Smith*.<sup>119</sup> Thus, even after *Smith*, courts defer to religious bodies on matters pertaining to internal organization.

## 2. Establishment

While the Free Exercise Clause focuses on the rights of individuals and institutions to practice their religion and manage their internal affairs free from

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<sup>114</sup> See Laycock, *supra* note 107, at 162 ("[*Locke*] is a funding case. It authorizes discriminatory funding, but it does not authorize discriminatory regulation, and it does little to clarify the regulation cases.").

<sup>115</sup> *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696713 (1976) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871)).

<sup>116</sup> *United States v. Ballard*, 322 U.S. 78, 86 (1944) (stating that the First Amendment precludes a jury from evaluating respondents' religious doctrines or beliefs).

<sup>117</sup> See *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 655 (10th Cir. 2002) (summarizing the church autonomy doctrine as the right of churches to decide matters of faith, doctrine, and church government, as well as to make decisions about their own affairs).

<sup>118</sup> *Id.* at 657.

<sup>119</sup> See *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 n.\* (4th Cir. 2000) (noting that all circuit courts addressing whether the ministerial exception has survived *Smith* have affirmed the exception's continued existence); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1303-04 (11th Cir. 2000) ("[T]he Court's rejection in *Smith* of the compelling interest test does not affect the continuing vitality of the ministerial exception."); *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 349-50 (5th Cir. 1999) (holding that the ministerial exception has not been affected by the Supreme Court's decision in *Smith*); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462-63 (D.C. Cir. 1996) (declaring that the *Smith* holding does not require the rejection of the ministerial exception); *Petruska v. Gannon Univ.*, 350 F. Supp. 2d 666, 678 (W.D. Pa. 2004) (holding that "*Smith* does not undermine the viability of the ministerial exception").

state intrusion,<sup>120</sup> the Establishment Clause requires that “government should not prefer one religion to another, or religion to irreligion.”<sup>121</sup> Thus government may not coerce its citizenry to support or participate in religion or its exercise,<sup>122</sup> create the perception of government endorsement of religion,<sup>123</sup> or single out religion for exclusion from government programs.<sup>124</sup> The overriding maxim of modern Establishment Clause jurisprudence remains neutrality toward religion.<sup>125</sup> At the same time, however, slavish devotion to the potential formalism of neutrality is not required where it might penalize or exclude individuals or groups from government programs or benefits solely on account of their religious beliefs.<sup>126</sup>

Several principles emerge in the context of religious association. First, government may not establish a public forum and exclude religious groups from that forum by invoking the Establishment Clause. For this reason, in *Good News Club v. Milford Central School*, the Court held that a school district violated a religious club’s free speech rights by refusing to grant the club, and other religious organizations, access to after-school facilities otherwise held open to the public.<sup>127</sup> More importantly, the Court held that granting religious and secular groups equal access to school facilities is not a

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<sup>120</sup> See *supra* text accompanying note 111.

<sup>121</sup> Bd. of Educ. v. Grumet, 512 U.S. 687, 703 (1994).

<sup>122</sup> See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (determining that “the delivery of a pregame prayer [at a high school football game] has the improper effect of coercing those present to participate in an act of religious worship.”).

<sup>123</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 654-56 (2002) (holding that Ohio’s Pilot Project Scholarship Program did not violate the Establishment Clause amid allegations that the program created a “public perception that the State is endorsing religious practices and beliefs”).

<sup>124</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995) (explaining that the Establishment Clause does not require a “refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design”).

<sup>125</sup> *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion) (observing the Supreme Court’s approval of the “principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion”); *Rosenberger*, 515 U.S. at 839 (“A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.”).

<sup>126</sup> See *Rosenberger*, 515 U.S. at 839 (“[In] enforcing the prohibition against laws respecting establishment of religion, we must ‘be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious beliefs.’”) (citation omitted); *Grumet*, 512 U.S. 687, 715 (1993) (O’Connor, J., concurring) (“Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.”).

<sup>127</sup> 533 U.S. 98, 102 (2001).

violation of the Establishment Clause.<sup>128</sup> To permit only secular groups to access school facilities would risk the public perception of endorsement of irreligion. Similarly, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court held that a public university may not invoke the Establishment Clause to refuse to fund a religious student publication from a student activities fund where the university also funds secular organizations from the same fund.<sup>129</sup> Rather, “the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”<sup>130</sup> The Court implied that a refusal to fund the religious publication might itself constitute an Establishment Clause violation.<sup>131</sup>

Second, the Establishment Clause does not prohibit government funding of religious organizations if the funding is neutral with respect to religion and provides assistance to a broad class of citizens who in turn direct the government aid to religious organizations as a result of their own independent private choices.<sup>132</sup> Third, the government impermissibly endorses religion by displaying religious symbols in a context that would cause a reasonable observer to perceive an endorsement of religion.<sup>133</sup> The reasonable observer in

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<sup>128</sup> *Id.* at 114 (“For the ‘guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.’” (citing *Rosenberger*, 515 U.S. at 839)).

<sup>129</sup> 515 U.S. at 845-46 (1995) (holding that the University should not have denied a student publication funding simply because of the publication’s viewpoint as it could undermine the neutrality required by the Establishment Clause).

<sup>130</sup> *Id.* at 839.

<sup>131</sup> *Id.* at 845-46 (“[The University’s] course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.”). *But see generally* *Locke v. Davey*, 540 U.S. 712 (2004) (finding that the State of Washington’s decision to deny scholarship aid to students pursuing a devotional theology degree did not violate the Free Exercise Clause).

<sup>132</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

<sup>133</sup> *See* *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (plurality opinion) (affirming lower court’s determination that a reasonable observer would not conclude that a monument surrounding the Texas State Capitol and inscribed with the Ten Commandments constitutes an official endorsement of religion); *id.* at 2868-72 (Breyer, J., concurring) (emphasizing that the monument stood uncontested for nearly two generations); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2745 (2005) (understanding the Establishment Clause to “require the Government to stay neutral on religious belief”); *id.* at 2747 (O’Connor, J., concurring) (“The purpose behind the counties’ display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.”); *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) (“[T]he government’s use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs . . . .”); *Lynch v. Donnelly*, 465 U.S. 668, 688-94 (1984) (O’Connor, J., concurring) (asserting that the crucial element in determining

question is deemed aware of the history and context of the community and forum in which the religious display occurs.<sup>134</sup> Thus, the state would violate the Establishment Clause by erecting symbols on government property that are associated with organized religion or by constructing a monument commemorating a religious organization so long as a reasonable person would perceive these actions as government endorsements of religion.

Fourth, while the Establishment Clause does not prohibit government funding of religious organizations, neither does it require such funding.<sup>135</sup> This is the apparent holding of *Locke v. Davey*,<sup>136</sup> although *Locke* is limited in several ways. For instance, *Locke* applies only to state failures to fund, rather than where the state penalizes religious organizations through removal of funds.<sup>137</sup> In addition, the opinion may be limited only to the training of clergy.<sup>138</sup> Also, funding decisions based on hostility to religion, rather than legitimate state interests, might not withstand scrutiny.<sup>139</sup> Finally, refusals to fund might not withstand scrutiny if they implicate free speech rights, as in *Rosenberger*.<sup>140</sup>

These principles apply to any organization exhibiting a religious character. Thus a religious community group would have just as much of a right to access

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government endorsement of religion is whether the public perceives the government to be, in fact, endorsing religion); *see also* *Stone v. Graham*, 449 U.S. 39, 39-43 (1980) (per curiam) (holding that a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms lacked any secular legislative purpose).

<sup>134</sup> *See McCreary*, 125 S. Ct. at 2737; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (explaining that the text and history of the school's policy of pregame prayers reinforce the objective observer's perception that prayer is encouraged by the school); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring).

<sup>135</sup> *Locke*, 540 U.S. at 717-25 (holding that the denial of funding for a theology degree is not, by itself, inherently constitutionally suspect); *see supra* notes 101-107 and accompanying text (describing the facts and holding of *Locke*).

<sup>136</sup> 540 U.S. at 712.

<sup>137</sup> *Id.* at 721; *see also* Laycock, *supra* note 107, at 175-76 (indicating that when the government does not fund a constitutionally protected activity, the government is not imposing a burden on the exercise of the unfunded right).

<sup>138</sup> The *Locke* Court states that "the only interest at issue here is the State's interest in not funding the *religious training of clergy*." *Locke*, 540 U.S. at 722 n.5 (emphasis added). Moreover, the Court concludes that "[w]e need not venture further into this difficult area to uphold the [program] as currently operated." *Id.* at 725; *see also* Laycock, *supra* note 107, at 184 (suggesting that the *Locke* opinion is confined to the training of clergy).

<sup>139</sup> *Locke*, 540 U.S. at 721 ("That a State would deal differently with religious education for the ministry than with education for other callings is a product of these [legitimate state interests], *not evidence of hostility toward religion*.") (emphasis added); *see also* Laycock, *supra* note 107, at 187 ("The Court implied that discriminatory refusal to fund religious education *would* be constitutionally suspect if it were motivated by hostility to religion.").

<sup>140</sup> *See supra* text accompanying notes 129-132 (discussing *Rosenberger* and the merits of free speech and Establishment Clause claims); Laycock, *supra* note 107, at 191.

school facilities as a student group dedicated to Bible study, and both groups would have the right to access the facilities on terms equal to those of secular groups.<sup>141</sup> Conversely, the state violates the Establishment Clause by funding groups of varying religiosity – be it the Catholic Church or an after-school Christian student society – in a non-neutral fashion.<sup>142</sup> Also, the same endorsement principles apply to groups of varying religious intensity, although the more religious the group, the more likely a reasonable observer to deem public displays of symbols associated with the group as endorsing religion. The *Barnes-Wallace* court failed to apply these principles to the BSA when it held that the BSA was a religious organization.<sup>143</sup> Instead, the court concluded that a reasonable person would view San Diego’s contractual relations with the BSA as an endorsement of religion despite the fact that most people likely do not view the BSA as purely religious and despite the fact that the city leased city property to dozens of organizations, including the BSA, for the express, secular purpose of improving the general welfare of the city.<sup>144</sup> The *Barnes-Wallace* court’s misapplication of the neutrality principle renders the result highly suspect in light of existing Establishment Clause jurisprudence.

#### B. *Expressive Association*

As seen in *Dale*, expressive associations whose message implicates religious beliefs need not rely exclusively on the religion clauses to protect their expressive rights.<sup>145</sup> If organizations like the BSA do not qualify for either a *Smith* exception or for protection as a religious institution, they may invoke both the First Amendment’s speech clause and its concomitant right of expressive association.<sup>146</sup>

*Dale* is not an anomaly. Rather, *Dale* follows logically from the Court’s previous expressive association cases. The general principle, as articulated in *Dale*, requires a showing that a particular group is an expressive association; that the challenged state action significantly affects the group’s ability to advocate its viewpoint; and that the state’s interest justifies the burden it imposes on the group’s expressive association.<sup>147</sup> What seems clear after *Dale* is that a private, noncommercial expressive association retains the power to define itself, its membership, its message, and the means of articulating its

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<sup>141</sup> See *supra* notes 127-128.

<sup>142</sup> See *supra* notes 129-131.

<sup>143</sup> See *supra* notes 69-75 and accompanying text (discussing how the court in *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) applied the *Lemon* test).

<sup>144</sup> See *Barnes-Wallace*, 275 F. Supp. 2d at 1269-76 (summarizing the process by which the city leased property to the BSA).

<sup>145</sup> See generally *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

<sup>146</sup> *Id.*

<sup>147</sup> *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 231 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (citing *Dale*, 530 U.S. at 648-58).

message free from government intrusion, barring the most compelling of circumstances.<sup>148</sup>

A trio of cases from the 1980s establishes the commercial/noncommercial distinction. *Roberts v. United States Jaycees*,<sup>149</sup> *Board of Directors of Rotary International v. Rotary Club*,<sup>150</sup> and *New York State Club Ass'n v. City of New York*<sup>151</sup> each involved challenges to state public accommodation and anti-discrimination laws by private commercial associations that refused membership to women or minorities. In each case the Court affirmed the concept of associative expression, but found that the associations involved were commercial associations whose expression would not be compromised in any significant way by requiring the admission of women<sup>152</sup> or minorities.<sup>153</sup> For example, in *Roberts* the Court held that the Jaycees' primary purpose was business networking, and that there was no evidence that admitting women as voting members in the association would impede the Jaycee's ability to express its message.<sup>154</sup> Likewise, the law imposed no "restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."<sup>155</sup> Similar logic applied in the *Rotary Club* and *New York Club* cases.<sup>156</sup>

Likewise, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group (GLIB)*, the Court upheld a private parade organizer's right to exclude GLIB, an organization of gay, lesbian, and bisexual individuals, from marching in an

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<sup>148</sup> See Paulsen, *supra* note 35, at 1924.

<sup>149</sup> 468 U.S. 609 (1984).

<sup>150</sup> 481 U.S. 537 (1987).

<sup>151</sup> 487 U.S. 1 (1988).

<sup>152</sup> *Rotary Int'l*, 481 U.S. at 548 ("[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."); *Roberts*, 468 U.S. at 627 ("There is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities . . .").

<sup>153</sup> *N.Y. State Club*, 487 U.S. at 13-14 (explaining that while the law does not prevent an association from excluding individuals who do not share the same view that the association desires to promote, the law does prevent an association from using race to determine membership).

<sup>154</sup> *Roberts*, 468 at 627; see also *id.* at 633 (O'Connor, J., concurring):

[A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. . . . [P]rotection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.

<sup>155</sup> *Id.* at 627.

<sup>156</sup> *N.Y. State Club*, 487 U.S. at 13-14 ("If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end."); *Rotary Int'l*, 481 U.S. at 548 ("[The Act] does not require [clubs] to abandon their classification system or admit members who do not reflect a cross section of the community.").

annual Saint Patrick's Day parade.<sup>157</sup> Stating first that protected speech extends beyond particularized expression to the conduct that facilitates the expression,<sup>158</sup> the Court observed that every parade participant affects the message conveyed by the parade organizers.<sup>159</sup> Thus, requiring the organizers to include GLIB in their parade was the equivalent of requiring them to alter the content of their message, in violation of the First Amendment.<sup>160</sup> Observing the noncommercial nature of the parade, the Court concluded by stating:

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.<sup>161</sup>

Practically, the commercial/noncommercial distinction is imperfect. For example, a pervasively sectarian school is clearly expressive, but at the same time can constitute a commercial organization interacting with both the marketplace of consumers and the marketplace of ideas. Likewise, a large media enterprise exhibits both expressive and commercial characteristics, and just like the Jaycees and the Rotary Club discussed above, might pursue commercial and noncommercial activities simultaneously. Two Supreme Court cases, *Runyon v. McCrary*<sup>162</sup> and *Bob Jones University v. United States*,<sup>163</sup> are instructive in this regard.

In *McCrary* the Court held, inter alia, that requiring a private school to grant admission to African Americans did not violate the school's freedom of association.<sup>164</sup> While *McCrary* involved the interpretation of federal civil rights laws, its outcome depended on principles similar to those that the Court applied in the club cases. Remarking that associative rights might provide parents a First Amendment right to send their children to schools that promoted the idea that racial separation was desirable, the Court concluded that such a right does not encompass a right to exclude racial minorities from educational institutions.<sup>165</sup> Presaging later cases, the Court held that "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

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<sup>157</sup> 515 U.S. 557 (1995).

<sup>158</sup> See *id.* at 569-70.

<sup>159</sup> *Id.* at 572.

<sup>160</sup> *Id.* at 572-74 (asserting that if every group had a right to participate in a private parade, it would violate the First Amendment's fundamental rule that an individual has the autonomy to choose the content of his own message).

<sup>161</sup> *Id.* at 579.

<sup>162</sup> 427 U.S. 160 (1976).

<sup>163</sup> 461 U.S. 574 (1983).

<sup>164</sup> 427 U.S. at 176.

<sup>165</sup> *Id.*

dogma.”<sup>166</sup>

Similarly, in *Bob Jones* the Court upheld the IRS’s revocation of Bob Jones University’s tax-exempt status on the grounds that the university discriminated on the basis of race by prohibiting interracial dating.<sup>167</sup> Although ostensibly a free exercise claim, *Bob Jones* can be placed under the rubric of associational rights given the Court’s reasoning. Upholding the revocation of tax exempt status under strict scrutiny review, the Court held that “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.”<sup>168</sup>

To a certain extent, the Court’s reasoning in these two cases is inconsistent with *Dale*. For example, *McCrary* quotes approvingly from an earlier racial discrimination case, *Norwood v. Harrison*,<sup>169</sup> to support the proposition that “[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.”<sup>170</sup> In contrast, *Dale* seems to sanction private discrimination, at least when it is associated with private expression. This inconsistency has several explanations: the fact that *Norwood*, *McCrary*, and *Bob Jones* dealt with racial discrimination and thus permitted the state to regulate private conduct by way of the Thirteenth Amendment’s enforcement clause;<sup>171</sup> the government’s compelling interest in eliminating invidious racial discrimination in the context of education;<sup>172</sup> the commercial nature of the educational enterprise,<sup>173</sup> or the fact that requiring the admission of minorities did not affect the schools’ ability to inculcate racist values.<sup>174</sup> Regardless, the inconsistencies of these cases do not undermine *Dale*’s rule that, barring a compelling government interest and narrowly tailored imposition on associative rights, the government cannot dictate how a private expressive association defines itself, its membership, its message, or the means by which it chooses to articulate its message. Given the *Dale* court’s focus on an organization’s expressive message, rather than its religious character, it would seem that the associative rights protected in *Dale* would apply equally to religious and secular organizations.

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<sup>166</sup> *Id.* (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1087 (4th Cir. 1975)).

<sup>167</sup> *Bob Jones*, 461 U.S. at 604.

<sup>168</sup> *Id.* at 603.

<sup>169</sup> 413 U.S. 455 (1972).

<sup>170</sup> *Id.* at 470; see *McCrary*, 427 U.S. at 176.

<sup>171</sup> See *McCrary*, 427 U.S. at 168-72; see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968).

<sup>172</sup> See Paulsen, *supra* note 35, at 1936.

<sup>173</sup> See *supra* notes 149-156.

<sup>174</sup> See *supra* notes 166-168 and accompanying text.

C. *Speech and Unconstitutional Conditions*

Lower courts have accepted *Dale*'s holding, although they have limited it to the unique circumstances presented by the Boy Scouts.<sup>175</sup> Significantly, an organization's right to associate represents only part of the relevant legal framework. The fact remains that while the government cannot intrude on a private association's *internal* organization and expressive conduct, the government may limit an association *externally* through neutral and generally applicable limitations on access to public forums and benefits. Two areas of constitutional law – free speech and unconstitutional conditions – modify *Dale*'s absolute protections. Indeed, the BSA's current legal troubles reflect this.<sup>176</sup> In responding to the BSA's victory in *Dale*, governments have managed to punish the BSA for its discriminatory behavior without technically intruding on the BSA's associative freedoms. For example, Connecticut's anti-discrimination law discussed in *Wyman* is, at least ostensibly, a neutral law of general applicability that bars discriminatory associations from participating in a state-sanctioned forum.<sup>177</sup> Similarly, on its face, Berkeley's anti-discrimination law, discussed in *Evans*, seems neutral.<sup>178</sup> Even where governments have failed to punish the BSA, they have nonetheless invoked the logic of neutrality.<sup>179</sup> Whether neutral laws are legitimate means of excluding the BSA, or instead constitute an end-run around *Dale*, remains a question the Supreme Court has declined to examine.<sup>180</sup> However, the fact that federal and state courts are split on the permissibility of excluding the BSA,<sup>181</sup> indicates that the validity of the practice of applying neutral laws to preclude a discriminatory association's rights of public access is not a foregone

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<sup>175</sup> See Koppelman, *supra* note 35, at 31 (discussing how lower federal courts have for the most part rejected *Dale*-like claims, and observing that “[o]nly four reported cases follow *Dale* to uphold a claim of freedom of association”). For an example in which a court has upheld such claims, see *Donaldson v. Farrakhan*, 762 N.E.2d 835 (Mass. 2002) (finding that the Nation of Islam, as an expressive association, did not violate the Massachusetts civil rights laws by refusing women access to certain speaking events held in a Mosque).

<sup>176</sup> See *supra* Part I.

<sup>177</sup> See *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 94-95 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2003).

<sup>178</sup> See *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696, 702 (Cal. Ct. App. 2002), *review granted*, 65 P.3d 402 (Cal. 2003) (commenting that the BSA-affiliated organizations “were treated the same as any other private citizens or groups who desire to rent berths at the marina, and must pay a rental fee”).

<sup>179</sup> *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1303-11 (S.D. Fla. 2001).

<sup>180</sup> 541 U.S. 903 (2003) (denying the BSA's petition for certiorari in *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003)).

<sup>181</sup> Compare *Wyman*, 335 F.3d at 94-95, and *Evans*, 127 Cal. Rptr. 2d at 702-03, with *Till*, 136 F. Supp. 2d at 1310-11, and *Scalise v. Boy Scouts of Am.*, 692 N.W.2d 858, 871-84 (Mich. Ct. App. 2005); see also *Sherman v. Cmty. Consol. Sch. Dist. 21*, 8 F.3d 1160, 1165-67 (7th Cir. 1993) (holding that a school district did not violate the Establishment Clause by allowing the BSA to distribute printed material in schools).

conclusion. Rather, organizations like the BSA may find protection from exclusionary state practices in the Supreme Court's understanding of free speech and unconstitutional conditions.

### 1. Free Speech

The most important aspect of free speech doctrine for the purposes of the BSA relates to the types of forums in which speech takes place and the concept of "viewpoint neutrality." Generally speaking, there are three categories of forums where an expressive association can articulate its message – traditional, designated, and nonpublic. The government's ability to limit access to traditional public forums – parks or sidewalks, for example – is subject to the greatest scrutiny.<sup>182</sup> Government can limit access to a traditional public forum only when the exclusion is necessary to further a compelling state interest and the exclusion is narrowly tailored to achieve that interest.<sup>183</sup> Similarly, when a government creates a limited public forum by opening up a nonpublic forum for designated purposes, government exclusion of a speaker who falls within the designated class is subject to strict scrutiny.<sup>184</sup> Under either of these formulations, the state may regulate the time, place, and manner of expression in a content-neutral manner, if such regulations are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.<sup>185</sup> However, a state's restrictions on speech in a traditional public forum are subject to stricter scrutiny than are restrictions in a limited public forum.<sup>186</sup> Finally, when the government creates a nonpublic forum for a specific purpose, government may regulate access "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."<sup>187</sup> Thus the government may exclude a speaker from a nonpublic forum if the speaker seeks to address a topic not related to the purpose of the forum or if he is not a member of the class of speakers for whose benefit the forum was created, but

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<sup>182</sup> *United States v. Kokinda*, 497 U.S. 720, 727 (1990) ("Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny." (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983))).

<sup>183</sup> *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." (citing *Perry*, 460 U.S. at 45)).

<sup>184</sup> *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

<sup>185</sup> *Perry*, 460 U.S. at 46.

<sup>186</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum.").

<sup>187</sup> *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993), (quoting *Cornelius*, 473 U.S. at 806).

may not deny a speaker access solely to suppress the point of view he espouses on an otherwise permitted subject.<sup>188</sup>

Limited and nonpublic forums are most relevant to the BSA. In each of the post-*Dale* cases challenging BSA access to public forums, benefits, and programs, the forums in question were either limited or nonpublic forums.<sup>189</sup> Several Supreme Court cases are instructive in this regard. In *Lamb's Chapel v. Center Moriches Union Free School District*, a school district created a limited public forum by opening up its facilities for, inter alia, "social, civic, or recreational use," but barred any such use that was religious in character.<sup>190</sup> Lamb's Chapel, a religious organization, sought to use the facilities for the purpose of showing a film about child rearing and family values which it claimed was a social, civic, or recreational use, albeit from a religious perspective.<sup>191</sup> Putting to one side Lamb's Chapel's argument that "social, civic, or recreational use" was so broad a category as to render school facilities the equivalent of a traditional public forum,<sup>192</sup> the Court required the school district to grant Lamb's Chapel access on terms equal to other groups.<sup>193</sup> The Court reasoned that Lamb's Chapel's film qualified as a "social, civic, or recreational use" regardless of its religious content.<sup>194</sup> Thus refusing access to Lamb's Chapel constituted viewpoint discrimination violative of the First Amendment.<sup>195</sup> Similar logic applies in most limited public forum cases,<sup>196</sup> and was applied to the Broward County School Board's exclusion of the BSA in *Till*.<sup>197</sup>

*International Society for Krishna Consciousness v. Lee*<sup>198</sup> is an example of a nonpublic forum case. In *Krishna*, the International Society for Krishna Consciousness, a nonprofit religious organization, performed a ritual known as "sankirtan," in which group members disseminate religious literature and

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<sup>188</sup> *Cornelius*, 473 U.S. at 806.

<sup>189</sup> *See supra* Part I.

<sup>190</sup> 508 U.S. at 387.

<sup>191</sup> *Id.* at 390-92.

<sup>192</sup> *Id.* at 391-92.

<sup>193</sup> *Id.* at 393-94 (explaining how a "film about child rearing and family values would be a use for social or civic purposes otherwise permitted" and that to deny such a presentation because it was from a "religious perspective" would be "plainly invalid").

<sup>194</sup> *Id.* at 394.

<sup>195</sup> *Id.*

<sup>196</sup> *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-11 (2001) ("The restriction must not discriminate against speech on the basis of viewpoint." (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995))); *Rosenberger*, 515 U.S. at 829 ("When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

<sup>197</sup> *See Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restrictions.").

<sup>198</sup> 505 U.S. 672 (1992).

solicit funds in public locations.<sup>199</sup> A New York and New Jersey Port authority regulation prohibited such solicitation within airport terminals.<sup>200</sup> Krishna sued, alleging First Amendment violations.<sup>201</sup> The Court, holding that an airport terminal constituted a nonpublic forum, upheld the regulation.<sup>202</sup> Commenting that “the government – like other property owners – ‘has power to preserve the property under its control for the use to which it is lawfully dedicated,’”<sup>203</sup> the Court reasoned that the restrictions on solicitation were reasonable in light of the airport’s commercial character.<sup>204</sup> *Perry Education Ass’n v. Perry Local Educators’ Ass’n*<sup>205</sup> serves as a second example of nonpublic forum analysis. In *Perry*, a school district negotiated a labor contract with a teacher’s union.<sup>206</sup> The contract stipulated, in part, that the contracting union would have access to teachers’ mailboxes and the right to use the interschool mail delivery system to the exclusion of other unions.<sup>207</sup> Other unions retained the right to utilize all other means of communication with teachers and could also access teacher mailboxes and the interschool mail system during a contested election.<sup>208</sup> A competing union filed suit, alleging, inter alia, a violation of its First Amendment rights.<sup>209</sup> That union claimed that the school mail system had become a limited public forum from which the union could not be excluded by virtue of its prior use of the system and because private groups unrelated to the school periodically used the system.<sup>210</sup> Holding that the mail system was in fact a nonpublic forum,<sup>211</sup> the Court rejected the union’s argument, concluding instead that the school district’s grant of selective access was reasonable in light of the school’s legitimate interest in preserving its property “for the use to which it is lawfully dedicated.”<sup>212</sup> The Second Circuit invoked this reasoning in *Wyman*, holding that the state charitable giving program at issue was a nonpublic forum to which the state could reasonably limit access.<sup>213</sup>

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<sup>199</sup> *Id.* at 674-75.

<sup>200</sup> *Id.* at 674.

<sup>201</sup> *Id.* at 676.

<sup>202</sup> *Id.* at 683.

<sup>203</sup> *Id.* at 679-80 (citing *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

<sup>204</sup> *Id.* at 682-83.

<sup>205</sup> 460 U.S. 37 (1983).

<sup>206</sup> *Id.* at 39-41.

<sup>207</sup> *Id.* at 39.

<sup>208</sup> *Id.* at 41.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 47.

<sup>211</sup> *Id.* at 46.

<sup>212</sup> *Id.* at 50-51 (citation omitted).

<sup>213</sup> *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 98 (2d Cir. 2003) (“Because the BSA has not presented any evidence of viewpoint discrimination, and because the defendants’ removal of the BSA from the [Charitable] Campaign was reasonable, the district court was

The Court's speech cases indicate that while religious and secular expressive organizations may retain absolute control over their internal organization and their expressive message, they do not necessarily retain the right to articulate that message wherever they choose. Rather, government can limit expressive organizations' access to designated, limited, and nonpublic forums where the limitations are necessary incidents to the functioning of the forum in question. The same framework applies regardless of the religious or secular viewpoint of the speaker, and the government does not violate the First Amendment by refusing to permit discussion of specified religious or secular topics when those topics are not relevant to the purpose of the forum. However, the doctrine emerging from the speech cases is not without its shades of grey. Determining the purpose of a particular limited or nonpublic forum is not always simple. Although the government might articulate a forum's purpose in a facially satisfying way, such rationalizations can be convoluted or discriminatory as applied.

Problems determining a forum's purpose undermine the reasoning of the Second Circuit's opinion in *Wyman*.<sup>214</sup> Under the speech framework set out above, the court should have examined *both* the purpose of the charitable giving program *and* the purpose and application of Connecticut's anti-discrimination law. The Second Circuit recognized that the purpose of the charitable giving program was to "raise funds from state employees for charitable and public health, welfare, environmental, conservation and service purposes."<sup>215</sup> But the court made no mention of this when it concluded that the purpose of Connecticut's Gay Rights Law was to combat invidious discrimination on the basis of sexual orientation.<sup>216</sup> Thus, the court's analysis failed to acknowledge *Cornelius*'s instruction that a state may exclude specific speakers if such exclusions are reasonable in light of the forum's purpose and are viewpoint neutral.<sup>217</sup> Moreover, *Wyman* gave little weight to the fact that Connecticut excluded only the BSA, noting instead that the state's human rights agency could, as an enforcement body, choose to exclude the BSA on such an ad hoc basis.<sup>218</sup> Finally, *Wyman* distinguished between the regulation of expression and the regulation of conduct, explaining that Connecticut merely regulated primarily non-expressive conduct – the BSA's membership

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correct to grant the defendants' motion for summary judgment on the BSA's First Amendment claim.").

<sup>214</sup> *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *see supra* notes 50-63 and accompanying text.

<sup>215</sup> *Wyman*, 335 F.3d at 84 (quoting CONN. GEN. STAT. § 5-262 (2003)).

<sup>216</sup> *Id.* at 94-95.

<sup>217</sup> *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

<sup>218</sup> *Wyman*, 335 F.3d at 96 n.11 ("[A] legitimate, viewpoint-neutral reason might include the state's finding that discriminatory conduct against one group was more pernicious, for historical or other reasons, than discriminatory conduct against another group.").

policies.<sup>219</sup> This distinction directly contradicts the Supreme Court's decision in *Hurley*, which determined that the First Amendment's protections extend not only to written or oral speech, but to the conduct that is a necessary incident to that speech.<sup>220</sup> Just as the conduct of selecting or excluding parade participants is a necessary incident to the parade's expression, so too is the BSA's conduct in selecting its members a necessary incident to its expressive message regarding homosexuality.

Thus, on the whole, the *Wyman* court's holding on speech grounds seems questionable. Moreover, it is in direct tension with *Till*, where the BSA's right to access public school facilities trumped a governmental purpose to avoid discrimination on the basis of sexual orientation.<sup>221</sup> A similar problem emerges in cases like *Barnes-Wallace*,<sup>222</sup> where government singles out a specific expressive association and precludes it from securing government contracts. The fact that *Wyman*'s charitable giving program and *Barnes-Wallace*'s contract bidding both involve commercial conduct does not change the analysis. While purely commercial speech is entitled to less protection than other forms of speech,<sup>223</sup> it is nonetheless protected by the First Amendment, even if only proposing a commercial transaction.<sup>224</sup> In any event, the BSA's conduct, whether in the context of charitable giving, access to public schools, or city contracts, cannot be classified as purely commercial speech when the BSA's expressive message is intertwined with its provision of youth services. The BSA does far more than merely propose a commercial transaction when it seeks access to state forums, programs, and benefits. Moreover, whether the speech is commercial or not, the state's exclusion of a speaker must be reasonable in light of the forum's purpose.<sup>225</sup> Where the purpose of a forum clearly contemplates including associations like the BSA – as the charitable giving program in *Wyman* does – exclusions based solely on the organization's membership policies should not withstand forum analysis. This logic applies to religious and secular organizations alike.

## 2. Unconstitutional Conditions

A second strand of constitutional doctrine limiting the scope of *Dale*'s right

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<sup>219</sup> *Id.* at 94 (stating that state regulation of conduct is allowed, whereas regulation of viewpoints is impermissible).

<sup>220</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569-570 (1995) (characterizing marching in a South Boston parade as expression protected by the First Amendment).

<sup>221</sup> *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001); *see supra* notes 42-49 and accompanying text.

<sup>222</sup> 275 F. Supp. 2d 1259, 1276 (S.D. Cal. 2003); *see supra* notes 69-75 and accompanying text.

<sup>223</sup> *Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993).

<sup>224</sup> *Id.* at 421.

<sup>225</sup> *See supra* note 217 and accompanying text.

of association is the doctrine of unconstitutional conditions. This doctrine holds that the government cannot compel an individual to choose between the exercise of a constitutional right and participation in an otherwise available public program or benefit.<sup>226</sup> Put another way, the government cannot impose a penalty to “produce a result which [it] could not command directly.”<sup>227</sup> However, not all discretionary government decisions that require the recipient of a benefit to acquiesce to a government condition fall within the rubric of unconstitutional conditions. It is important to distinguish between governmental offers or refusals to fund on the one hand, and government threats or penalties on the other.<sup>228</sup> A penalty or threat might entail conditioning a property tax exemption on a loyalty oath,<sup>229</sup> prohibiting journalistic editorializing as a condition for funding,<sup>230</sup> or conditioning renewal of a public college teaching contract on the offeree’s consent to not criticize

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<sup>226</sup> See, e.g., *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 674-675 (1996) (holding that a government employer is liable if an employee can demonstrate that he was fired, at least in part, for engaging in constitutionally protected conduct); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“[T]he government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit [that] . . . has little or no relationship to the property.”); *FCC v. League of Women Voters*, 468 U.S. 364, 399-402 (1988) (“[T]he specific interest sought to be advanced by § 399’s ban on editorializing are . . . not served in a sufficiently limited manner to justify to substantial abridgement of important journalistic freedoms which the First Amendment jealously protects.”); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.”); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“[A] constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment.” (quoting *Bailey v. Alabama*, 219 U.S. 219, 239 (1911))).

<sup>227</sup> *Speiser*, 357 U.S. at 526.

<sup>228</sup> See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1300-01 (1984) (stating that courts must distinguish between threats – allocations that make a citizen worse off because of her exercise of a constitutional right – and offers – that merely expand her range of options); Laycock, *supra* note 107, at 175 (explaining that the Court tends to characterize refusals to fund as imposing no burden on the exercise of a constitutional right); Sullivan, *supra* note 16, at 1421-22 (arguing that strict scrutiny applies where the government offers a benefit with the condition that the recipient perform or forgo a constitutionally protected activity).

<sup>229</sup> *Speiser*, 357 U.S. at 518, 526 (finding that the denial of veteran tax exemption due to appellants’ refusal to “subscribe oaths that they do not advocate the overthrow of the Federal or State Government by force, violence or other unlawful means” is an impermissible penalty).

<sup>230</sup> *FCC*, 468 U.S. at 468 (holding that § 399 of the Public Broadcasting Act of 1967, which forbids receipt of federal funds by noncommercial television and radio stations that editorialize, violates the First Amendment).

the school's Board of Regents.<sup>231</sup> In contrast, an offer or refusal to fund includes funding for doctors that can be used to advise patients about contraception but not abortions,<sup>232</sup> funding that pays for an indigent mother's live birth, but not abortion,<sup>233</sup> and government decisions to fund post-secondary education but not theological training.<sup>234</sup> Threats and penalties entail purposeful, indirect government action that successfully changes behavior, or at least seeks to effect a change in behavior that the government is constitutionally forbidden from achieving through direct regulation. Conversely, offers or refusals to fund expand the range of choices available to a class of potential recipients or channel government funding without encroaching upon preexisting rights. The Supreme Court tends to construe government action that is classifiable as either penalties or refusals to fund as the latter.<sup>235</sup> However, the doctrine of unconstitutional conditions does not apply with any less force if the right in question is religious and not secular.<sup>236</sup> Thus, the doctrine applies equally to religious and secular organizations.

Two BSA cases – *Wyman*<sup>237</sup> and *Evans*<sup>238</sup> – discuss this issue. *Wyman* is the

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<sup>231</sup> *Perry*, 408 U.S. at 597.

<sup>232</sup> *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (holding permissible the restriction of receipt of federal funds under § 1008 of the Public Health Service Act, Title X, to only those services where abortion is not used or advocated as a method for family planning).

<sup>233</sup> *Harris v. McRae*, 448 U.S. 297, 316-17 (1980) (stating that “the financial constraints that restrict an indigent woman’s ability to [pay for an abortion] are the product not of governmental restrictions on access to abortions, but rather of her indigency”); *Maher v. Roe*, 432 U.S. 464, 474-75 (1977) (“The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there.”).

<sup>234</sup> *Davey v. Locke*, 540 U.S. 712, 720-21 (2004) (holding that the state’s prohibition against using state scholarship funds to pursue devotional degrees “does not require students to choose between their religious beliefs and receiving a government benefit”).

<sup>235</sup> See Laycock, *supra* note 107, at 175.

<sup>236</sup> See *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (holding that a person may not be compelled to choose between his free exercise rights and participation in an otherwise available public program (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947))); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963):

Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine . . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

(citation omitted), *overruled in part by* *N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch.*, 90 N.Y.2d 244, 248 (N.Y. 1997) (stating that “a generally applicable and otherwise valid enactment, which is not intended to regulate religious conduct or beliefs but which may incidentally burden the free exercise of religion, is not deemed to violate the First Amendment”).

<sup>237</sup> 335 F.3d 80 (2d Cir. 2003); see also *supra* notes 50-63 and accompanying text.

<sup>238</sup> 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002), *review granted*, 65 P.3d 402 (Cal. 2003); see also *supra* notes 64-68 and accompanying text.

more troubling of the two cases. As noted above,<sup>239</sup> *Wyman* involved the exclusion of the BSA from a state charitable giving program established to collect funds for various community organizations for the benefit of the public.<sup>240</sup> Excluding the BSA from this program was neither a refusal to fund nor an offer to fund. Facially, it appears much closer to a penalty. Connecticut's anti-discrimination law was enforced only against the BSA, despite the participation of other, arguably discriminatory organizations.<sup>241</sup> The *Wyman* court itself acknowledged that Connecticut excluded the BSA at least in part because of its victory in *Dale*.<sup>242</sup> Moreover, the court characterized the exclusion as a penalty.<sup>243</sup> The fact that the BSA, and only the BSA, was excluded confirms that the state's decision was a penalty. In order to justify its policy as truly neutral, Connecticut would have to remove *all* organizations that discriminate in their membership or employment policies. But doing so, in effect, requires any discriminatory organization to modify its membership criteria in order to gain admission to the charitable giving program. Thus, the alternative to excluding only the BSA also raises unconstitutional condition problems. Both the actual and hypothetical state actions here are far more analogous to a threat or penalty than to a refusal or offer to fund.

A series of cases involving the Ku Klux Klan (KKK) – *Robb v. Hungerbeeler*,<sup>244</sup> *Cuffley v. Mickes* (“*Cuffley I*”),<sup>245</sup> and *State of Missouri ex rel. Missouri Highway & Transportation Commission v. Cuffley*<sup>246</sup> – is instructive by way of comparison.<sup>247</sup> Each case involved a Missouri chapter (or “Unit”) of the KKK that sought to participate in Missouri's Adopt-A-

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<sup>239</sup> *Supra* notes 50-63 and accompanying text.

<sup>240</sup> *Supra* note 215 and accompanying text.

<sup>241</sup> *Supra* notes 50-63 and accompanying text.

<sup>242</sup> *See supra* note 53 and accompanying text.

<sup>243</sup> *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 95 n.8 (2d Cir. 2003) (“Connecticut has not prevented the BSA from exercising its First Amendment rights; it has instead set up a regulatory scheme to achieve constitutionally valid ends under which, as it happens, the BSA *pays a price for doing so.*”) (emphasis added).

<sup>244</sup> 370 F.3d 735 (8th Cir. 2004).

<sup>245</sup> 208 F.3d 702 (8th Cir. 2000).

<sup>246</sup> 112 F.3d 1332 (8th Cir. 1997).

<sup>247</sup> *See Robb*, 370 F.3d at 744 (“[T]he State may not deny Unit 188's [Adopt-A-Highway Program] application because it discriminates on the basis of race, and exclusion of Unit 188 pursuant to the ‘history of violence’ regulation unconstitutionally restricts its expressive and associational rights.”); *Cuffley II*, 208 F.3d at 708-10:

The State's purported reasons for denying the Klan's application are so obviously unreasonable and pretextual . . . the State disagrees with the Klan's beliefs . . . Nevertheless, the First Amendment protects everyone, even those with viewpoints as thoroughly obnoxious as those of the Klan, from viewpoint-based discrimination by the State.

*See also Cuffley*, 112 F.3d at 1333.

Highway program.<sup>248</sup> The state refused to allow the KKK to participate, citing the Klan's record of intolerance and racial discrimination.<sup>249</sup> The Eighth Circuit held that "requiring the Klan group to refrain from racial discrimination constituted 'an unconstitutional condition on the Klan's participation in the Adopt-A-Highway program.'"<sup>250</sup> Perhaps more importantly, in *Cuffley II* the Eighth Circuit rejected the state's argument that by permitting the KKK to adopt a highway, the state, by association, would discriminate, thereby triggering state action:

In *Burton*, the Supreme Court found state action when a private coffee shop, operating within a publicly owned building, refused service to a black customer. What we have here, however, is more like a State owned coffee shop offering service to a group of customers who want a table for only their white friends. The state action doctrine does not extend so far. The State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association. Accordingly, we conclude that this reason for refusing participation, . . . constitutes an unconstitutional condition on the Klan's participation in the Adopt-A-Highway program.<sup>251</sup>

This logic should have applied in *Wyman*, where Connecticut similarly argued that permitting the BSA to participate in the charitable giving program would impermissibly entangle the state with the BSA, thus associating the state with the BSA's discriminatory policies by way of the state action doctrine.<sup>252</sup> Likewise, singling out the BSA and tacitly requiring it to alter its membership policies in order to be allowed to participate in Connecticut's charitable program seems analogous to – and as suspect as – Missouri's exclusion of the KKK from an adopt-a-highway program. Finally, to whatever extent either of these decisions in fact represents ideology masquerading as law, the KKK is unquestionably a far more discriminatory, violent, and reprehensible organization than the BSA. To include the KKK but to exclude the BSA thus makes little sense on either legal or policy grounds.

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<sup>248</sup> *Robb*, 370 F.3d at 738-39 (discussing the facts of *Cuffley* and *Cuffley II*).

<sup>249</sup> *Id.* at 739.

<sup>250</sup> *Id.* (quoting *Cuffley II*, 208 F.3d at 708-09); see also *Invisible Empire of the Knights of Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 291 (D. Md. 1988) (finding that the requirements that a municipality placed on the KKK's request for a parade permit constituted unconstitutional conditions).

<sup>251</sup> *Cuffley II*, 208 F.3d at 709 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)) (footnote omitted).

<sup>252</sup> *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 97-98 (2d Cir. 2003). The fact that this issue arose in both *Wyman* and *Cuffley II*, and that the Supreme Court denied certiorari in both cases, indicates that this issue will not go away until the Court speaks on the matter. See *Wyman*, 541 U.S. 903 (2003) (denying certiorari); *Cuffley II*, 532 U.S. 903 (2001) (same).

*Evans* seems less questionable than *Wyman*, but it is nonetheless troubling given that the city of Berkeley also excluded only the BSA. Recall that *Evans* involved Berkeley's revocation of a subsidy that allowed the BSA to dock a boat at the city marina free of charge.<sup>253</sup> Berkeley explicitly conditioned continued receipt of the subsidy on the BSA's express abandonment of any policy of discrimination against gays and atheists.<sup>254</sup> While this link between the subsidy and the BSA's membership policies seems like a penalty, Berkeley's conditional subsidy differs from Connecticut's charitable giving program in that it actually involves state allocation of taxpayer funds.<sup>255</sup> As such, *Evans* is governed not by the line of unconstitutional condition cases dealing with punitive or threatening state action, but by the line of cases concerning state funding decisions that do not render a potential funding recipient worse off than he was before if he does not qualify for the funding.<sup>256</sup> Under this line of cases, a "decision not to subsidize the exercise of a fundamental right does not infringe the right."<sup>257</sup> That is, a refusal to fund the BSA's free access to Berkeley's marina does not prevent the BSA from continuing its membership practices. It only requires the BSA to pay the berthing fee that they would have had to pay but for their special exemption.<sup>258</sup> Of course, the fact that Berkeley singled out the BSA seems punitive. But Berkeley's actions are less coercive than Connecticut's, as the BSA is not presented with the either/or choice of altering its membership policies or not participating in the state program at all. Instead, the BSA faces an either/or choice of a different kind – pay to berth its boat on the same terms as others, or alter its membership policies and continue to receive the subsidy. This distinction between *Wyman* and *Evans* may seem minor; but this is exactly the sort of distinction the Court makes in unconstitutional conditions cases,<sup>259</sup> and it is the reason that *Wyman* is suspect while *Evans* is less so.

### III. A TRIPARTITE APPROACH TO EXPRESSIVE ASSOCIATIONS

As the above discussion demonstrates, the decisions upholding the exclusion of the BSA from government programs, facilities, benefits, and contracts fail to fully account for existing First Amendment law and the BSA's religious character. The BSA is a unique organization in terms of the size of its membership,<sup>260</sup> its cultural significance as a norm-setting body,<sup>261</sup> and the

<sup>253</sup> See *supra* notes 64-68 and accompanying text.

<sup>254</sup> *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696, 698-99 (Cal. Ct. App. 2002).

<sup>255</sup> See *supra* notes 64-68 and accompanying text.

<sup>256</sup> See *supra* notes 226-235 and accompanying text.

<sup>257</sup> *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983).

<sup>258</sup> *Evans*, 127 Cal. Rptr. 2d at 698.

<sup>259</sup> See *supra* note 226.

<sup>260</sup> As of December 31, 2004, over 3.1 million youth and 1.1 million adults were members of the Boy Scouts in some capacity. Boy Scouts of America, Boy Scouts at a Glance: Membership and Units, <http://www.scouting.org/factsheets/02-501.html> (last visited

duality of its religious and secular message.<sup>262</sup> It is a mistake for governments and courts to focus solely on the BSA's secularity when drafting policy or analyzing legal issues related to it. Rather, governments and courts should undertake a tripartite approach to expressive associations, differentiating between religious, secular, and quasi-religious associations. Under such an approach the BSA should be considered a quasi-religious organization.

A. *Religious, Secular, and Quasi-Religious Associations*

Clearly, associations occupying the polar extremes of religiosity and secularity are the easiest to identify. The Catholic and Mormon churches are undoubtedly religious organizations, just as the Augusta National Golf Club and the American Civil Liberties Union are secular organizations.<sup>263</sup> The classification difficulty arises when one aspect of an organization's expressive message is religious. How should a court deal with an organization whose primary message and purpose does not revolve around religion, but that nonetheless relies in part on religion in framing its message and purpose?

Rather than view organizations either as religious or secular, courts should acknowledge the quasi-religious elements of organizations whose purpose – but not sole purpose – involves religious beliefs or values. This distinction is not merely semantic. Organizations of a quasi-religious character arguably deserve many of the protections religious organizations receive by way of the Free Exercise Clause.<sup>264</sup> These groups may serve a religious function by offering faith-based guidance and inculcating religious values in various segments of the population.<sup>265</sup> By failing to acknowledge a quasi-religious group's religiosity, courts analyzing an expressive association claim may ignore the religious elements of the group's expression, thus articulating legal holdings that ignore free-exercise precedent and limit the group's ability to function in its religious capacity. Such an approach greatly limits the effectiveness of such groups when faced with state regulation of their internal affairs. Moreover, failing to recognize a group's quasi-religious nature can lead courts to categorize religious expression that is vital to a group's purpose as expression of secondary importance that is less immune to state regulation. In order to better define what is quasi-religious, the next section discusses the definitional limits of religious and secular organizations.

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Jan. 25, 2006).

<sup>261</sup> See *infra* Part IV.A.

<sup>262</sup> See *infra* Part IV.A.

<sup>263</sup> See *supra* note 21 and accompanying text.

<sup>264</sup> See also *infra* Parts III.B, IV.A.

<sup>265</sup> See *infra* Part III.A.3.

## 1. Religious Organizations

### a. *Defining Religion*

Defining religion is itself a difficult task. The Supreme Court has waded into the definitional waters on several occasions. In *United States v. Seeger*, the Court gave religion a broad and expansive definition.<sup>266</sup> The Court, interpreting the Universal Military Service and Training Act, recognized as religious an individual's "sincere religious beliefs," even though not theistic in nature, if "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."<sup>267</sup> Thus, belief in a "Supreme Being" of some sort "that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" was sufficient to qualify as "religious training and belief" within the meaning of the Act's conscientious objector exemption.<sup>268</sup> The Court went even further in *Welsh v. United States*, interpreting the same statute and extending conscientious objector status to a military conscript even though he declined to profess a belief in a "Supreme Being" or theistic conception of the divine, invoking instead a parallel system of beliefs.<sup>269</sup> Four Justices reached the constitutional issue, either expressly or implicitly defining religion to include non-theistic ideologies.<sup>270</sup> Finally, in *Thomas v. Review Board of Indiana Employment Security Division*, the Court commented that determining what constitutes valid religious belief or practice must "not . . . turn upon a judicial perception of the particular belief or practice in question."<sup>271</sup> In that case, a Jehovah's Witness, citing his religious beliefs as precluding his participation in the manufacture of weapons, quit his employment at a weapons manufacturer.<sup>272</sup> The Court overturned the Indiana Supreme Court, and required the state to provide the claimant with unemployment benefits, despite the fact that the state's highest court had found the claimant did not leave his job for good cause.<sup>273</sup> The Court observed that, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."<sup>274</sup>

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<sup>266</sup> 380 U.S. 163, 166 (1965) (construing "religion" to require sincere belief akin to that in a "Supreme Being").

<sup>267</sup> *Id.* at 176.

<sup>268</sup> *Id.* at 165-66.

<sup>269</sup> 398 U.S. 333, 340-44 (1970) (plurality opinion).

<sup>270</sup> *Id.* at 358-59 (Harlan, J., concurring) (stating that "religion" in a First Amendment context includes strongly held moral beliefs akin to traditional religion); *id.* at 367-74 (White, J., dissenting, joined by Burger, C. J., and Stewart, J.) (assuming that non-theistic beliefs are included in religion).

<sup>271</sup> 450 U.S. 707, 714 (1981).

<sup>272</sup> *Id.* at 709.

<sup>273</sup> *Id.* at 713, 720.

<sup>274</sup> *Id.* at 714.

However, the Court has also interpreted religion less broadly. In *Wisconsin v. Yoder*, the Court upheld a challenge by a group of Amish parents who alleged that Wisconsin's mandatory education laws violated their free exercise rights.<sup>275</sup> In so doing, the Court seemed to narrow the definitional scope of religion articulated in *Seeger* and *Welsh*. Using Henry David Thoreau's belief system as an example of non-religious practice, the Court stated that beliefs based only upon philosophical or personal reasons, rather than religious ones, "do not rise to the demands of the Religion Clauses."<sup>276</sup> Moreover, the Court seemed to alter the existing definition of religion by requiring the presence of organizational structure and invoking evidence of historical and traditional practice on the part of the Amish.<sup>277</sup>

Other courts have also been more circumspect in their approach to defining religion. For example, in *Africa v. Commonwealth of Pennsylvania*, the Third Circuit held that a prisoner alleging he was a "Naturalist Minister" of the "MOVE organization" was not entitled to a special religious diet in part because the "MOVE organization" was not a religion.<sup>278</sup> The claimant in *Africa* alleged that he was an adherent of MOVE, a religion "absolutely opposed to all that is wrong" and intent on "bring[ing] about absolute peace."<sup>279</sup> MOVE members participated in no distinct ceremonies or rituals, believing that "every act of life itself is invested with religious meaning and significance."<sup>280</sup> MOVE espoused an "unadulterated existence," thus requiring a religious diet consisting of raw fruits and vegetables.<sup>281</sup> The court applied a three-part analysis, holding that MOVE was not concerned with religious principles, failed to embody a comprehensive, multi-faceted theology, and lacked the defining structural characteristics of a traditional religion.<sup>282</sup>

Scholarly attention to the definition of religion has further muddled the waters. Some commentators propose a functional definition of religion. For example, one commentator offers a definition akin to *Seeger*, arguing that religious belief, in the free exercise context, should be defined as beliefs contending with matters of "ultimate concern."<sup>283</sup> The same commentator

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<sup>275</sup> 406 U.S. 205, 236 (1972).

<sup>276</sup> *Id.* at 216.

<sup>277</sup> *Id.* at 215-16 (finding that the Amish way of life constituted religious practice). Justice Douglas vehemently dissented, commenting that the Court's previous definition of religion did not invoke history or tradition and that under existing precedent Thoreau's worldview would qualify as religious. *See id.* at 246-49 (Douglas, J., dissenting).

<sup>278</sup> 662 F.2d 1025, 1036 (3d Cir. 1981).

<sup>279</sup> *Id.* at 1026.

<sup>280</sup> *Id.* at 1027.

<sup>281</sup> *Id.* (explaining the tenets of MOVE).

<sup>282</sup> *Id.* at 1032-33 (applying the three-part test developed in *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring)).

<sup>283</sup> Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1075 (1978).

states that for establishment purposes, religious belief should require evidence of three things: organization and structural elements; theology, or comprehensive and formal tradition and practice; and attitudinal conformity, which refers to a group's ideological homogeneity and the importance of the group's beliefs in the lives of the believers.<sup>284</sup>

Other commentators suggest a content-based approach. The most conservative of these views would require a belief in God as traditionally conceived.<sup>285</sup> Other views are less restrictive. For example, Anand Agneshwar suggests that “[r]eligion is a system of beliefs, based on supernatural assumptions, that posits the existence of apparent evil, suffering, or ignorance in the world and announces a means of salvation or redemption from those conditions.”<sup>286</sup> Inverting this theme somewhat, Jesse Choper defines religious belief as encompassing “extratemporal consequences.”<sup>287</sup> That is, an individual's belief is religious if that person's belief contemplates his actions' effects extending in some way beyond his lifetime.<sup>288</sup> And Andrew Austin suggests that religion is a system of non-rational faith statements based on unprovable assumptions, including the existence of a higher power.<sup>289</sup> Still other commentators advocate a “religion by analogy” approach, which compares a belief system to existing religions in order to ascertain the religiosity of those beliefs.<sup>290</sup> Each of these views has certain drawbacks. The functional view can be overinclusive, while the analogical view may penalize new, developing religions. Similarly, the content-based approach is often underinclusive.

What emerges from the cases and commentary discussed above is a lack of clarity regarding the definition of religious belief and, as a result, what constitutes a religious organization. In terms of religious belief, the Supreme Court tends to embrace a functional approach to religion, but the question is far

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<sup>284</sup> *Id.* at 1087.

<sup>285</sup> *E.g.* *United States v. Seeger*, 380 U.S. 163, 166 (1965).

<sup>286</sup> Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295, 319 (1992).

<sup>287</sup> Jesse Choper, *Defining “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579, 599:

Belief in the phenomenon of “extratemporal consequences” – whether the effects of actions taken pursuant or contrary to the dictates of a person's beliefs extend in some meaningful way beyond his lifetime – is a sensible and desirable criterion . . . for determining when the free exercise clause should trigger judicial consideration.

<sup>288</sup> *Id.*

<sup>289</sup> Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 43 (1991).

<sup>290</sup> *See generally* *Africa v. Commonwealth of Pa.*, 662 F.2d 1025 (3d Cir. 1981) (comparing plaintiff's beliefs in MOVE to those of traditional religions); *see also* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 762 (1984) (suggesting an analogic approach that compares relevant aspects of the contested religion with “what is indisputably religion”).

from settled.<sup>291</sup> On the one hand, religious belief may encompass belief outside the traditional purview of theistic religion. On the other hand, qualifying as religious may require the presence of accepted indicia of religion – including rituals, structures, and beliefs analogous to traditional religions. What seems clear is that belief in a monotheistic conception of God qualifies as religious belief.<sup>292</sup> Moreover, religious beliefs that do not involve a theistic conception of a Supreme Being, but bear the indicia of traditional religion – including Buddhism and Taoism – would qualify as religious belief.<sup>293</sup> Conduct aimed at proselytizing religious belief, like canvassing door-to-door, which is an arguably necessary incident to the exercise of belief, is also considered religious.<sup>294</sup> However, sincerity of belief alone, devoid of at least some traditional religious indicia, likely does not qualify as religious.

b. *Defining Religious Organizations*

In terms of religious associations, it is clear that organizations whose very purpose is to maintain and advance the objectives of an organized religion qualify as religious organizations under the First Amendment. This classification involves two different aspects of religion. First, where an organization's conduct is so closely tied to the propagation and maintenance of religious belief, that conduct can be considered part of the religion itself. For example, the activities of the Catholic Church's American leadership not only involve religious belief, but also are inseparable from the Catholic religion itself. Thus the numerous organizational structures that manage the monotheistic faiths in which a majority of Americans profess membership clearly qualify as religious organizations. Moreover, religious organizations that manage non-theistic faiths recognized as religious would also qualify as religious organizations. Also, conduct mandated by an organized religion and closely related to proselytizing that religion would likely be considered part of the religion itself, rather than mere religious belief.<sup>295</sup>

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<sup>291</sup> See *supra* notes 271-274 and accompanying text.

<sup>292</sup> See *supra* notes 266-282.

<sup>293</sup> See *Torcaso v. Watkins*, 367 U.S. 488, 494-96 (1961). The *Torcaso* Court considered "Secular Humanism" a religion. *Id.* at 496 n.11. Later federal court holdings have cast doubt on this proposition. See *Kalka v. Hawk*, 215 F.3d 90, 99 (D.C. Cir. 2000) ("The Court's statement in *Torcaso* does not stand for the proposition that humanism, no matter how practiced, amounts to a religion under the First Amendment."); see also *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994) (commenting that simply "[a]dding an 'ism'" does not change the meaning nor magically metamorphose 'evolution' into a religion.').

<sup>294</sup> See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160-62 (2002) (balancing First Amendment rights with the government's interest in prohibiting door-to-door canvassing).

<sup>295</sup> See *id.* at 160 ("[D]oor-to-door canvassing is mandated by [a Jehovah's Witness's] religion."); *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 674-75 (1992) (observing that Krishna members "perform a ritual known as *sankirtan* [which] 'consists of

Second, when an organization invokes religious belief as animating its primary purpose, that organization will qualify as religious.<sup>296</sup> Thus the non-decision-making entities of a religion – including individual churches, synagogues, and mosques – are religious organizations. Similarly, an association dedicated to accomplishing its objectives by encouraging individuals to embrace the precepts of Christianity likely qualifies as a religious organization. For example, an association dedicated to the rehabilitation of substance abusers that explicitly requires participants to embrace the teachings of Jesus Christ can be considered a religious organization.<sup>297</sup> Conversely, organizations affiliated with churches, but whose purpose is not to inculcate religious values or deal in matters of faith and spirituality, are likely not religious.<sup>298</sup> Likewise, an employer's religious belief, when invoked in the context of employment, likely fails to qualify the employing company as a religious association, given the employer's ultimate commercial, rather than religious goals, unless the employer's primary purpose in establishing his business is to somehow further religious ends or facilitate employment for his co-religionists.<sup>299</sup>

What emerges from this analysis is the conclusion that what qualifies as religious belief may sometimes be construed narrowly and may sometimes embrace value systems outside the traditional understanding of religion (such as monotheism) or of religious organizations (such as church bodies). Organizations managing religious doctrine or proselytizing religious beliefs

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going into public places, disseminating religious literature and soliciting funds to support the religion.”) (citation omitted).

<sup>296</sup> See *Watchtower*, 536 U.S. at 161 (assuming that canvassing by Jehovah's witnesses implicates the Religion Clauses).

<sup>297</sup> See, e.g., *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1076-77 (2d Cir. 1996), *reinstated by* 173 F.3d 120 (2d Cir. 1999) (finding a constitutional violation where parolee was forced to attend Alcoholics Anonymous meetings at which he was required to participate in religious exercises).

<sup>298</sup> See, e.g., *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 79-85 (holding that a church-affiliated charitable organization did not qualify as religious employer within the meaning of California law).

<sup>299</sup> See *United States v. Lee*, 455 U.S. 252, 261 (1982) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 539 (W.D. Ky. 2001) (holding that a city regulation barring discrimination on the basis of sexual orientation in the employment context, rather than the beliefs of the employer, was a valid regulation of the conduct of employers), *vacated on other grounds by* 53 Fed. App'x 740 (6th Cir. 2002); see generally Julie M. Magid & Jamie D. Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191 (2005) (discussing the distinction between employers whose main purpose as an organization is to facilitate religious practice by co-religionists and employers who merely profess religious belief but whose business does not exist for the express purpose of advancing religious goals).

actually deemed “religious” would also qualify as religious associations under the First Amendment.

## 2. Secular Organizations

Secular organizations are easier to define than religious organizations, provided that these organizations do not profess as one of their goals the advancement of religious belief or faith. The Court in *Dale* commented that the First Amendment’s explicit protections imply an analogous right to “associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>300</sup> That is, a secular organization is one that involves a “collective effort on behalf of shared goals,”<sup>301</sup> other than religious goals. Thus, for example, advocacy groups, non-religious universities, business partnerships and commercial enterprises, social or sporting clubs, and groups dedicated to the arts qualify as secular associations. Private intimate associations also qualify as secular associations if entered into for non-religious purposes.<sup>302</sup> Individuals have a fundamental right “to enter into and carry on certain intimate or private relationships.”<sup>303</sup> These relationships include marriage,<sup>304</sup> bearing<sup>305</sup> and raising children,<sup>306</sup> and cohabitation with relatives,<sup>307</sup> but also encompass relationships that presuppose “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”<sup>308</sup> When determining whether any particular association is sufficiently personal or private to qualify as an intimate association, courts consider several factors, including “size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.”<sup>309</sup> Existing Supreme Court precedent thus

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<sup>300</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)).

<sup>301</sup> *Roberts*, 468 U.S. at 622.

<sup>302</sup> *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987) (finding that the Rotary Club qualifies as an intimate, but not religious, association).

<sup>303</sup> *Id.* at 545.

<sup>304</sup> *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (“Freedom to marry has long been recognized as one of the vital personal rights essential to the ordered pursuit of happiness by free men.” (quoting *Skinner v. Oklahoma* 316 U.S. 535, 541 (1942))).

<sup>305</sup> *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-86 (1977) (“The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.”).

<sup>306</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (identifying the constitutionally protected right to raise children).

<sup>307</sup> *Moore v. E. Cleveland*, 431 U.S. 494, 503-06 (1977) (plurality opinion) (raising family bonds to the level of Constitutionally protected association).

<sup>308</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

<sup>309</sup> *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987).

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envisioning a broad definition of secular associations, and a more narrow definition of intimate associations. However, nearly any form of non-religious association with shared goals or a communal purpose will likely qualify as a secular association.

### 3. Quasi-Religious Organizations

As the previous discussion on defining religion demonstrates, a narrow conception of religious belief will push many groups professing such beliefs outside the category of religious associations. Even broad definitions of religion will leave many organizations that lack some indicia of traditionally understood organized religion outside the rubric of “religion.” Thus viewing the world of associations in binary terms inadequately captures the true character of many organizations. In order to examine the proper scope and effect of government policy and existing laws on organizations like the BSA, it is imperative to establish a third category of associations encompassing groups that profess both religious and secular purposes. This category would include organizations whose primary purpose is not to proselytize or manage matters of faith, but who instead espouse religious values and teachings as part of their expressive purpose.

In order to qualify as quasi-religious, a group would have to demonstrate that religious beliefs and values are an important aspect of the group’s expressive mission, dictating in part the association’s organization and message, but that secular considerations bear comparable influence on the group’s internal structure and expressive purpose. Thus, eliminating a quasi-religious group’s religious elements would seriously hinder the group’s ability to function as it chooses, but would not entirely destroy the group’s reason for associating in the first place. Also, the religious attributes of the quasi-religious association in question would have to be religious as understood by the Supreme Court in order to qualify the organization as quasi-religious.<sup>310</sup> This category would not encompass groups whose purpose is to preach a quasi-religion, as opposed to organizations whose expressive message explicitly includes properly understood religious beliefs. Thus the MOVE organization discussed above,<sup>311</sup> which the court held was not religious, would not be a quasi-religious organization.

The YMCA, an organization founded on Christian principles and which provides thousands of communities with health and social services,<sup>312</sup> would qualify as a quasi-religious organization. The YMCA’s primary purpose is not the inculcation of religious values in the users of its facilities. Rather, the YMCA seeks to “put [its] Christian principles into practice” by providing the

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<sup>310</sup> See *supra* Part III.A.I.

<sup>311</sup> See *supra* notes 278-282.

<sup>312</sup> See About the YMCA, [http://www.ymca.net/about\\_the\\_ymca/](http://www.ymca.net/about_the_ymca/) (last visited Feb. 10, 2006); see also *Smith v. YMCA*, 462 F.2d 634, 637 (5th Cir. 1972) (describing the YMCA’s services and mission).

communities it serves with recreational facilities and social programs.<sup>313</sup> Similarly, a rehabilitation organization whose primary purpose is to combat alcoholism and drug abuse, but which also encourages individuals to profess a belief in a power greater than themselves as a recuperative mechanism, would qualify as a quasi-religious organization. On the other hand, a recovery program explicitly predicated on establishing a relationship with God through the mediation of Jesus Christ would likely be religious rather than quasi-religious, given that such an organization defines itself in terms of its Christian elements.<sup>314</sup> For similar reasons, courts have held Alcoholics Anonymous to be a religious organization in the context of state-coerced attendance by inmates or parolees.<sup>315</sup>

Consider also the case of employers professing to further religion as a primary purpose of their business enterprise.<sup>316</sup> In *McClure v. Sports and Health Club, Inc.*, the Minnesota Supreme Court rebuffed a religious employer's free exercise challenge, upholding the validity of anti-discrimination laws in the workplace.<sup>317</sup> The employer in *McClure* was a born-again Christian who used his religious beliefs as a method of employee management – including firing and refusals to promote.<sup>318</sup> The court acknowledged that Minnesota's anti-discrimination law burdened the employer's free exercise as an individual, but upheld the law as applied because of the state's compelling interest in combating employment discrimination and because the law was the least restrictive means of accomplishing the state's goal.<sup>319</sup> The court observed that the state law provided exemptions for religious corporations "when religious beliefs [are] a bona fide occupational qualification for employment."<sup>320</sup> However, the court stated that the employer was not a religious corporation, but a commercial enterprise engaged in business for profit.<sup>321</sup> As such, "[b]y engaging in this secular endeavor, appellants have passed over the line that affords them

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<sup>313</sup> See YMCA Mission, <http://www.ymca.net> (last visited Feb. 10, 2006) (top left corner of home page).

<sup>314</sup> See *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 881-84 (7th Cir. 2003) (holding that permitting a parolee to attend a religious rehabilitation program did not violate the Establishment Clause).

<sup>315</sup> See *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1076-77 (2d Cir. 1996), *aff'd on reh'g*, 173 F.3d 120 (2d Cir. 1999); *Kerr v. Farrey*, 95 F.3d 472, 476-80 (7th Cir. 1996) (finding that state-mandated Alcoholics Anonymous attendance triggers Establishment Clause questions).

<sup>316</sup> See *supra* note 299 and accompanying text.

<sup>317</sup> 370 N.W.2d 844 (Minn. 1985).

<sup>318</sup> *Id.* at 846-47.

<sup>319</sup> *Id.* at 852-53.

<sup>320</sup> *Id.* at 853 (citing MINN. STAT. § 363.02, 1(2) (1984)).

<sup>321</sup> *Id.*

absolute freedom to exercise religious beliefs.”<sup>322</sup>

On its face, it appears that Sports and Health Club, Inc. is not a religious organization, given its for-profit motivations. However, for-profit motivations do not nullify the religious element of an organized church. Rather, exemptions from laws,<sup>323</sup> or court-created doctrine like the ministerial exception,<sup>324</sup> protect a religious institution’s employment practices. It is possible that an employer seeks both to profit from a commercial enterprise and to provide a unique employment opportunity for his co-religionists.<sup>325</sup> Perhaps Sports and Health Club’s shortcoming as a religious employer was that it employed numerous individuals who were not born-again Christians, thus eliminating any pretense of serving as an employer for co-religionists.<sup>326</sup> Yet it seems clear that the employer in *McClure* does not fit neatly into the either/or categorization as a religious organization protected from state encroachments or as secular organization subject to anti-discrimination laws.

Also, consider charitable organizations associated with churches. The California Supreme Court dealt with such a scenario in *Catholic Charities of Sacramento, Inc. v. Superior Court*.<sup>327</sup> In that case, Catholic Charities, a nonprofit public benefit corporation affiliated with the Catholic Church, argued that it was a “religious employer” pursuant to a state statute that granted religious employers exemptions from a state law requiring drug insurers to provide coverage for contraceptives.<sup>328</sup> The court observed that the organization in question provided the public numerous social services as an adjunct to the social justice ministry of the Catholic Church, including “providing immigrant resettlement programs, elder care, counseling, food, clothing and affordable housing for the poor and needy, housing and vocational training of the developmentally disabled and the like.”<sup>329</sup> Relying

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<sup>322</sup> *Id.*

<sup>323</sup> See, e.g., CAL. HEALTH & SAFETY CODE, § 1367.25(b) (exempting “religious employers” from the requirement that prescription drug benefits include contraceptives); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329-30 (1987) (holding that § 702 of the Civil Rights Act of 1964, which exempts religious organizations from Title VII’s prohibition against discrimination on the basis of religion, applies to the secular nonprofit activities of religious organizations).

<sup>324</sup> See, e.g., *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 348-51 (5th Cir. 1999) (discussing the ministerial exception to Title VII, which protects the freedom of a church to select its own ministers).

<sup>325</sup> See Magid & Prekert, *supra* note 299, at 193 (advocating an expansion of the religious exemption under Title VII to those employers who advance their religious beliefs through their occupational pursuits or employment decisions).

<sup>326</sup> See *McClure*, 370 N.W.2d at 848 (commenting that the owners of Sports and Health Club employed individuals of various religious persuasions as well as divorcees and unmarried individuals).

<sup>327</sup> 85 P.3d 67 (Cal. 2004).

<sup>328</sup> *Id.* at 75-76.

<sup>329</sup> *Id.* (quoting Catholic Charities’s description of its organization).

on a statutory definition of “religious employer,” the court commented that the organization did not, *inter alia*, evince a primary purpose of inculcating religious values and that it did not primarily hire and serve Catholics, and thus did not qualify as a religious organization.<sup>330</sup> Much like the U.S. Supreme Court in *Dale*, the *Charities* court focused solely on the organization’s secular purpose, ignoring other organizational motivations. Moreover, the *Charities* court discussed what it assumed, albeit reasonably in the context of the case, was Catholic Charities’ primary purpose of providing services to the community, without according similar weight to religious factors that Catholic Charities argued also served as primary motivations for the organization.<sup>331</sup> Thus, Catholic Charities is neither strictly a religious nor secular institution.

Finally, consider the Second Circuit decision of *Hsu ex rel. Hsu v. Roslyn Union Free School District No. 3*,<sup>332</sup> where the court examined a school non-discrimination policy’s effect on an after-school Bible club whose founding members wished to impose a Christianity requirement on its officers.<sup>333</sup> The case involved a claim by members of the Bible club pursuant to the Equal Access Act,<sup>334</sup> which required public schools to grant access to after-school facilities on equal terms, regardless of an extracurricular group’s religious, political, philosophical, or other message.<sup>335</sup> Considering the Bible club an expressive association, the court held that application of the club’s Christian officer requirement to the positions of president, vice-president, and music coordinator – but not activities coordinator or secretary – was essential to the preservation of the club’s expressive purpose and identity, and thus was valid under the Equal Access Act.<sup>336</sup> The court relied on Supreme Court cases dealing with expressive association, as opposed to free exercise.<sup>337</sup> But the court could just as reasonably have focused on the Bible club’s religious character and free exercise rights.<sup>338</sup> Thus, as in *Dale*, the *Hsu* court did not rest its holding on the quasi-religious, if not religious, nature of the Bible club in its analysis. The court’s analysis implies that the Bible club was neither

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<sup>330</sup> *Id.* at 80 (citing CAL. HEALTH & SAFETY CODE, § 1367.25(b)).

<sup>331</sup> *Id.* at 75, 80-81.

<sup>332</sup> 85 F.3d 839 (2d Cir. 1996).

<sup>333</sup> *Id.* at 847-48.

<sup>334</sup> 20 U.S.C. §§ 4071-74 (1994).

<sup>335</sup> *Hsu*, 85 F.3d at 847-48, 854.

<sup>336</sup> *Id.* at 848 (concluding that the officer requirement was essential to the expressive content of the group’s meetings and to the preservation of its purpose and identity); *id.* at 858-59 (explaining that the occupants of the three leadership positions of President, Vice President, and Music Coordinator affect the content of speech at meetings since they lead prayers and devotions).

<sup>337</sup> *Id.* at 858-59 (citing, *inter alia*, *N.Y. State Club Ass’n, Inc. 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); and *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

<sup>338</sup> Admittedly, the court did rely on Establishment Clause doctrine to hold that the Bible club’s officer requirements did not constitute an establishment violation. *Id.* at 867.

purely religious nor secular.<sup>339</sup> But even without explicit acknowledgement of quasi-religious organizations, legal analysis cannot seriously view a student Bible club and the Mormon Church as comparable entities. Catholic Charities, the health club in *McClure*, and the Bible club in *Hsu* are exactly the kinds of organizations that can slip through the definitional cracks when courts classify associations in binary, religious-or-secular terms. In order to avoid this sort of either/or analysis, organizations evincing dual secular and religious purposes and dogma should be classified as quasi-religious organizations.

B. *The BSA Is a Quasi-Religious Association*

While two federal district courts have found the BSA to be religious in the context of claims that government aid or contractual relations with the BSA raised Establishment Clause concerns,<sup>340</sup> no federal or state court has expressly held that the BSA is a religious organization meriting the protections of the religion clauses. This makes sense. Unlike an organized religion, the BSA does not proselytize, seek converts, or maintain the faith. Rather, the BSA focuses on instilling in youth a system of moral values predicated on the Scout Oath<sup>341</sup> and Law<sup>342</sup> by way of communal and outdoor activities.<sup>343</sup> However, the BSA is not a strictly secular institution. Faith in a theistic power greater than oneself is an important tenet of Scouting, and remains one of the paramount values that Scouting aims to instill in boys and young men. The Scout Oath, enumerating the several duties of Scouts, opens with a Scout's "duty" to God.<sup>344</sup> Similarly, the Scout Law closes with the requirement that a Scout be "Reverent."<sup>345</sup> To become and remain a member, boys and adults

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<sup>339</sup> *Id.* at 857 (commenting that some of the group's activities, including guest speakers, skits and games, are not unambiguously religious).

<sup>340</sup> See *Winkler v. Chi. Sch. Reform Bd. of Trs.*, No. 99C2424, 2005 WL 627966, at \*20 (N.D. Ill. Mar. 16, 2005) (finding that the BSA is not pervasively sectarian but does qualify as religious for the purpose of Establishment Clause analysis); *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1270-73 (S.D. Cal. 2003) (discussing how the BSA is a religious organization with a religious purpose and, therefore, that a city's lease of parkland to the BSA therefore raises Establishment Clause concerns).

<sup>341</sup> The Scout Oath reads, "On my honor I will do my best To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." THE BOY SCOUT HANDBOOK, *supra* note 18, at 9.

<sup>342</sup> The Scout Law states that "[a] Scout is Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, and Reverent." *Id.*

<sup>343</sup> *Id.* ("As an American, I will do my best to Be clean in my outdoor manners, Be careful with fires, Be considerate in the outdoors, and Be conservation-minded.")

<sup>344</sup> *Id.* ("On my honor I will do my best To do my *duty to God* and my country and to obey the Scout law, To help other people at all times, To keep myself physically strong, mentally awake and morally straight.") (emphasis added).

<sup>345</sup> *Id.* ("A scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and *reverent*.") (emphasis added).

alike must affirm their “Duty to God” through the Scout Oath. “At virtually every meeting and ceremony, Boy Scouts and their adult leaders recite the Oath and Law in unison.”<sup>346</sup> Moreover, adult leaders must subscribe to the Declaration of Religious Principle, which begins, “The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God.”<sup>347</sup> Likewise, during Scout hiking outings, Scouts participate in religious services, usually on Sunday.<sup>348</sup>

Admittedly, the BSA is non-denominational in its religious requirements, and leaves matters related to the inculcation of specific religious doctrine to a Scout’s family and church.<sup>349</sup> Even so, as the Seventh Circuit observed in a claim by an atheist similar to the one the Supreme Court heard in *Dale*, one of the dominant purposes of Scouting “is to equip youth of all races, colors and creeds to fulfill their duty to God.”<sup>350</sup> Indeed, this observation led the Seventh Circuit to conclude that “[t]he Boy Scouts of America would be unable to carry out its very purpose if the government . . . required it to accept members who deny a condition of membership, that is, the belief in God.”<sup>351</sup> In addition to the BSA’s avowed principles to which each Scout must adhere, the BSA also maintains strong relationships with various churches throughout the country. In fact, nearly sixty-five percent of all Scout troops are sponsored by churches or synagogues.<sup>352</sup> Thus, working in tandem with religious entities, Scouting “has always been committed to the moral, ethical, and spiritual development of

<sup>346</sup> Brief for Petitioners at 3, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, No. 99-699 (2000).

<sup>347</sup> Declaration of Religious Principle, *supra* note 18.

<sup>348</sup> See Manual for Chaplain Aides and Chaplains, <http://www.scouting.org/relationships/chaplains/> (last visited Feb. 10, 2006) (setting out guidelines for conducting “appropriate interfaith religious services during troop outings”).

<sup>349</sup> See THE BOY SCOUT HANDBOOK, *supra* note 18 (“Your family and religious leaders teach you about God and the ways you can serve.”); Declaration of Religious Principle, *supra* note 18:

The Boy Scouts of America . . . recognizes the religious element in the training of the member, but is *absolutely nonsectarian* in its attitude toward that religious training. Its policy is that the home and the organization with which the member is connected shall give definite attention to religious life.

(emphasis added).

<sup>350</sup> *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1277 (7th Cir. 1993); see also *Winkler v. Chi. Sch. Reform Bd. of Trs.*, No. 99C2424, 2005 WL 627966, at \*\*16-19 (N.D. Ill. Mar. 16, 2005) (listing twenty-nine reasons set forth by the plaintiff for why the BSA could be considered a religious organization).

<sup>351</sup> *Welsh*, 993 F.2d at 1277.

<sup>352</sup> Brief for Petitioners, *supra* note 346, at 3; Laurie Goodstein, *Jewish Group Recommends Cutting Ties to Boy Scouts*, N.Y. TIMES, Jan. 10, 2001, at A12 (stating that about sixty-five percent of Scout troops are sponsored by religious organizations, but that very few are Jewish organizations); Benjamin Soskis, *Big Tent; Saving the Boy Scouts from its Supporters*, NEW REPUBLIC, Sept. 17, 2001, at 18 (commenting on how this percentage has risen over the last fifteen years).

our youth.”<sup>353</sup> As the court stated in *Barnes-Wallace*, “[t]here are few religions in America which can boast of millions of youth who meet each week and openly affirm their belief in God.”<sup>354</sup>

Under the broad interpretation of religion espoused by the Supreme Court in the statutory context of the Selective Service Act,<sup>355</sup> it seems that the theistic focus of the Boy Scouts qualifies it as religious. If the consenting and dissenting opinions in *Welsh* are taken into account, then at least four Justices at one time believed that even non-theistic conceptions of a high power qualified as religious.<sup>356</sup> Even under the analysis-by-analogy approach articulated in *Africa*,<sup>357</sup> the BSA would conceivably qualify as religious. Regardless, the BSA requires that members both espouse a theistic conception of God and reaffirm their belief both publicly and privately through oaths, ceremony, and ritual.<sup>358</sup> The BSA’s sponsorship ties with religious institutions further strengthens the BSA’s religiosity.<sup>359</sup> Moreover, the very fact that the BSA would risk public condemnation in order to vindicate its right to exclude individuals who do not meet their religion-based criteria speaks volumes to the BSA’s religious nature. Indeed, in *Dale*, the Scouts sought to ensure they retained control over their Scoutmasters,<sup>360</sup> a role that is the quasi-religious analogue of church youth ministers; both Scoutmasters and Church youth ministers serve the primary function of communicating moral and religious messages to the young by word and example, shepherding youth through the often difficult choices they face growing up. The value system the Scouts seek to inculcate includes a belief in a theistic conception of the divine<sup>361</sup> and opposition to homosexuality.<sup>362</sup> Countless Churches espouse the very same doctrine, grounded in the same religious considerations. It seems clear that the BSA requires its members to espouse religion as opposed to secularism and

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<sup>353</sup> BSA National Executive Board, *Reaffirmation of the Position of the Boy Scouts of America on Duty to God*, June 12, 1991, <http://usscouts.org/aboutbsa/rpa1991.html>.

<sup>354</sup> *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1270 (S.D. Cal. 2003); see also *Boy Scouts at a Glance*, *supra* note 260 (stating that over 3.1 million youth and 1.1 million adults were members of the Boy Scouts as of December 31, 2004).

<sup>355</sup> See *supra* notes 266-270 and accompanying text.

<sup>356</sup> See *supra* note 270 and accompanying text (discussing *Welsh*, 398 U.S. at 340-44 (plurality opinion)).

<sup>357</sup> See *supra* notes 278-282 and accompanying text (discussing *Africa v. Commonwealth of Pa.*, 662 F.2d 1025 (3d Cir. 1981)).

<sup>358</sup> See *supra* notes 344-346 and accompanying text.

<sup>359</sup> See *supra* note 352 and accompanying text; see also Brief for Petitioners, *supra* note 346, at 3.

<sup>360</sup> See *supra* note 26 and accompanying text.

<sup>361</sup> See *supra* notes 350-351 and accompanying text (explaining how belief in God is a requirement for BSA membership).

<sup>362</sup> *Dale*, 530 U.S. at 651-53 (concluding that the BSA sincerely believes that homosexual conduct is inconsistent with the Scout Oath and that homosexuals do not provide appropriate role models for scouts).

that the BSA indeed commands religious adherence over irreligion.<sup>363</sup> Thus, at the very least, the BSA should be considered a quasi-religious, rather than a secular association. As such, any legal analysis of the effect of anti-discrimination laws on the BSA or the validity of the government actions should take account of the organization's religious character.<sup>364</sup>

#### IV. QUASI-RELIGIOUS ORGANIZATIONS DESERVE GREATER LEGAL AND POLITICAL PROTECTIONS THAN SECULAR ASSOCIATIONS

The existing legal framework provides protection in varying degrees to religious and secular organizations. The religion clauses protect religious organizations' decisions regarding internal organization and issues of faith.<sup>365</sup> The freedoms of speech and associative expression protect religious and secular organizations alike.<sup>366</sup> The doctrine of unconstitutional conditions likewise protects both religious and secular organizations.<sup>367</sup> To the extent that the law implicitly recognizes the existence of quasi-religious organizations – most often in free speech and Establishment Clause cases<sup>368</sup> – such organizations receive the same protections as religious organizations. To the extent that the law doesn't recognize such organizations – specifically in the free exercise and freedom of association contexts – courts should afford quasi-religious organizations, as defined above, protections similar to those of religious organizations.

##### A. Heightened Legal Protection for the BSA as a Quasi-Religious Organization

The caselaw suggests that Establishment Clause analysis plays out similarly regardless of whether the association in question is religious or quasi-religious. The quasi-religious student group in *Hsu*<sup>369</sup> would have just as much a right to access school facilities as the religious group in *Good News*<sup>370</sup> and just as much a right to school funding as the religious publication in *Rosenberger*.<sup>371</sup>

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<sup>363</sup> See *supra* notes 341-348 (discussing the requirement that Scouts believe in God).

<sup>364</sup> See *supra* Part I.

<sup>365</sup> See *supra* Part II.A.

<sup>366</sup> See *supra* Parts II.B, II.C.1.

<sup>367</sup> See *supra* Part III.C.2.

<sup>368</sup> See *supra* notes 129-131, 332-338, and accompanying text (analyzing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) and *Hsu ex rel Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996)).

<sup>369</sup> See *Hsu*, 85 F.3d 839; *supra* notes 332-338 and accompanying text (describing the *Hsu* case, which challenged an after-school Bible club's rule that all officers be Christian).

<sup>370</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *supra* notes 127-128 and accompanying text (discussing a religious group's right to receive equal access to a public forum).

<sup>371</sup> See *Rosenberger*, 515 U.S. 819; *supra* notes 129-131 and accompanying text (explaining how, under the Establishment Clause, a public university must fund religious

Conversely, the state would be as likely to violate the Establishment Clause by funding the group in *Hsu* in a non-neutral fashion as it would by funding the Catholic Church in a non-neutral fashion.<sup>372</sup> Moreover, *Locke*, however it is interpreted,<sup>373</sup> would apply equally to religious and quasi-religious associations. Thus, courts analyzing an Establishment Clause claim in which the BSA invokes its religiosity and seeks the protection of the religion clauses would conduct the same analysis as courts analyzing a claim in which the BSA espouses religious values but claims to be a secular organization. Under either view, the BSA remains in part motivated by its religious views. Any effort by the state to exclude the BSA from neutral programs of general applicability that are open to other organizations, whether secular or not, and any state funding of the BSA on non-neutral terms would violate the Establishment Clause. Similar logic would apply to any association inhabiting the grey-zone of quasi-religious organizations.

The law, however, might treat religious and quasi-religious organizations differently in the context of state erection of religious and quasi-religious symbols. This is so because a reasonable person is far less likely to perceive state sponsorship of religion where symbols involving quasi-religious organizations, as opposed to religious symbols, are displayed on state property. Thus, a cross erected in front of a courthouse likely violates the Establishment Clause, while the erection of a statue commemorating the BSA's contributions to civic life in the same location likely does not violate the Establishment Clause. Likewise, courts would be less likely to perceive a statue that included religious content donated by the BSA to a municipality for purposes of displaying the statue on public property as endorsing religion than a similar statue donated by the Catholic Church.<sup>374</sup> But even in the symbolism context,

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groups and secular groups).

<sup>372</sup> A recent district court opinion reinforces this point. See *Winkler v. Chi. Sch. Reform Bd. of Trs.*, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005). In *Winkler*, the plaintiffs sought to enjoin the Departments of Defense and the Housing and Urban Development from using taxpayer funds to support various BSA programs on Establishment Clause grounds. *Id.* at \*1. Plaintiffs did not sue the BSA or any BSA affiliates. *Id.* The court, citing *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), held that the BSA was religious for purposes of establishment clause analysis. *Id.* at \*20. The court found that a statute authorizing the government to fund the BSA's jamboree activities violated the Establishment Clause, as the statute provided direct funding *only* to the BSA. *Id.* at \*22. However, the court upheld government funding of the BSA where the government provided aid to other recipients on a neutral basis and where sufficient safeguards existed to prevent the aid from funding religious activities. *Id.* at \*4, \*24-29; see also *Winkler*, 2005 WL 1792189, at \*4 (entering a permanent injunction barring the Department of Defense from providing aid to the BSA under the "Jamboree statute," 10 U.S.C. § 2554 (2003)).

<sup>373</sup> See *supra* notes 136-140.

<sup>374</sup> To further clarify the example, the BSA might hypothetically donate a statue to a municipality that includes an Eagle clutching a Bible in its talons. The BSA might also

courts would apply the same reasonable person test to the symbol in question, regardless of its religious or quasi-religious subject matter or origin.

Problems arise where the law does not recognize the quasi-religious nature of private associations. These problems are especially salient when courts apply anti-discrimination laws to such associations. The BSA serves as a prime example. As noted above, the BSA is neither a strictly religious nor a secular organization.<sup>375</sup> Rather, it seeks to inculcate youth with values of both secular and religious origin. However, separating the secular from the religious in the context of the BSA is quite difficult. Is constructing a makeshift chapel on a backpacking trip a religious or secular activity? Does reciting the Scout Oath, with its dual invocations of duty to God and country, constitute the inculcation of patriotic values or religious virtue? Does the Scout duty to “help other people at all times”<sup>376</sup> arise from secular or religious obligations? The difficulty of fashioning a satisfactory answer to these questions reflects the BSA’s quasi-religious nature.

Few other organizations serve as large a constituency in a quasi-religious fashion. The BSA’s unique quasi-religious nature requires courts to acknowledge religion when ruling on cases involving the BSA and suggests that lawmakers should take account of the BSA’s quasi-religious underpinnings when legislating and setting policy. To what extent the institutional protections safeguarded after *Smith*<sup>377</sup> would apply to quasi-religious organizations is unclear. So long as courts distinguish between associations in binary terms, it is unlikely that any organization whose primary purpose is not religious will receive the protections religious organizations receive. But the fact remains that quasi-religious organizations like the BSA serve important societal and religious functions analogous to bona fide religious organizations. The Alcoholics Anonymous attendee finds redemption by accepting a new set of values; religiously-oriented halfway homes steer criminals away from recidivism and toward a system of values capable of

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affix a placard to this statue indicating it is a gift to the municipality to commemorate Scouting’s contributions to the municipality’s development. *Cf.* *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005) (discussing a similar fact pattern involving the Fraternal Order of Eagles’ gift of a statue depicting the Ten Commandments to the State of Texas). Even though the Bible is clearly a religious symbol connoting monotheistic religion, it likely would not constitute an endorsement of religion. The reasonable observer might associate the Bible with Scouting’s history and tradition and, more likely than not, would view the state’s placement of the statue on public property as commemorative of the BSA rather than advocating religion. It is far less likely, however, that a reasonable person would view a similar gift by the Catholic Church commemorating Jesus Christ’s contributions to the municipality’s developments as evincing a secular purpose.

<sup>375</sup> See *supra* Part III.B.

<sup>376</sup> See *supra* note 341.

<sup>377</sup> See *supra* notes 111-119 (remarking that *Employment Div. v. Smith*, 494 U.S. 872 (1990), likely does not change regulatory landscape for religious associations regarding free exercise).

reintroducing convicts to civil society; and the BSA inculcates millions of boys and young men with values based on religious precepts. Thus, quasi-religious organizations serve as acculturating agents much as churches do. Similarly, they serve a societal gate-keeping function, working with youth, outcasts, misfits, and the anti-social in order to facilitate their introduction into adult society. No court has applied the ministerial and church autonomy doctrines to quasi-religious organizations as defined in this Note. For organizations that inhabit this grey space between the religious and secular, but nonetheless work in the medium of religious values and faith, the religious fiber of their employees may be just as important as for churches. As such, to the extent that these organizations exercise similar functions as religious organizations – instilling moral and religious values – they should receive similar protections when managing their institutional affairs.

Therefore, courts should develop a dual framework, involving both free exercise and expressive association rights. In the context of the BSA's ability to choose its leaders and define its membership, the doctrines of free exercise and expressive association might run on parallel tracks.<sup>378</sup> Both doctrines permit private religious associations to select their own leaders and members.<sup>379</sup> Religious bodies, invoking their free exercise rights, may rely on the doctrines of "church autonomy" and the "ministerial exception" when ordering their internal affairs.<sup>380</sup> Or they may invoke *Dale*. To the extent that free exercise and expressive association claims are interchangeable, in that they produce the same result when applied to the BSA, courts might not need to import the concept of church autonomy or the ministerial exception into freedom of association analysis.

However, recognizing the BSA's religious character would allow the BSA to defend itself using one of *Smith*'s three exceptions.<sup>381</sup> For example, in a future *Wyman*-like case, the BSA could invoke *Smith*'s "individualized exemption" exception.<sup>382</sup> While arising most often in the employment context, courts have utilized the doctrine in other situations, such as exemptions from curricular requirements.<sup>383</sup> Thus in *Wyman* or *Evans*,<sup>384</sup> the BSA might have

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<sup>378</sup> See generally Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001). Tushnet argues that the Free Exercise Clause is largely covered by, among other things, the expressive association doctrine because it "could provide substantial protection for the internal activities of religious organizations, where those activities are in some sense constitutive of the religious community itself." *Id.* at 72.

<sup>379</sup> See *supra* notes 115-119 and accompanying text; Part II.B.

<sup>380</sup> See *supra* notes 115-119 and accompanying text (remarking that courts cannot question religious bodies on particular religious matters under the "church autonomy" doctrine and that courts exempt religious organizations from rules governing employment decisions under the "ministerial exception").

<sup>381</sup> 494 U.S. 872 (1990); see *supra* notes 84-88 and accompanying text.

<sup>382</sup> See *supra* notes 84-88 and accompanying text.

<sup>383</sup> See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) (applying *Smith*'s individualized exemption doctrine and reversing summary judgment order because a

pointed out that the state permitted other organizations of arguably discriminatory character to retain access to the charitable giving program and the marina berthing subsidy. Similarly, in *Barnes-Wallace*,<sup>385</sup> where the court expressly held that the BSA was a religious organization, the court should have at least discussed whether excluding the BSA, and only the BSA, from contracting with the city due to its religious character was an Establishment Clause violation.

Recognizing the BSA's religious character would also permit the BSA to invoke *Smith*'s "hybrid rights" exception.<sup>386</sup> As noted above, the hybrid rights exception has received a rocky reception in the lower courts.<sup>387</sup> But in cases like *Wyman*, the doctrine, if applied, would make a difference. The Second Circuit would have had greater difficulty upholding the BSA's exclusion from a charitable giving program had the court faced not just an associative expression claim, but also a free exercise claim inextricably linked to the associative expression claim. Instead of applying a reasonableness analysis, the *Wyman* court would have had to apply strict scrutiny. If New Jersey's admittedly strong interest in eradicating discrimination on the basis of sexual orientation was insufficient to require the BSA to alter its membership policies in *Dale*,<sup>388</sup> then surely excluding the BSA from Connecticut's charitable giving program must likewise fail strict scrutiny.

This is so because the BSA, as a quasi-religious, norm-engendering organization, likely causes far more societal damage by excluding all homosexual boys and young men than by participating in a state program with hundreds of other participants. By excluding young homosexuals, the BSA brands them as outsiders and subjects them to the ridicule of fellow classmates who are BSA members. This very issue led an Oregon appeals court to forbid the BSA from recruiting on school property during school hours.<sup>389</sup> But any link between the BSA's participation in Connecticut's charitable giving program and the negative effects on young children that might result from such

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genuine issue of material fact existed as to whether defendant educational institution maintained a discretionary system of case-by-case exemptions from curricular requirements).

<sup>384</sup> *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696, 702 (Cal. Ct. App. 2002), *review granted*, 65 P.3d 402 (Cal. 2003); *see supra* notes 50-68 and accompanying text (describing courts' denials of BSA's challenges to two state laws, in Connecticut and California, that appeared to penalize BSA for its hiring policies).

<sup>385</sup> *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003); *see supra* notes 69-75 and accompanying text (detailing how the *Barnes-Wallace* court held that BSA's lease of public parkland violated the Establishment Clause because the BSA was a religious organization and San Diego did not use a religion-neutral process).

<sup>386</sup> *See supra* notes 89-93 and accompanying text.

<sup>387</sup> *See supra* notes 89-93 and accompanying text.

<sup>388</sup> *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

<sup>389</sup> *Powell v. Bunn*, 108 P.3d 37, 49-50 (Or. Ct. App. 2005).

participation is far more tenuous. Excluding the BSA likely does nothing to change the BSA's policies,<sup>390</sup> and should fail strict scrutiny because it is not narrowly tailored to achieve the government's interest. Thus, the concept of hybrid rights would aid the BSA just as *Smith's* "individual exemption" exception would. Courts adjudicating the BSA cases should view the BSA as a quasi-religious organization and invoke *Smith's* exceptions instead of focusing exclusively on the BSA's freedom of association rights as a secular organization.

Finally, recognizing the BSA's religious character would necessarily render a court's unconstitutional conditions analysis involving the BSA more robust. While courts more often than not view governmental conditions as offers or refusals to fund rather than as penalties,<sup>391</sup> the fact remains that government regulation of the BSA, as discussed in this Note, would impinge not one, but several constitutional rights. Courts have not imported the logic of hybrid rights – whereby two individually noncolorable constitutional claims, when combined as a hybrid claim, become colorable<sup>392</sup> – into unconstitutional conditions analysis. Yet it seems unlikely that a court would treat the forced waiver of several constitutional rights the same as it would the waiver of just one. Thus, in a future case, where the BSA might very well have to sacrifice speech, association, and free exercise rights in order to gain access to government benefits, a court could and should view such government coercion with greater skepticism and heightened scrutiny.

B. *Heightened Political Protection for the BSA as a Quasi-Religious Organization*

To the extent that the BSA cannot secure its rights through existing legal paradigms, federal, state, and local governments should seek to accommodate the BSA as they do other religiously-oriented organizations. While it is true that after *Smith*, governments are not required to accommodate religious organizations,<sup>393</sup> governments may still, and often do, grant

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<sup>390</sup> See *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295, 1310 (S.D. Fla. 2001) (“[T]he action taken by the School Board barring the Boy Scouts from use of school facilities does nothing to stop the possible exclusion of students or teachers from scouting. If its purpose is to stop discrimination, the method chosen by the Board is ineffective.”).

<sup>391</sup> See Laycock, *supra* note 107, at 175:

The Court often says that when the government refuses to fund a constitutionally protected activity, it imposes no cognizable burden on the exercise of the unfunded constitutional right. It also says that the government cannot respond to an exercise of a constitutional right by withholding money for *other* activities eligible for government funding; this would penalize the exercise of the right.

<sup>392</sup> See *supra* notes 84, 89-93 and accompanying text.

<sup>393</sup> *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (“But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.”).

accommodations.<sup>394</sup> The rationale for accommodating the BSA may be applied to quasi-religious organizations in general, but it applies especially to the BSA, given the organization's unique station in American cultural life both historically and today.

Scouting has served as a right of passage for millions of American boys.<sup>395</sup> As of December 31, 2004, nearly 3.2 million youths and 1.2 million adults were members of the Boy Scouts in some capacity.<sup>396</sup> Fifty percent of all American boys between the ages of seven and ten are Cub Scouts, and twenty percent between eleven and eighteen are Boy Scouts.<sup>397</sup> The size of the Boy Scouts makes it the largest civic youth organization in the United States.<sup>398</sup> As such, Scouting serves an important acculturation and norm-setting function – teaching millions of boys and young men about citizenship, morals, and masculinity.<sup>399</sup> It is in the state's interest to secure access to such an important cultural institution for all its citizens and to avoid discrimination in the provision of the public-good function BSA membership serves. It is therefore no surprise that numerous governments and private parties have demanded that the BSA change its membership policy after *Dale*.

But despite the state's interest, in the long-run it would be wiser to either afford the BSA legislative accommodations or to ensure the organization's independence, thus permitting the BSA to continue functioning as it currently does. First, it is important to note that the marketplace of ideas, while far from perfect, seems to be working just fine with respect to the BSA. Now that the BSA's position on sexual orientation is public knowledge, parents know full well what type of organization their boys are joining. Any post-*Dale* parental decision to send their children to the Scouts is likely a conscious and deliberate value choice.<sup>400</sup> While some parents might hesitate to forbid their child's participation in the BSA once he has made friends or developed roots in a specific BSA troop, the fact remains that the BSA's membership has decreased since *Dale*.<sup>401</sup> Numerous local BSA governing bodies have protested the

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<sup>394</sup> See *supra* notes 320 & 323 (discussing religious exemptions granted by the federal government, California, and Minnesota).

<sup>395</sup> Over 110 million since 1910. See Boy Scouts at a Glance, *supra* note 260.

<sup>396</sup> See *id.*

<sup>397</sup> Koppelman, *supra* note 35, at 47-48 (citing Brief for Respondent at 1, Boy Scouts of Am. v. Dale, 530 U.S. 640 (No. 99-699)).

<sup>398</sup> *Id.* at 47.

<sup>399</sup> See Carpenter, *supra* note 37, at 1535; Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1599 (2001).

<sup>400</sup> While there are no scientific surveys on the matter, many of those who send their children to Scouting likely do so, in part, because of the BSA's specific value-system, including its stance on homosexuality.

<sup>401</sup> See Year in Review: 2003, *supra* note 10 (revealing a 5.4 percent drop in membership).

BSA's national membership policy,<sup>402</sup> but none have broken away from the national body.<sup>403</sup> Some current and former Scouts have begun their own advocacy organizations, albeit without the blessing or sanction of the BSA national body, in an attempt to affect the BSA's membership policy.<sup>404</sup> While it is true that organized religion exerts strong influence over the BSA, perhaps explaining the group's hesitation to alter its membership policies,<sup>405</sup> the important thing to note is that parents at all times retain the right to vote with their feet;<sup>406</sup> those that prefer the BSA for its values or other reasons<sup>407</sup> are free

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<sup>402</sup> See Sara Rimer, *Boy Scouts Under Fire: Ban on Gays Is at Issue*, N.Y. TIMES, July 3, 2003, at A19 ("After two years of meetings, civic leaders and Boy Scout executives [in Philadelphia] drafted a policy saying that the local scout council would not discriminate against gays."); Eric Lipton, *Local Scouting Board, Calling Gay Ban 'Stupid,' Urges End to National Policy*, N.Y. TIMES, Feb. 27, 2001, at B3 ("Calling the ban on homosexual scouts and troop leaders by the Boy Scouts of America 'repugnant' and 'stupid,' members of the group's New York City board announced yesterday that they were trying to persuade the Texas-based national organization to renounce and repeal the policy."); Letter from Nine Scout Councils to the Resolutions Committee, Boy Scouts of America, National Council (Apr. 27, 2001), available at <http://www.scoutingforall.org/aaic/100101.shtml>.

<sup>403</sup> Koppelman, *supra* note 35, at 50 (mentioning the local councils' proposal to end the ban on homosexuals but stating that "none of these cities' councils has officially rejected the national policy").

<sup>404</sup> See Scouting For All Mission Statement, <http://www.scoutingforall.org/articles/mission.shtml> (last visited Feb. 10, 2006):

THE MISSION of Scouting For All . . . is to advocate on behalf of its members and supporters for the restoration of the traditionally unbiased values of Scouting as expressed and embodied in the Scout Oath & the Scout Law, and to influence the Boy Scouts of America (BSA) to serve and include as participating members ALL youth and adult leaders, regardless of their spiritual belief, gender, or sexual orientation.

(boldface omitted).

<sup>405</sup> See *supra* note 351 and accompanying text (quoting *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1277 (7th Cir. 1993), for the proposition that if government required the BSA to accept children that did not believe in God, government would frustrate the BSA's purpose because belief in God is a condition of membership); Brief for National Catholic Committee on Scouting as Amici Curiae Supporting Petitioners at 1, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, No. 99-699 (2000).

<sup>406</sup> One commentator contends that breaking away from the BSA would be difficult for individual Scout troops or local Scout districts, given the BSA's intellectual property rights over the uniforms and terms like "Scouting" as well as the costs. See Koppelman, *supra* note 35, at 50-52. While it is true that in the five years since *Dale* no local Scouting body has broken away from the organization, membership has still declined, and continues to do so. It remains speculative whether the BSA will continue to successfully exert control over all its local subsidiaries. The fact that the BSA finds itself under attack across the country lends weight to the argument that eventually individual troops and districts will break off from the BSA. Moreover, the BSA would not necessarily succeed if it sought to enjoin breakaway troops from using terms like "troop" or "Scout" and similar uniforms. See *Nat'l Bd. of YMCA v. Flint YMCA*, 764 F.2d 199, 201 (6th Cir. 1985) (declining to enjoin a local breakaway chapter of the YMCA from using the national organization's trade name).

to stay.

Moreover, it is unclear if a schism within the BSA or disintegration of the organization as we know it will do more good than harm. The BSA serves underprivileged young men from numerous impoverished communities who may not otherwise have access to an extracurricular outlet that successfully steers them away from destructive behaviors.<sup>408</sup> While encouraging the BSA to split into rival factions might satisfy those opposed to the BSA's views on sexuality, several competitive Scouting organizations may not be able to serve inner-city communities as efficiently without the guiding hand of a national, unified, well-financed governing body. This lesser-of-two-evils logic is not entirely satisfying, but these sorts of arguments are exactly what legislators should consider when contemplating a system of regulation that seeks to maximize utility across broad swaths of society.

Second, the very notion of a functioning pluralistic society presupposes the existence of associations espousing myriad cultural viewpoints. Genuine pluralism requires differences across the population, rather than government-orchestrated homogeneity.<sup>409</sup> Even the most discriminatory and illiberal associations, whose ranks the BSA clearly does not belong to, serve important functions in a pluralistic society.<sup>410</sup> For example, membership in non-

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*But see* Church of Scientology Int'l v. Elmira Mission of the Church of Scientology, 794 F.2d 38, 45 (2d Cir. 1986) (directing the district court to enjoin a local branch of the Church of Scientology from using the national organization's trademarks).

<sup>407</sup> Reasons include organized access to the outdoors for millions of youths who might not otherwise be exposed to nature in such a way.

<sup>408</sup> See Koppleman, *supra* note 35, at 52 (quoting Chicago Area Council president, Lewis Greenblatt, who said, "In Chicago, our core group is kids from the inner city. Scouting offers them some extremely positive reinforcement they don't otherwise get."); Brief for the Church of Jesus Christ of Latter-Day Saints as Amici Curiae Supporting Petitioners at 4, Boy Scouts of Am. v. Wyman, 335 F.3d 80, No. 03-956 (2d Cir. 2003) ("Scouting units are rarely well off. Many exist in difficult neighborhoods and serve underprivileged boys.").

<sup>409</sup> See Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 466 (2000):

If groups are required to accept members and appoint leaders who do not share their distinctive beliefs, their distinctive voice will be silenced. If individuals with disfavored beliefs can be forced to participate in institutions designed to mold them in accordance with the dictates of political correctness, the tapestry of pluralism will be seriously impaired.

<sup>410</sup> See generally NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA (1998) (arguing that all associations have intrinsic value and can provide members with broad benefits including self-development and self-affirmation). To cite an extreme example, despite the KKK's violent and repugnant history, the organization today often performs functions beneficial to local communities. For example, the KKK has adopted a highway and has supported both anti-drug programs and the American Association of Retired Persons. See *Invisible Empire of the Knights of the KKK v. Mayor of Thurmont*, 700 F. Supp. 281, 282 (D. Md. 1988) (discussing the KKK's organization of a parade to support the "Just Say No to Drugs" program and the AARP); see

mainstream, illiberal organizations can strengthen the virtues of citizenship by inculcating values like hard work, self-sufficiency, and cooperation.<sup>411</sup> Similarly, membership in non-mainstream organizations can steer the troubled and anti-social away from even more destructive or discriminatory behaviors.<sup>412</sup> Moreover, to permit organizations far more discriminatory and repugnant than the BSA to participate in public programs while excluding the BSA makes little sense on both fairness and utilitarian grounds.<sup>413</sup>

Also, for every BSA, there are dozens of organizations and millions of parents advocating counterbalancing, tolerant views on homosexuality. As a consequence, for every parent teaching his or her children intolerance, there exist thousands of schools, associations, and governing bodies to offset the effects of private, family-taught hate. To the extent that the BSA, like other organizations, schools, and government entities, inculcates important moral values in youth, it serves a function vital to pluralistic democracy. And by providing parents who may not embrace liberality in all its forms with a place to send their children, the BSA fills a cultural space that might otherwise be left vacant. Thus the state has an interest in ensuring that private quasi-religious associations like the BSA continue to function unfettered by state regulation that threatens to alter their fundamental character.

Third, penalizing the BSA through state regulation might force the BSA to become more extreme. Until *Dale*, the BSA never explicitly articulated its view on homosexuality. This led the Court to opine that the fact that “an organization does not trumpet its views from the housetops . . . does not mean that its views receive no First Amendment protection.”<sup>414</sup> However, some lower courts have interpreted *Dale*’s holding as applying only to BSA leadership positions, rather than to all membership and employment decisions.<sup>415</sup> In a political climate where the BSA faces increasing

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also cases cited *supra* notes 244-247 (citing three cases in which the KKK wanted to participate in an Adopt-a-Highway Program).

<sup>411</sup> Koppelman, *supra* note 35, at 41.

<sup>412</sup> See ROSENBLUM, *supra* note 410, at 4.

<sup>413</sup> For example, it is somewhat bizarre to judicially protect the KKK’s right to participate in civic society while excluding the BSA. Compare cases cited *supra* notes 244-247 (holding that requiring the Klan to refrain from racial discrimination constituted an unconstitutional condition on the Klan’s participation in Missouri’s Adopt-A-Highway program) with *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 98 (2d Cir. 2003) (upholding the state of Connecticut’s decision to exclude the BSA from a state charitable giving program and accepting the state’s invocation of its anti-discrimination laws as justification for the exclusion), *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (invalidating the BSA’s lease of a public park from the city of San Diego), and *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696, 702-05 (Cal. Ct. App. 2002) (upholding the city of Berkeley’s conditioning of the BSA’s free use of the city marina on the BSA’s express revocation of its discriminatory policies).

<sup>414</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

<sup>415</sup> See *Boy Scouts of Am. v. D.C. Comm’n on Human Rights*, 809 A.2d 1192, 1201-03 (D.C. 2002) (remarking that the *Dale* Court required some level of “gay activism” to deny

condemnation and litigation, the BSA might respond by espousing views on homosexuality far more discriminatory and extreme than the organization currently does in order to receive greater associative protections.<sup>416</sup> For example, the KKK has long trumpeted its views on race. Yet the Eighth Circuit grants protection to the KKK, while courts in New York, California, and Oregon deny protection to the BSA.<sup>417</sup> As counterintuitive as it seems, the BSA might receive more, not less, protection under an expressive association theory if it espoused a louder, more discriminatory message.

The federal government already accommodates the Boy Scouts by requiring any public school that receives funds from the Department of Education to grant the BSA equal access to school facilities if those facilities are held open to the public.<sup>418</sup> The BSA's quasi-religious nature calls for accommodations similar to those that governments provide to religious organizations.<sup>419</sup> The BSA's function as both a teacher of religious values and a cultural gatekeeper so requires. To do otherwise would be to change the Scouts' character, limiting the BSA's ability to fulfill its mission and sending a state-approved message of exclusion to millions of Americans who may not hold the same views on civic responsibility and social inclusion as the governing body doing the excluding. Mainstream values should compete fairly with divergent values, and the state should not place its imprimatur on one specific, pre-approved canon of citizenship and morality. To facilitate this competition, government should allow the BSA to function as it is regardless of liberal disapproval of its membership policies. Impeding the BSA's – and only the BSA's – access to the marketplace of ideas because it does not fit neatly into religious or secular categories serves only to hinder pluralistic society and foster further division. Recognizing a third type of association – quasi-

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employment); *Chi. Area Council of Boy Scouts of Am. v. City of Chi. Comm'n on Human Relations*, 748 N.E.2d 759, 767-69 (Ill. App. Ct. 2001) (finding that the presence of a homosexual in some nonexpressive positions within the BSA would not detract from the BSA's overall purpose).

<sup>416</sup> See Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 129 (2000) (“Noncommodifiers should admire the way in which the Scouts has organized its affairs and they should recognize the dangers of state intervention that would force the Scouts to take hard-edged positions.”).

<sup>417</sup> See *supra* Part I & notes 247-251; see also Epstein, *supra* note 416, at 128-29.

<sup>418</sup> Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905 (2003):

Notwithstanding any other provision of law, no public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America . . . .

The BSA also enjoys a Congressional charter. See 36 U.S.C. §§ 30901-30908 (2003).

<sup>419</sup> These accommodations could include the protections afforded by the ministerial and church autonomy doctrines, as well as exemptions from certain anti-discrimination laws in the employment context. See *supra* notes 115-119, 323.

religious organizations – will provide the BSA and similar organizations the protection the law should afford them, and ensure its ability to participate in civil society on equal footing.

#### CONCLUSION

Current constitutional doctrine provides some, but not enough, protection to the BSA. Rather than view private associations in binary terms, courts and legislators alike should acknowledge the BSA's quasi-religious nature and provide the organization with protections similar to those that religious organizations receive. Thus, the state should respect the BSA's speech, association, and free exercise freedoms and not seek to exclude the BSA as punishment for its membership policies and its victory in *Dale*. Likewise, in lawsuits involving the BSA, courts should consider the BSA's quasi-religious underpinnings when applying constitutional doctrine.

Many organizations like the BSA, both religious and quasi-religious, exist to further traditional moral values. Regrettably, some of these organizations espouse views on sexual orientation incompatible with modern notions of equality. Organizations like the BSA, however, do far more good than harm, and to hinder these organizations' ability to fulfill their missions may achieve one state goal at the expense of numerous others. Moreover, courts which utilize questionable legal analysis to uphold state-sanctioned exclusions or legislators who punish these organizations for what they advocate send these organizations and society at large a divisive and condescending message: you are not one of us. This sort of exclusion and smug superiority is the primary reason why the culture wars rage in American society. It is indeed peculiar that modern liberality, so proud of its legacy of inclusive tolerance, would exclude a voice no less legitimate than its own from public participation. The Constitution provides that the government may not endorse religion or irreligion and that each individual retains the power to choose what moral compass to follow. But such choices necessarily imply the presence of diverse groups from which to choose. Singling out the BSA and other religious entities for regulation and exclusion does not serve these ends. A marketplace of ideas devoid of competitive viewpoints engenders a slow, insidious establishment of conformity, contrary to the fundamental precepts of the First Amendment.

One of the founders' principal aims in enacting the First Amendment was to ensure that conformity never takes root in the American conscience. The BSA, as it exists today, fulfills this vision by performing acculturating functions and counterbalancing other private associations that espouse values different from the BSA's. However strong the state's interest in enforcing egalitarian norms and eliminating societal discrimination, these interests must co-exist with equally important conceptions of individual and associational liberty. As the Court's associative expression cases suggest, the First Amendment has no greater antithesis than state suppression of minority viewpoints. Courts and legislators alike should consider their actions carefully before hindering

religious and quasi-religious organizations' ability to manage their internal affairs and to articulate their expressive goals. Otherwise governments risk damaging the diverse underpinnings that American society is built upon, while encouraging a tyranny of the majority that does little to safeguard true equality within a pluralistic and multi-faceted society.