Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute

Jennifer Gerarda Brown
Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute

Jennifer Gerarda Brown†

[When a “message” is kept secret, many individuals will invest in an organization they would not have joined had they known of the “message.” How many pro-gay individuals are now deeply troubled that they ever sent their boys to the Scouts, or gave the Scouts their money or their time as volunteers?

— Kenji Yoshino1]

INTRODUCTION

In Dale v. Boy Scouts of America,2 the United States Supreme Court reinforced the principle that no matter how large or apparently public an organization might be, the decision to join it is imbued with meaning; a person signals something by associating with an organization. Thus, the Boy Scouts of America (BSA) and its members had the right of “expressive association,” which would be violated if they were forced to extend membership to anyone who failed to meet their admission standards. The trouble, of course, was that one of those standards came into direct conflict with New Jersey’s public accommodations statute. This statute prohibited institutions and organizations of a sufficiently public nature from discriminating on the basis of enumerated characteristics—including sexual orientation. James Dale, an openly gay man, sought to retain his position as scoutmaster and argued that the public accommodations statute required

† Professor of Law and Director, Center on Dispute Resolution, Quinnipiac University School of Law; Visiting Lecturer and Senior Research Scholar, Yale Law School. I am grateful to Akhil Amar, Ian Ayres, Kenji Yoshino, and Bill Eskridge for helpful comments and conversations. Thanks to Gowri Ramachandran for helpful research assistance.


this result. In ruling for the BSA, the Court effectively held that the right of expressive association trumps the right to be free of discrimination.

The effects of Dale extend far beyond James Dale and the administrative offices of the BSA. The ruling affected millions of people who were, or are now, involved in scouting. Some of these people, no doubt, breathed a sigh of relief. Others felt a keen disappointment—and even embarrassment—that the organization to which they had devoted much of their time and energy had committed itself so thoroughly to an exclusionary policy with which they disagreed.

Dale has been framed as a battle between an organization's interest in exercising its First Amendment right of expressive association on the one hand, and a state's interests in eradicating discrimination on the other.3 A third interest deserves greater attention, however: the interest of individuals in knowing what they express by associating with a particular organization. The exercise of the right of expressive association holds meaning only when the decision—to join or not to join—is informed and deliberate. Only then can a person actually signal something by joining. If an organization's failure to disclose discriminatory policies allows it to recruit people who would refuse membership if fully informed, a kind of associational fraud occurs. In addition to potential members and donors, the state maintains an interest in preventing this sort of fraud.

What is astonishing in Dale is how easily a private organization can establish that its members understand it to be a discriminatory organization. At stake are the rights of people who disagree with discriminatory behavior: the right to detect their disagreement with an organization's policies and the right to act upon it. The decision not to associate with an organization is also expressive, and that right of expression, it would seem, deserves protection.

When the decision not to associate is collective and coordinated, it becomes a boycott. Through boycott, people can critique and discipline organizations.4 Boycotts are difficult to


4. When Exxon rescinded Mobil's gay-friendly employee policies after the
pull off, however, because individual decision makers must coordinate their activities. This Essay proposes a legislative initiative that would make it easier for people to avoid organizations that adopt policies with which they disagree. Moreover, because the proposed statute would increase the amount of information about an organization available to potential members, it would facilitate more meaningful decisions to join organizations when people agree with their policies.

The thesis of this Essay is that gay rights advocates should lobby states to enact disclosure requirements—"Informed Association" statutes—that would help to coordinate individual decision makers. Public accommodations statutes, like the one in Dale, would remain in place to create a default rule of nondiscrimination. To preserve organizations' rights to opt out of that default rule, however, the Informed Association Statute would create a safe harbor—a disclosure process\(^5\) that would effectively exempt organizations from the public accommodations statute.

Ultimately, the First Amendment rights of the organization, as recognized by the Court in Dale, would prevail.\(^6\) The rights of the organization would be protected at a lower cost to the state's interest in promoting nondiscrimination and individuals' interests in knowing where their money and energy will be directed. Failure to comply with the safe-harbor provisions would signal an organization's submission to the state's public accommodations statute, and individuals could join the group assured that they would not be associating with a discriminatory organization.

A statute requiring disclosure of, and explicit consent to, an association's discriminatory policies would in no way force

---

5. A range of safe-harbor processes is possible, and this Essay will discuss several alternatives. See discussion infra Part III.

6. In this way, the statute could be seen as promoting the ascendancy of First Amendment values. See generally Bernstein, supra note 3, at 85-126 (examining the tension between antidiscrimination norms and First Amendment rights).
inclusion of gay and lesbian people upon unwilling organizations. Such a statute would, however, force some heterosexual people to come to terms with their own acts of discrimination. Heterosexuals would lose the plausible deniability that currently allows them, in some cases, to enjoy the benefits of organizations they would feel compelled to quit if discriminatory policies were revealed. If information about organizations’ policies were readily available, ignorance would be no excuse. The Informed Association Statute, therefore, would force decisions that people can currently avoid by claiming ignorance.

The Informed Association Statute thus seeks to change the social meaning of joining an organization through a process Professor Lawrence Lessig has called “tying.” Through the process of tying, a policy maker “attempts to transform the social meaning of one act by tying it to, or associating it with, another social meaning.” By promoting disclosure of discriminatory membership policies, the Informed Association Statute would more closely tie the decision to join such an organization to discriminatory activity. “Tying,” Lessig writes, “changes the cost of an activity by making it more clear just what meaning an action has.”

For some people, the statute would thus create an uncomfortable space—but one from which support for gay rights could ultimately emerge. Social change often depends upon people in power being put to hard choices. Although President John F. Kennedy, for example, may have preferred to sidestep the civil rights battles of his day, the moral force of activists such as Dr. Martin Luther King, Jr. forced Kennedy’s hand.

Forty years later, history credits Kennedy with

---

8. Id.
9. Lawrence Lessig, Social Meaning and Social Norms, 144 U. PA. L. REV. 2181, 2188 (1996). Tying is the flip side or “nested opposition” of ambiguation, because it clarifies or highlights a particular character of some activity, while ambiguation blurs categories. See Lessig, supra note 7, at 1010 n.224.
10. See THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 233-36 (Clayborne Carson ed., 1998). Dr. King explains the nature of Kennedy’s change:

President Kennedy was a strongly contrasted personality. There were in fact two John Kennedys. One presided in the first two years under pressure of the uncertainty caused by his razor-thin margin of victory. He vacillated, trying to sense the direction his leadership
providing much of the momentum that propelled the Civil Rights Act of 1964 through Congress. The people in power this Essay addresses are not only legislators and political leaders, but perhaps more importantly, they are the great center of the heterosexual majority. Their choices—even ones that are difficult or uncomfortable at first—could make all the difference for the cause of gay rights in this country.

Part I of this Essay summarizes the Dale case, with a focus on the Court’s desire to protect the right of expressive association. Part II relates the popular reaction to Dale, especially institutional efforts by churches, schools, and cities to disassociate themselves from the BSA. As a complement to this institutional work, Part III proposes the Informed Association Statute as a means to facilitate individuals’ deliberate associations—or disassociations—when organizations discriminate. The Essay concludes by examining some of the risks and benefits of the legislative strategy proposed.

I. DALE v. BOY SCOUTS OF AMERICA IN THE UNITED STATES SUPREME COURT

In the now familiar case giving rise to this proposal, the BSA terminated James Dale as a Boy Scout leader because he was gay, and Mr. Dale challenged his expulsion. When the case reached the United States Supreme Court, Justice Rehnquist told the story in this way:

The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey’s public accommodations law requires that the Boy Scouts readmit Dale. This case presents the question whether applying New Jersey’s public accommodations law in this way violates the Boy Scouts’ First
Amendment right of expressive association. We hold that it does.\textsuperscript{11}

Justice Rehnquist's summary tells a simple story, one in which the conclusion (to require the BSA to readmit Mr. Dale would violate the BSA's right of expressive association) seems to flow almost inexorably from the very identity of the characters: an organization "engaged in instilling its system of values in young people" on the one hand, and an "avowed homosexual and gay rights activist" on the other.

Mr. Dale sued the BSA in New Jersey Superior Court, alleging that the organization violated New Jersey's common law and public accommodations statute\textsuperscript{12} by excluding him from membership based solely on his sexual orientation.\textsuperscript{13} The case wended its way to the New Jersey Supreme Court via decisions for the BSA in the trial court and for Mr. Dale on appeal.\textsuperscript{14} The New Jersey Supreme Court held that the BSA constituted a place of public accommodation due to its size and public nature,\textsuperscript{15} and was subject to the public accommodations statute.\textsuperscript{16} According to the court, by excluding Mr. Dale based on his sexual orientation the BSA violated the statute.\textsuperscript{17}

The New Jersey Supreme Court rejected the BSA's claim that subjecting it to the public accommodations law would violate its federal constitutional right "to associate for the purpose of engaging in protected speech."\textsuperscript{18} The court acknowledged that the BSA "expresses a belief in moral values and uses its activities to encourage the moral development of its members."\textsuperscript{19} The court could not, however, accept the notion

\textsuperscript{14} Dale, 530 U.S. at 645-47.
\textsuperscript{15} Dale, 734 A.2d at 1210-13.
\textsuperscript{16} Id. at 1213-18 (reaching this conclusion after rejecting BSA's argument that it fell within one of the statute's exceptions).
\textsuperscript{17} Id. at 1218-19.
\textsuperscript{18} Id. at 1219 (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544 (1987)).
\textsuperscript{19} Id. at 1223.
that “a ‘shared goal[]’ of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral.” Because the court believed that Dale’s membership “would not ‘affect in any significant way [the BSA’s] existing members’ ability to carry out their various purposes,’” it ruled that being forced to include Dale would not violate the BSA’s right of expressive association.21

The United States Supreme Court reversed. A deferential review of the Scout Oath and Law persuaded the majority that homosexuality is contrary to the values the BSA seeks to instill in its members. The BSA asserted that homosexual conduct is inconsistent with the Scout Oath and Law, particularly the Scout Oath to remain “morally straight” and the Scout Law requiring scouts to be “clean.”22 The Court acknowledged that the Oath and Law do not mention homosexuality expressly, and that the terms “morally straight” and “clean” are “by no means self-defining.”23 Notwithstanding the ambiguity of these phrases, the Court deferred to the organization’s interpretation of its own doctrine and accepted the BSA’s assertion that it views homosexuality as immoral.24 More importantly for this analysis, the Court accepted the BSA’s assertion that the BSA had clearly and consistently expressed this view of

20. Id. at 1223-24 (alteration in original) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)). Conversely, the United States Supreme Court stated that such a central purpose is not required in order to gain First Amendment protection. See Dale, 530 U.S. at 655 (“[A]ssociations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment.”). A five-year-old boy I know expressed skepticism similar to the New Jersey Supreme Court’s, however, when he overheard some adults discussing the Dale case on the day the United States Supreme Court issued its opinion. He exclaimed in shock and indignation, “The purpose of the Boy Scouts is to exclude?” 21. Dale, 734 A.2d at 1225 (alteration in original) (quoting Rotary Club, 481 U.S. at 548).
22. Dale, 530 U.S. at 650.
23. Id. Indeed, as Kenji Yoshino has noted, “[T]he Scout Handbook defines ‘morally straight’ to include the following prescriptions: ‘[G]uide your life with honesty, purity, and justice,’ ‘Respect and defend the rights of all people,’ ‘Your relationships with others should be honest and open.’” Yoshino, supra note 1 (second alteration in original).
24. Dale, 530 U.S. at 651. The Court stated, The Boy Scouts asserts that it “teach[es] that homosexual conduct is not morally straight,” and that it does “not want to promote homosexual conduct as a legitimate form of behavior.” We accept the Boy Scouts’ assertion. We need not inquire further to determine the nature of the Boy Scouts’ expression with respect to homosexuality. Id. (alteration in original) (citations omitted).
homosexuality in the past (though the Court considered this past behavior relevant only to show "the sincerity of the professed beliefs," not to secure First Amendment protection).\textsuperscript{25}

According to the majority opinion in \textit{Dale}, if forced to admit Mr. Dale, the BSA's expressive activity concerning homosexuality would be impaired. This impairment would occur, moreover, even if it were true, as the New Jersey Supreme Court had concluded,\textsuperscript{26} that the BSA "discourages its leaders from disseminating any views on sexual issues."\textsuperscript{27} As Justice Rehnquist explained, "The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."\textsuperscript{28}

\section*{II. INSTITUTIONAL RESPONSES TO \textit{DALE}}

The BSA relies heavily on community sponsorship and financial support. Churches and schools often provide the Boy Scouts free meeting space, and local United Way groups provide financial assistance.\textsuperscript{29} In the wake of \textit{Dale}, a nationwide movement has developed to remove various forms of community support for the BSA.\textsuperscript{30} This movement principally targets the two institutional supports identified above—meeting space and money. Moreover, three features of this movement are interesting and important: it has involved people who are gay and non-gay, it has not been orchestrated in

\begin{itemize}
\item [25.] Id.
\item [26.] \textit{Dale}, 734 A.2d at 1223 ("Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues . . . .").
\item [27.] Id., quoted in \textit{Dale}, 530 U.S. at 654. The Court further noted, \[E\]ven if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues—a fact that the Boy Scouts disputes with contrary evidence—the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above. \textit{Dale}, 540 U.S. at 655.
\item [28.] \textit{Dale}, 540 U.S. at 656.
\item [30.] Actually, this movement can be traced to earlier challenges to the BSA's discriminatory policy. Eight local United Way chapters adopted anti-discrimination policies affecting their relationship with the BSA prior to the \textit{Dale} decision. Id.
\end{itemize}
any central way, and it has involved people in a variety of roles (e.g., BSA members, parents of members, and people who are not involved directly with the BSA).

As a result of this diverse effort, many communities and organizations have withdrawn sponsorship of the BSA. The first institutional response has been the withdrawal of free meeting space for the BSA. Examples of both private and public withdrawals of support exist. In Taunton, Massachusetts, for instance, the Union Congregational Church ended a two-year relationship with the BSA.31 The church had subsidized the Scouts and provided them with meeting space.32 Pastor Beverly Duncan explained that gay and heterosexual members of the church expressed concern about the ruling in Dale.33 Although the church had experienced no problems with the local scout troop, it could not ignore the “stark contrast” between the national organization’s stance on homosexuality and the church’s beliefs.34 Further, one Oak Park, Illinois church turned the tables on the BSA to force the organization’s hand: Cornerstone Church’s application for a charter to sponsor a Cub Scout pack was denied by the BSA because the church stated an intention to run an “open and inclusive program.”35

School districts, too, have sought to restrict BSA access to meeting space. Nine months after the Supreme Court ruling in Dale, directors of the New York City Board of Education passed a resolution urging school boards to deny building access to any group that engages in discrimination.36 In its October 2000 newsletter, Vice President Harris Dinkoff wrote, “We cannot tell ourselves and our children that it is OK to exclude and be biased against one group of people and then say we are not biased against anyone else. By accepting bias in any form, we

32. Id.
33. Id.
34. Id. (“We have a big, red and white banner out front that says, ‘All Are Welcome’ . . . . Jesus never said anything about homosexuality. We’re taking this stance because of how we believe in Christianity.”).
condone what we profess to condemn.”

On December 1, 2000, Chancellor Harold O. Levy announced that New York City schools could no longer sponsor Boy Scout troops. The BSA could no longer use public schools as sites for recruiting new members, and the organization was barred from bidding on school contracts. Troops could continue to hold meetings in public schools, but only on the same basis as all other organizations that have access to public schools as meeting places.

In Florida, the Broward County School Board took more extreme measures. It voted unanimously on November 14, 2000, to ban the BSA entirely from its schools pursuant to the board’s nondiscrimination policy, which forbids use of school facilities by “any group or organization which discriminates on the basis of [a series of characteristics including] sexual orientation.” Prior to the vote, individual board members expressed their desire to send a message not only to the BSA, but also to the community that discrimination “would not be tolerated.” When the BSA challenged this action in federal court, the court scrutinized different aspects of the board’s decision independently. The court found that the school board was “free to fashion its own message”: It did not have to affirmatively endorse, participate, or solicit scout members as provided in the cancelled partnership agreement. However,

38. Board of Education, supra note 36.
40. Boy Scouts of Am. v. Till, 136 F. Supp. 2d 1295, 1302-03 (S.D. Fla. 2001). The BSA partnership agreement also contained a provision prohibiting discrimination, which the school board brought to BSA’s attention before it voted to bar the Scouts from school facilities. Id. at 1300-01.
42. Till, 136 F. Supp. 2d at 1302 (quoting Ortega Aff. Ex. 25 at 13-15 (M. Oliphant)).
43. Id. at 1306-11 (analyzing the merits of BSA’s claim before granting BSA’s motion for preliminary injunction).
44. Id. at 1308 (discussing the partnership agreement between the Boy Scouts and the school board that gave the BSA use of school resources to assist in Boy Scout recruitment); see also id. at 1299-1301 (describing the agreement
the school board’s attempt to prevent the BSA from using school facilities—limited public fora—on the same basis as other private groups would violate the First Amendment.\textsuperscript{45} Although the school board could speak for itself and express its “disapproval of intolerance toward homosexuality,” it was not free to punish the BSA for its contrary message.\textsuperscript{46}

The United States Congress has stepped into this fray as well. In June of 2001, the Senate approved a bill introduced by Senator Jesse Helms (Helms Amendment), which would withhold federal funds from public school districts that deny “equal access” to meeting space for the Boy Scouts and ‘any other’ youth groups that ‘prohibit the acceptance of homosexuality.’\textsuperscript{47} The House of Representatives passed a similar amendment in May of 2001.\textsuperscript{48} Congressional opponents of these measures argued that the Helms Amendment amounted to little more than gratuitous anti-gay rhetoric, because the United States Constitution and existing civil rights laws already prevent schools from denying the Boy Scouts access to meeting space on the same basis as other groups.\textsuperscript{49}

Gay civil rights groups and their allies in Congress worked with a House-Senate conference committee to remove language they deemed most harmful.\textsuperscript{50} The enacted legislation, the Boy Scouts of America Equal Access Act, makes clear that nothing in the statute “shall be construed to require any school, agency, or a school served by an agency to sponsor any group officially affiliated with the Boy Scouts of America.”\textsuperscript{51} The final version thus appears to extend no further than preexisting case law; it requires schools to permit the BSA to use facilities on the same terms provided to other outside organizations.\textsuperscript{52}

\textsuperscript{45} Id. at 1310-11.
\textsuperscript{46} Id. at 1308.
\textsuperscript{48} Id.
\textsuperscript{49} See Till, 136 F. Supp. 2d at 1306-11.
\textsuperscript{52} Chibbaro, supra note 47.
remain free to cancel sponsorships.

The second institutional reaction to Dale has been an effort to remove the BSA from lists of local United Way funding recipients. In Broward County, for example, the United Way announced that beginning in 2002, the BSA would be ineligible for program grants due to the organization's discriminatory policy. This sort of funding boycott can be powerful because people opposed to Boy Scout policies can express their disapproval and impose costs on the organization, even if they are not potential members or parents of potential members. Inertia, however, is apparently difficult to overcome. According to the United Way of America, the national organization permits local groups to set their own funding policies, but only thirty-five to forty-five local groups—out of 1400 total—have changed their policies regarding scout funding.

The political stakes of limiting BSA funding can sometimes be high. In Tempe, Arizona, Mayor Neil Giuliano attempted to disqualify the BSA from city employee donations to the United Way. This action triggered a recall effort against him. After he received substantial criticism, Giuliano said that city employees should determine their own contributions to be.

---


54. Peter Freiberg, Rallies Target Boy Scouts Policy Banning Gays, WASH. BLADE, Aug. 24, 2001, http://www.washblade.com/national/010824g.htm (last visited Sept. 16, 2002). Perhaps the Kauai chapter of the United Way is typical. In response to concerns about continued funding of the BSA, this chapter issued the following statement:

Kauai United Way values the dignity and worth of all people and works on behalf of the broadest possible constituency, including people from a range of backgrounds and points of view. Kauai United Way implements its philosophy of non-discrimination by maintaining a network of charities that embrace special considerations and community needs. Each individual participating agency has developed their own mission statement. Kauai United Way will continue to consider the Kauai District Boy Scouts as a participating agency.

E-mail from Scott Giarman, Executive Director, Kauai United Way, to William E. Woods, Executive Director, Gay and Lesbian Education Advocacy Foundation (Mar. 8, 2002, 1:31:03 HST) (on file with author).

55. It is possible that the recall was also sparked by the fact that Giuliano is openly gay. See Kim Krisberg, Giuliano Wins: Mayoral Recall Effort Fails, WASH. BLADE, Sept. 14, 2001, http://www.washblade.com/national/010914g.htm (last visited Sept. 16, 2002). Interestingly, the recall election went forward on September 11, 2001 even after news of the terrorist attacks in New York and Washington.
made to the United Way. Although Giuliano abandoned his effort, the controversy seems to have suppressed donations to the United Way by city employees.

Corporate donors to the BSA have mirrored actions by local United Way chapters and their donors. For instance, Novell, Inc., a computer software firm headquartered in Provo, Utah, announced that it would no longer match employee contributions to the BSA. The company announced this new rule as an effort to comply with its overarching policy not to make charitable contributions to discriminatory organizations. Novell later modified its stance, agreeing to match employee contributions to the local United Way chapter.

In addition, in December of 2000, the Wells Fargo Bank instructed the United Way not to allocate any of its $400,000 annual corporate gift to the BSA. Some regional councils and local chapters of the BSA are defecting from the national position on homosexuality, attempting to substitute their own policies of inclusion and nondiscrimination.

In Rhode Island, where the statewide public accommodations law covers discrimination on the basis of sexual orientation, some regional councils and local chapters of the BSA are defecting from the national position on homosexuality, attempting to substitute their own policies of inclusion and nondiscrimination. In Rhode Island, where the statewide public accommodations law covers discrimination on the basis of sexual orientation, some regional councils and local chapters of the BSA are defecting from the national position on homosexuality, attempting to substitute their own policies of inclusion and nondiscrimination.

---

59. Id.
60. Novell, Inc., Novell Employee Giving, at http://www.novell.com/company/cr/employee_giving.html (last visited Oct. 20, 2002) (displaying Novell's employee-giving policy). Although employees are free to prevent the BSA from receiving their United Way contribution, the United Way in most places has continued to fund local Boy Scout troops. The United Way of the Great Salt Lake Area, for example, donated $188,000 to the Boy Scouts in 1999. See Mims, supra note 58.
61. David Austin, Wells Fargo and PGE Divert Funds from Scouts, OREGONIAN, Dec. 11, 2000, at B1, 2000 WL 27112429. The BSA's "Learning for Life" program in city schools will continue to get Wells Fargo funding, however, because it does not exclude gay students from participation. Id. (correction that ran Dec. 12, 2000).
62. Short of such defiance, other heads of area scout councils have asked the BSA to revoke its ban on gay scout leaders. See Laura Parker, Big Cities' Scout Leaders Pushing for Inclusion of Gays, USA TODAY, June 15, 2001, at A1.
of sexual orientation, a Cub Scout pack and a Boy Scout troop in Providence informed the BSA that they would ignore the national policy. Daniel Gasparo, chief executive of the Greater New York Councils of the BSA, asserted that the New York scout organizations do not discriminate based on sexual orientation. Such statements of inclusion and nondiscrimination may be subject to monitoring and discipline by the national body of the BSA, however. This is a result the Providence pack and troop are prepared to handle; they indicate that they will refuse to enforce the anti-gay policy even if the national organization responds by terminating their charters.

Individuals could take action here too. If all eagle scouts who support gay rights were to sign a national petition, or begin publicly to renounce their honors from the BSA, the organization would receive disapproval from some of its most valued members, undermining in a retroactive way the organization's claims about the importance of the anti-gay policy to the scouting experience. Indeed, even without active coordination, individual decision makers seem to be steering clear of the Boy Scouts. According to Newsweek magazine, internal BSA documents show that Cub and Boy Scout membership dropped 4.5% in 2000—7.8% in the northeast region of the United States—while membership rates in the same period increased for other youth organizations that do not discriminate on the basis of sexual orientation.

The BSA's response to all of this agitation, apparently, has been to dig in its heels and resist the inclusion of gay men even more vehemently. On February 6, 2002, the BSA issued a

66. See supra note 64 and accompanying text.
68. See David France, Scouts Divided, NEWSWEEK, Aug. 6, 2001, at 44, 47 (noting that Girl Scouts and Boys and Girls Clubs are experiencing increases in membership rates).
press release\textsuperscript{69} and accompanying resolution announcing that
"the national officers . . . agree that homosexual conduct is
inconsistent with the traditional values espoused in the Scout
Oath and Law and that an avowed homosexual cannot serve as
a role model for the values of the Oath and Law."\textsuperscript{70} This
finding is cited in support of another of the BSA's resolutions:
"WHEREAS, the national officers reaffirm that, as a national
organization whose very reason for existence is to instill and
reinforce values in youth, the BSA's values cannot be subject to
local option choices, but must be the same in every unit."\textsuperscript{71}
This resolution sends a strong signal to the local chapters in
New York and Rhode Island: Inclusive policies will not be
tolerated.

III. LESSONS FROM DALE—A LEGISLATIVE SOLUTION

Because James Dale publicly and persistently challenged
his exclusion from the BSA, America knows that the
organization discriminates on the basis of sexual orientation.
Indeed, some organizations have cited the BSA's newfound
notoriety as the factor forcing them to pull their support. As
one Broward County school board member explained,
\begin{quote}
The Scouts wanted to make a statement and that they did by pushing
this point to the Supreme Court. By so doing, they put us on notice of
something that we were unaware of previously. Had it not gone to
court, had it not gotten the publicity that it did, we may never have
known about it and may not be having this discussion . . . If we have
no knowledge . . . we can't take action.\textsuperscript{72}
\end{quote}
The BSA's policy has thus become a matter of public record.
But what of those organizations whose exclusionary policies
remain more obscure?

The United States Supreme Court in \textit{Dale} set a rather
relaxed standard for the timing and articulation of an
organization's "message" sufficiently important to displace the
state's public accommodations statute. This raises the

\begin{itemize}
\item \textsuperscript{69} Press Release, Boy Scouts of America, BSA Affirms Traditional
Leadership Standards (Feb. 6, 2002), http://www.scouting.org/media/press/
020206/index.html.
\item \textsuperscript{70} Boy Scouts of America Resolution (Feb. 6, 2002), http://www.scouting.
org/media/press/020206/resolution.html. The resolution also makes clear that
"duty to God is not a mere ideal for those choosing to associate with the Boy
Scouts of America; it is an obligation." \textit{Id.}
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} Boy Scouts of Am. v. Till, 136 F. Supp. 2d 1295, 1302 (S.D. Fla. 2001)
(first alteration in original) (quoting Ortega Aff. Ex. 25 at 20 (P. Eichner)).
\end{itemize}
troubling possibility, as Professor Kenji Yoshino argues, that an organization can simply opt out of a public accommodations statute anytime it wants, receiving First Amendment protection by manufacturing a “message” of discrimination even as late as the litigation in which an act of discrimination is challenged.\footnote{Yoshino, supra note 1.} Moreover, because the Court has instructed lower courts to adopt a deferential approach—taking organizations at their word regarding their own discriminatory aims, goals, or philosophies—the eleventh-hour invocation of discriminatory “messages” may be particularly troubling.

Another reading of \emph{Dale} is possible, however. The actual holding of the case, after all, focuses on a particular \textit{mechanism} employed by the state to further its interests in nondiscrimination: a requirement of mandatory admission. The Court's holding acknowledges the state's interests but does not find that those interests can justify this particular mechanism:

We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.\footnote{Dale v. Boy Scouts of Am., 530 U.S. 640, 659 (2000).}

The Court does not preclude the state from trying other ways to further nondiscrimination. Perhaps the New Jersey public accommodations statute failed as applied to the Boy Scouts because the enforcing mechanism—mandatory admission—provided no opportunity for the organization to opt out of what would otherwise be understood as the nondiscrimination default.

Would a statute creating such a default but prescribing an opt-out or safe-harbor procedure withstand constitutional attack? Clearly, the opt-out procedure would have to avoid “materially interfer[ing] with the ideas that . . . organization[s seek] to express.”\footnote{Id. at 657. The Court stated, We recognized in cases such as \emph{Roberts} and \emph{Duarte} that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to}
opt out of the public accommodations statute, but requiring them to do so publicly, would achieve three goals: promote the state's interests in nondiscrimination, uphold the organizations' right of expressive association, and protect the public from unknowing association with discriminatory organizations.

The question is whether requiring an organization to register as a potential discriminator would interfere with the organization's expression of those discriminatory ideas. On the one hand, by requiring an organization to register as one reserving the right to discriminate on the basis of sexual orientation, the safe-harbor process could be seen to facilitate rather than suppress "the organization's right to oppose or disfavor homosexual conduct." An organization could hardly complain that its ability to express disapproval of homosexuality would be "burdened" if it were forced to make public its expression of disapproval. It would be a broad reading of Dale indeed to say that an organization has a First Amendment right to exclude gay and lesbian members in order to express disapproval of homosexuality and a simultaneous right to keep that disapproval secret from its own members and potential members. On the other hand, if the statutory language pertaining to registration were too blunt (too general, or in some cases, perhaps, too specific), it might be seen as forcing an organization's views into a prefabricated expression of discrimination, one that is actually inconsistent with the views of the organization and its members.

 conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express.

Id. at 659. Perhaps the organization would object to the mode or manner in which the statute forces it to express this idea, arguing that the way in which an idea is expressed is absolutely constitutive of the idea itself. To the extent that the safe-harbor process imposed a template of flat, unqualified discrimination on policies or practices that organizations might experience and express in more nuanced terms, the equation of style and substance could gain greater weight.

Yet it is just this potential reading of Dale that troubles Yoshino. See Yoshino, supra note 1. He worries that the Court's approach, "failing to look at both the organization's claims and the contemporaneous evidence," will be "particularly dangerous, for it lets organizations that want to discriminate have it both ways." Id. If contemporaneous evidence fails to reveal the importance of the discriminatory policy to the organization, Yoshino suggests, members could be confused about the nature of the organization they have joined. Id. I agree. The statute proposed in this Essay is a possible solution to this problem.
The solution to this problem is a safe-harbor clause that merely refers to actions or potential actions rather than examining the organization's policies or philosophies. Still, to prevent the opt-out process from eviscerating the public accommodations statute, the state should require at least a facial claim by the organization that its exclusionary practices are necessary to protect legitimate rights of expressive association.

To balance these concerns, a modified public accommodations statute, the Informed Association Statute, might read as follows:

(1) All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right. 78

(2) When necessary to preserve a right of expressive association in an organization subject to this Act, the organization may discriminate in admission to membership on the basis of a characteristic enumerated in section 1 of this Act. In order to qualify for this exception, the organization must file with the Secretary of State a statement signed by the organization's officers that:

(a) affirms that the organization reserves the right to discriminate in admission to or terms of membership;

(b) lists the characteristic(s) enumerated in section 1 of this Act on which the discrimination would be based; and

(c) sets forth the message or policy of the organization that necessitates this discrimination.

(3) Any organization failing to comply with the requirements set forth in subsection 2 is subject to the full force and effect of this Act.

Nothing in the safe-harbor process would require that all members agree with the discriminatory policy, 79 only that they become or remain members with knowledge of the policy. 80


79. See Dale, 530 U.S. at 655 ("[T]he First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'").

80. In this way, the discriminatory policy is analogous to a latent or
Other approaches are possible. The statute could require that, as an alternative to the mode of disclosure set forth in subsection 2 above, the organization could disclose clearly and in writing to all members, donors, and potential members and donors that the organization reserves the right to discriminate in admission to or terms of membership, listing the characteristic(s) enumerated in section 1 of the Act on which the discrimination would be based. In order to prove that all members and donors had received such disclosure, the organization would need to maintain on file a signed statement from each affirming the following matters:

1. The member or donor was informed that the organization reserves the right to discriminate in admission to or terms of membership;
2. The organization disclosed which of the characteristic(s) enumerated in section 1 of the Act would be the basis for such discrimination; and
3. With this information, the member consented to membership in the organization or the donor made a contribution.

This kind of documentation would protect individuals' interests in joining organizations with full information about the message their association will convey. It would also relieve the organization from publicly declaring that it might, at some point in the future, discriminate on some basis otherwise outlawed by the public accommodations statute. Because this approach to the safe-harbor exemption would give

hidden defect in a commercial product: a seller must disclose the danger in order to avoid liability. 1 DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 2:8 (3d ed. 2000). “The maker's obligation to warn of hidden dangers in its products is an ancient one. Its roots reach back into early Roman sales law, early English civil law, and the ecclesiastical (but not the secular) law of medieval England.” Id. (footnotes omitted).

organizations greater control over the expression of their messages, they might prefer it to the approach that requires a public filing with the state.

Under this alternative approach employing written consent forms, however, actually invoking the exemption in the context of litigation could prove far more onerous for an organization—perhaps fatally so. If an organization were ever sued under the public accommodations statute, invoking the safe-harbor exemption under this permutation could require the organization to give the court access to the disclosure forms signed by individual members. This could impermissibly infringe on the organization’s right to keep its membership lists secret.

In *NAACP v. Alabama* ex rel. *Patterson*, Alabama sought to obtain membership lists from the state chapter of the NAACP.\(^82\) The NAACP resisted, arguing that disclosure of its membership list would subject individual members to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”\(^83\) These effects of disclosure would, in turn, deter people from associating with the NAACP in derogation of their rights to free association and expression. The United States Supreme Court held that “immunity from state scrutiny of membership lists [was] so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.”\(^84\)

The statute sought to be enforced in *Patterson* bore no relationship to rights of association on its face. It simply required a foreign corporation to take certain procedural steps before doing business in the state.\(^85\) The NAACP did not comply with the statute because it considered itself exempt.\(^86\) The Attorney General of Alabama sued in equity to enjoin the NAACP from further activities within Alabama, and indeed sought to oust the organization from the state.\(^87\)

---

83. *Id.* at 462.
84. *Id.* at 466.
85. The corporation was required to file its corporate charter with the secretary of state, designate a place of business, and name an agent to receive service of process. *Id.* at 451.
86. *Id.* at 452.
87. *Id.* The bill in equity alleged,
moved for production of NAACP documents, including "records containing the names and addresses of all Alabama 'members' and 'agents' of the Association." The Court summarized the NAACP's objection to producing membership lists:

[T]he effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs. It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State. The Court agreed that it should carefully scrutinize any state regulation restricting the right of NAACP members to associate freely, even if the restrictive effect was indirect or unintentional.

Moreover, the Court recognized the importance of privacy, particularly for minority groups. The Court reasoned that compelled disclosure of member lists could drive members or potential members away from the organization "because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." The fact that punishment for unpopular views would come "not from state action but from private community pressures" mattered not a whit: "The crucial factor," said the Court, is "the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold." None of Alabama's stated interests was sufficiently important to justify this restraint on

[T]he Association had opened a regional office and had organized various affiliates in Alabama; had recruited members and solicited contributions within the State; had given financial support and furnished legal assistance to Negro students seeking admission to the state university; and had supported a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race.

Id. It is interesting and perhaps heartening to see the way time changes perceptions. The NAACP's efforts, which after forty-five years and immense social change are perceived by most people as heroic acts, were at the time alleged to have caused "irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama." Id.

88. Id. at 453.
89. Id. at 460 (emphasis added).
90. Id. at 461.
91. Id. at 462 ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").
92. Id. at 463.
93. Id.
association. Under *Patterson*, then, if the procedures for opting out of the public accommodations statute would at any point require the organization to make public the identity of its members, the statute would violate the First Amendment.

A less problematic approach relying upon individual, signed forms might still be feasible, however. The statute could provide that any organization sued under the statute could plead as an affirmative defense that the plaintiff in the case had received full disclosure of the organization's discriminatory policy. For plaintiffs who had been members of or donors to the organization, this would in most cases involve a consent form bearing the plaintiff's signature. If the plaintiff was not a member or donor, the organization would have to prove disclosure in some other way—perhaps by documenting that the plaintiff received information about the organization's discriminatory policy. Because the public accommodations statute protects many characteristics, and everyone has a race, a sex, a national origin, and so forth, a broad array of people could be considered potential plaintiffs. The organization would therefore have an incentive to make these disclosures to every person expressing interest in the organization.

Organizations might not feel an equally strong incentive to inform all potential members or donors. The trouble with the affirmative defense approach is that it does not ensure disclosure to people marked by the organization as unlikely plaintiffs. For example, an organization that excludes openly gay men might feel little compulsion to disclose this policy to a married father of four who it identifies as heterosexual and is

---

94. *Id.* at 466.

95. Majority group members are not always viewed this way. Some commentators have argued that characteristics of dominant groups can become invisible so that, for example, whites are not seen as having a race, men are not seen as having a sex, and heterosexuals are not seen as having a sexual orientation—they are simply "the norm" by which other groups are measured. See, e.g., Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 108 (2000); Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 957 (1993).

96. Donors, for example, could be artificial persons lacking the sorts of characteristics enumerated in the statute.

97. This group would no doubt vary from one organization to another. Although white, heterosexual men between twenty-five and forty would appear unlikely to sue the Boy Scouts under the public accommodations statute, they could be deemed more likely plaintiffs against a youth organization targeted to, say, African-American girls.
therefore unlikely to suffer exclusion. The purpose of the statute would not be well served if the organization's incentive to disclose a discriminatory policy decreased with respect to individuals who would ordinarily gain admission to the organization. The larger objective of this Essay is to argue that heterosexual people who would themselves be admitted might object to joining (and should, indeed, be protected from unknowingly joining) an organization that excludes gay, lesbian, or bisexual people.

Therefore, the better approach would be to design an opt-out procedure based on ex ante, public disclosures of policy with the secretary of state. This approach would not run afoul of Patterson. Although Patterson holds inviolable the secrecy of an organization’s membership list when disclosure would impede expression, the case does not stand for a general right to secrecy simply because an organization is engaged in expressive activity. Thus, the NAACP did not deny the state’s right to obtain information “concerning the purposes of the Association and its activities within the State.”98 The Court noted that the NAACP had apparently complied with the production order except for the membership lists; it had supplied “varied business records, its charter and statement of purposes, the names of all of its directors and officers, and . . . the total number of its Alabama members and the amount of their dues.”99 On the record before the Court, these items did not appear “subject to constitutional challenge.”100

Patterson condemns state regulation that drives people away from organizations through which they would express views protected by the First Amendment. In Patterson, disclosing membership lists would have made it harder for people who agreed with the organization’s mission to join or remain with the organization. An approach to the Informed Association Statute requiring an ex ante filing with the secretary of state, in contrast, would require disclosure of association policies, not individual members’ identities. The required disclosure would only make it easier for people who disagree with the organization’s mission to decline membership. The statute would trigger the sorts of concerns expressed in Patterson only if it were to stigmatize the

98. Patterson, 357 U.S. at 463-64.
99. Id. at 465.
100. Id.
organization or its policies to such a degree that people who agreed with them were also driven from the organization.

Therefore, although *Patterson* would shield an organization like the BSA from disclosing its members' names,\(^\text{101}\) the case does not hold that an organization's policies are immune from publication. It would seem rather inconsistent for an organization to argue simultaneously that it has an interest protected by the First Amendment in expressing negative views about homosexuality and an interest in keeping its views about homosexuality a secret. Granted, an organization has a legitimate interest in controlling the expression of its policies, purposes, and missions.\(^\text{102}\) To withstand a constitutional challenge, therefore, any disclosure regime enacted to support a public accommodations statute would have to avoid imposing ideas or modes of expression on an organization that are not the organization's own.

Control over the expression of ideas would remain with the

\(^\text{101}\) It is hard to see what possible rationale the state could offer to justify such an approach that requires organizations to disclose a list of its members' names to opt out of the public accommodations statute. Non-members might claim an interest in knowing who belongs to discriminatory organizations, the better to avoid or shame people whose behavior cuts against norms of nondiscrimination. Indeed, the state might put so much weight on nondiscrimination norms that it would wish to burden people who even consider joining a discriminatory organization. A state might argue that it can put potential members in a more uncomfortable position if they purport generally to favor gay rights, for example, but the disclosure statute forces them explicitly to acknowledge that they are knowingly joining a group that discriminates against gay people. Using public disclosure to facilitate private sanctions, however, is precisely what *Patterson* condemned. In some cases, of course, people waive rights to privacy. For example, judges are not permitted to belong to any organization that discriminates in membership on the basis of personal characteristics enumerated in the applicable judicial code of conduct. *See, e.g.*, CAL. CODE OF JUDICIAL ETHICS Canon 2(C) (West 1986) (barring judges from holding “membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation”). After the Supreme Court ruled in *Dale*, a judge on the California Court of Appeals resigned from his post as an assistant scoutmaster. Carol Ness, *Judge Quits As Scoutmaster over Gay Policy*, S.F. EXAMINER, Sept. 15, 2000, at A4, LEXIS, Cal. General News & Information. He wrote an open letter to the BSA, in which he suggested that affiliation with the Scouts was “ethically questionable for judges everywhere.” *Id.; see also* William C. Duncan, “A Lawyer Class: Views on Marriage and “Sexual Orientation” in the Legal Profession,” 15 BYU J. PUB. L. 137, 153-54 (2001).

\(^\text{102}\) *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc., 515 U.S. 557, 573 (1995) (“[T]he fundamental rule of protection under the First Amendment [is that] a speaker has the autonomy to choose the content of his own message.”).
organization, however, if it were simply required to file a disclosure statement outlining the portion of the public accommodations statute from which the organization seeks to be exempt and a brief, even conclusory, statement of the organization’s policy or core value that serves as the basis for such an exemption. In effect, the statute would be asking organizations to anticipate their defense if they were ever sued under the public accommodations statute and to articulate that defense before rather than after the fact. For example, the BSA would declare that it seeks to be exempt from the portion of the statute that outlaws discrimination on the basis of sexual orientation. As the basis for this, the BSA would cite the same language from the Scout Oath and Law it relied upon in litigation.103

The state would not assess or second-guess the organization’s statement of its core values, nor would it speculate about the likelihood of damage to those core values if the organization were prevented from discriminating. The state would accept, at face value, the claim that discrimination is or might be necessary in order to preserve the organization’s First Amendment right of expressive association. Yoshino’s concern that the Court “simply took the Scouts at its word, according ‘deference to an association’s assertions regarding the nature of its expression’” would go unaddressed.104 The statute would, however, reduce one of the negative consequences of such deference identified by Yoshino—that keeping an organization’s “message” secret can lead individuals to “invest in an organization they would not have joined had they known of the ‘message.’”105 The statute would accomplish something important: People thinking about joining or contributing to an organization would have a place to go to determine whether the organization reserves the right to discriminate on any basis the potential members or donors find objectionable. In addition, potential members could more clearly see the organization’s policies or values expressed in that discrimination.

When applied to an organization like the BSA, the

103. Based upon the BSA’s recent statement of policy, it is also safe to assume that the organization would opt out of the portion of the statute forbidding discrimination on the basis of religion. See supra notes 69-70 and accompanying text.
104. Yoshino, supra note 1.
105. Id.
Informed Association Statute would raise some difficult, interesting questions. How meaningful, after all, is the disclosure of a potentially discriminatory policy when most of an organization’s members are children? Few if any eight-year-old boys joining the Cub Scouts could understand a statement by the BSA that it excludes gay men from membership, or that it does so in order to uphold rules requiring scouts to be “clean” and “morally straight.” Many eight-year-olds do not know what “homosexuality” is.\(^{106}\)

The probable response to this problem is that the safe-harbor disclosure would be targeted to parents rather than to the boys themselves. The parents would decide whether or not to associate with a potentially discriminatory organization. Parents and children might disagree, but parents often overrule their children’s wishes “for their own good.” Like soda pop and Pokemon, the Boy Scouts might be chosen by some children but vetoed by their parents. For other children, the Boy Scouts might be more like spinach or a good night’s sleep: something the kids would avoid but the parents insist upon. Indeed, expressive parental decision making can cut both ways: Supporters of gay rights might pull their boys from scouting despite the boys’ ardent wishes to join.

To permit informed association with the BSA to turn entirely upon parental consent seems to assume that the children are incapable of making legitimate, rational decisions different from their parents on points of conscience. As an empirical matter this is almost certainly false, particularly as boys move into adolescence. As a normative matter, the more an organization claims that an exclusionary policy is part of its “message,” the more difficult it becomes for the organization to argue coherently that the exclusionary part of the message is too complex for younger members to understand or ratify. If

\(^{106}\) An informed association statute would appear ridiculous if it rested on a claim that an eight-year-old boy’s association with the BSA can be informed only if he knows what homosexuality is. To be on the safe side, might organizations include a definition of the excluded group as part of the safe-harbor disclosure statement? This would give an organization that presumptively dislikes or disapproves of a particular group the opportunity to perpetuate myths or stereotypes about the group. Perhaps the state could assume some sort of regulatory role to make sure that the disclosures are full and appropriate. The legislature could enact, as part of the statute, additional safe-harbor language describing or defining the various groups or characteristics that might be the subject of discrimination. But language appropriate for adults would no doubt be puzzling to children and some adolescents.
young members are truly incapable of understanding the exclusionary policy, they cannot possibly be expressing anything relevant to the policy by joining the organization. If those young members are capable of understanding the policy and forming a judgment about it (one would think necessary prerequisites to expression about it), why not permit them to choose whether they want to associate? This suggests a rationale for treating fourteen- to eighteen-year-olds differently from boys thirteen and under.

CONCLUSION: ESCHEWING SILENCE WITHOUT FOMENTING ANTI-GAY RHETORIC

To bring his majority opinion in Dale to a close, Chief Justice Rehnquist quoted Justice Brandeis to underscore the importance of “discovery and spread of political truth” as First Amendment values: “Believing in the power of reason as applied through public discussion, [the Founders of this Nation] eschewed silence coerced by law—the argument of force in its worst form.”107 The statute proposed in this Essay would promote the “spread of political truth.” It would permit organizations and their members to “think as [they] will,” but it would also require them to “speak as [they] think” rather than concealing their discriminatory policies.108 Such an approach would protect the associational rights of people who want to join organizations that discriminate as well as those who wish to avoid such organizations. If, as the Supreme Court suggests, the First Amendment effectively grants the BSA a license to discriminate, the Informed Association Statute would at least force the BSA to post that license prominently.109

A key virtue of the safe-harbor process, moreover, is that once an organization has disclosed the necessary information, it need not go out of its way to make anti-gay statements or continually reaffirm its intention to discriminate on the basis of sexual orientation. Potential members can look to the safe-

107. Dale, 530 U.S. at 661 (emphasis added) (quoting Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).
108. Whitney, 274 U.S. at 375 (Brandeis, J., concurring) (“Those who won our independence believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .”).
harbor disclosure as the definitive statement of the organization's policies on the topic and decide whether or not to associate based on that statement. This prevents an organization from having it both ways: claiming an intent to discriminate as defense against subsequent liability under the public accommodations statute but simultaneously embracing nondiscrimination norms as a recruitment device.\textsuperscript{110} It also might dampen public anti-gay rhetoric, because organizations that have complied with the safe-harbor provision would not be pressured to continually declare their anti-gay policies.

This raises an important empirical issue, of course: Will the cause of gay rights be promoted when heterosexuals are forced to be more express and more expressive about their views on homosexuality? When informed that they belong to a discriminatory organization, some heterosexuals would no doubt heave a sigh of relief or utter words of strong approval. Other heterosexuals—those who support gay people and gay rights—might mount a challenge to the discriminatory policy only to find that the organization and the majority of its members support the policy. Indeed, in response to an attack on the policy, the organization might take reinforcing action, for example, by converting an otherwise informal norm into a codified rule.\textsuperscript{111} The "push back" effect could polarize the membership of the organization, actually worsening the position of its closeted gay or lesbian members by bringing anti-gay sentiment to the surface. The subsequent exit of people who oppose anti-gay policies could make dialogue and reform more difficult, as dissenters from the policy would lose insider status and the access to decision-making power that can come with it.

On the other hand, supporters of gay rights are disabled from reforming organizations' anti-gay policies if they lack information. If members of an organization learn of an anti-gay policy only after the fact, as many members and supporters of the Boy Scouts learned about the ban on gay scout leaders during litigation in Dale, it is very difficult for them to work for change within the organization. By the time the anti-gay policy

\textsuperscript{110} See Yoshino, \textit{supra} note 1.
\textsuperscript{111} Something similar occurred when President Clinton's announced intention to lift the ban on gay and lesbian military service members triggered legislation in Congress converting the rule excluding openly gay or lesbian service members from a Department of Defense regulation into a federal statute.
comes to light in the context of an actual membership dispute, the organization may have committed itself in ways that make compromise difficult. Knowledge before the fact could facilitate repudiation of anti-gay policies as a result of more incremental, inclusive discussions within the organization. Therefore, the Informed Association Statute should be viewed as a mechanism that enables not only exit from discriminatory organizations, but also dialogue and reform within the organizations.

Inevitably, some battles for reform would be lost, some won. No organization, however, should be permitted to invoke First Amendment rights to facilitate the extraction of time, energy, and financial support from members who, if fully informed of the organization's discriminatory policies, would have chosen to devote those resources elsewhere.